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**263 PACIFIC REPORTER
SECOND SERIES**

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SECOND SERIES

41 Cal.2d 683

ANGLIN v. CONWAY et al.

L. A. 22799.

Supreme Court of California.

In Bank.

Nov. 13, 1953.

Action by assignee of claims for labor and services rendered, against wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well by assignors. The Superior Court, Kern County, Norman F. Main, J., entered judgment adverse to wife, and she appealed. The Supreme Court, Spence, J., held that evidence warranted determination that wife was either the sole undisclosed principal or one of the undisclosed principals in the oil venture and therefore primarily liable for the labor claimed.

Judgment affirmed.

Prior opinion 255 P.2d 467.

1. Appeal and Error ⇨882(6)

Where action was brought by assignee of claims for labor and services rendered to defendant, and defendant's counsel, in his opening remarks and during course of the trial, led assignee's counsel and court to believe that there was no contest of the matter of assignment, defendant could not, on appeal, controvert the accepted fact of assignment, even though assignee may have made no proof of several of the assignments. Labor Code, § 300.

2. Appeal and Error ⇨994(3)

The question of credibility of witness is one to be resolved in the trial court.

3. Appeal and Error ⇨989

When an appellate court is confronted with question of sufficiency of evidence, its only duty is to determine whether there is any substantial evidence, contradicted or

uncontradicted, to support the findings and judgment.

4. Husband and Wife ⇨25(6)

In action by assignee of claims for labor and services against wife of person who had agreed to furnish supplies and all things necessary in drilling of oil well by assignors, evidence on issue of existence of employer and employee relationship between wife and assignors warranted determination that wife was either the sole undisclosed principal or one of the undisclosed principals in the oil well drilling venture, and that she was primarily liable for the labor claim.

Wallace & Cashin, Los Angeles, for appellant.

Donahue & Goldberg and R. C. Donahue, Bakersfield, for respondent.

SPENCE, Justice.

Plaintiff, as assignee of eight separate claims for labor and services rendered, brought suit against Alline E. Conway, the estate of H. A. Conway, deceased, and George Harwood. The latter defendant was not served with summons. The defendant estate was found not to be liable, and judgment totaling \$2,383.80 was entered only against defendant Alline E. Conway. She appeals on these grounds: (1) lack of proof of the assignment of the labor claims involved; and (2) insufficiency of the evidence to establish the employer-employee relationship between herself and respondent's assignors. Her position is not well taken on either point under the record, and accordingly the judgment must be affirmed.

[1] The pleadings show respondent's allegation of the several assignments in question and appellant's denial thereof. The

court found that the claims had been assigned as alleged. With two possible exceptions, respondent made no proof of the assignments, which fact appellant cites as a bar to respondent's recovery. *Ford v. Bushard*, 116 Cal. 273, 276, 48 P. 119; *Sterling Adjustment Co. v. Laher Auto Spring Co.*, 116 Cal.App. 100, 101, 2 P.2d 408. There would be merit to this contention, Labor Code, § 300, were it not for the actions and conduct of appellant's counsel in his opening remarks and during the course of the trial, leading respondent's counsel and the court to believe that there was no contest of the matter of assignment. The record shows the following colloquy at the outset of the trial:

"The Court: And this is an action on assigned claims for wages?

"Mr. Donahue (Respondent's Counsel): Particularly labor, your Honor.

"The Court: And the defense is they were not contracted by this defendant. Is that correct?

"Mr. Wallace (Appellant's Counsel): That is correct, your Honor.

"Mr. Donahue: In talking with counsel for this defendant, your Honor, he believes we can confine the issues in this case to the question of the liability of this named defendant—that is, his client * * *.

"The Court: I presume that would be his endeavor, at least.

"Mr. Donahue: Confine it to that rather than first have to establish the accounts * * *.

"The Court: You mean, Mr. Wallace, that you are not prepared to contest the correctness of the items, but only the liability? * * *

"Mr. Wallace: * * * if there is no liability, the question of the accounts will not become material * * *.

"The Court: Well, let's go ahead with the issue, then."

During the course of the trial, one of the alleged assignors was interrogated as follows:

"Q. (By Mr. Donahue): Now, you have assigned your claim against Aline E. Conway to M. H. Anglin. Did you not? A. Yes, sir.

"Mr. Wallace: I object to that. It calls for a conclusion of the witness. I will stipulate the purpose is he assigned his claim against—

"The Court: In other words, it is his conclusion as to the effect of this legal document?

"Mr. Wallace: He signed a document.

"Mr. Donahue: Well, it is just to identify this man as one of the parties in this action.

"Mr. Wallace: We are not going to quarrel with that.

"Mr. Donahue: That is the only purpose of the question.

"The Court: All right. Let it stand."

In these circumstances appellant may not now controvert the accepted fact of assignment. *Martin v. Going*, 57 Cal.App. 631, 633-634, 207 P. 935.

There now remains the question of the sufficiency of the evidence to establish the employer-employee relationship between appellant and respondent's assignors.

By an agreement dated August 22, 1949, H. A. Conway, appellant's husband, obtained from a Mr. and Mrs. Bolling the right to exploit certain property in Kern County for oil. The agreement was signed and acknowledged by Conway on September 7, 1949, in Colorado, and it was recorded in Kern County on September 15. By its terms Conway undertook to furnish all supplies and all things necessary for the drilling of an oil well. Harwood, whose interest in oil activities was known to the Conways by reason of other business dealings and associations, then proceeded with the operation—moving equipment onto the property and employing one Rivers as superintendent, who, in turn, hired the various workmen here involved. The log of the well, kept by Rivers and some of the workmen, showed the "rigging up" commenced on August 29 and the drilling continued under the name "H. A. Conway, 722 Crescent Drive, Beverly Hills, Cal." The well was drilled to a total depth of 2,873 feet; by September 15 it was obvious that the hole was dry, and all work ceased within a few days thereafter. The labor claims in question remained unpaid. All the pay-

roll records and tax statements signed during this period by the respective workmen gave the employer's name as H. A. Conway, with his address in Beverly Hills. A notice of non-responsibility was posted and recorded by the Bollings on August 30, stating that they had entered into a contract with H. A. Conway for the purpose of drilling a well on the premises described, and that one George Harwood was associated with H. A. Conway in the performance of the contract. There is no evidence that Conway ever visited the property or knew anything about the transaction other than signing the contract. He was in Colorado during this period working on location for a movie studio. About September 12 he became ill and returned to Los Angeles, where he died on November 15.

On September 4, 1949, appellant visited the well and according to several of the workmen who testified at the trial, Harwood introduced her to them as "the boss," the "one that was putting up the money" for their wages and the drilling expenses. On that day appellant wrote a number of checks on her personal bank account for wages due the employees, totaling approximately \$1,000. At that time appellant also wrote a couple of checks for material bills, which she gave to Rivers for delivery. Rivers testified that she made several trips later to the well; that on one trip about September 12, when he told her that he was worried about money for the men and the casing, she said, "In just a few days we will have money, and we will have casing, and we will complete the well," and that Harwood "verified" her statement; that on another occasion when she was there shortly after the well shut down on September 22, she gave him a check to repair the pump because he "figured [to] start up any day and [would] need the pump right away"; that he kept calling her home almost daily about paying the men, and she promised to get the money to him and told him "to keep the men out there." Rivers also testified that appellant on some of her later trips brought different men with her in an evident attempt to find someone to "take the well over" and "put up the money to clear the debts"; that about a month after the

well shut down, he with some of the workmen and appellant went to the district attorney's office in Bakersfield to talk over the matter of some labor checks which Harwood had given which were not paid; that appellant then told the district attorney that Harwood had agreed to furnish the rigging and her only obligation was to pay the labor; that she said that she had given Harwood about \$1,200 for that purpose but that he failed to deposit it. In further testimony, Rivers stated that Harwood employed him for \$700 per month; that Harwood gave him at various times sizable cash amounts for equipment and "stuff for the rig" but never paid him any wages; that appellant told him (Rivers) "I will see you get yours."

Various workmen testified that appellant told them at different times when she visited the well that "she would see all the boys got their money for working." One of the workers testified that he and another laborer called on appellant at her Beverly Hills home sometime toward the end of October to ask her "what she intended to do about the labor bills" that had accumulated; that she said, "Boys, I want to tell you how I got into this thing"—; that she then stated that under her agreement with Harwood she was to be responsible only for the labor, that the materials to drill the well and the machinery were to be furnished by "other parties"; that she understood that the "well would be completed in a lot less time than it was" and that "was why she didn't have sufficient money to pay off the wages right then"; that she thought "oil would be removed" upon completion of the well and "therefore they would easily get backing for the rest of the wells" which had been staked out for drilling; that the "labor bill got staggering and she said she didn't have money to cover" it; that he then told appellant how much he claimed to be due him, and she made no objection to the amount but said, "I am going to pay all you boys." Another workman testified that the day after he quit toward the end of September, he telephoned appellant and told her "all the men were going to quit," and she replied, "tell them to hang on a few days. Harwood and I are going to get

some money. I will get money, and we will be up and pay them off.”

In connection with appellant’s interest in the enterprise, Rivers testified that she had told him during the course of operations that “she was engaged in drilling the well and was going to make a present of” it to her husband, H. A. Conway. It further appears that appellant was ordered by the court through the issuance of a subpoena *duces tecum* to produce her records relative to all transactions pertaining to the oil well, including all cancelled checks and books of account covering the period of drilling operations, but appellant refused to comply. In the course of the trial the court, after reference to appellant’s failure to produce the documents as subpoenaed, undertook, without success, to elicit from appellant information as to her financial condition and bank statements for the specified period.

[2-4] It is true that appellant gave testimony which contradicted and tended to explain some of the evidence given by respondent’s witnesses. The question of the credibility of the witnesses, however, was one for the trial court to determine, *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557, and that court undoubtedly considered appellant’s failure to comply with the subpoena *duces tecum* in evaluating her testimony. When an appellate court is confronted with the question of the sufficiency of the evidence, its only duty is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support the findings and judgment. The foregoing review of the record clearly shows that there was abundant evidence from which the trial court could have concluded that despite the signing of the agreement solely by Mr. Conway, appellant was either the sole undisclosed principal or one of the undisclosed principals in the oil venture, and therefore primarily liable for the labor claims. That she so considered herself liable for such claims is shown by her own admissions, to which respondent’s witnesses testified. She had control of the purse in making available the funds to meet the workmen’s claims, and it was not necessary that she be con-

cerned with all the details of the employment in order to establish the employer-employee relationship between herself and respondent’s assignors. *Empire Star Mines Co. v. Cal. Employment Commission*, 28 Cal.2d 33, 43, 168 P.2d 686. Under these circumstances appellant’s cited authorities involving the requirement of the statute of frauds that a third person’s agreement to pay the debts of another must be in writing, *Code Civ.Proc. § 1973, subd. 2; Civ. Code, § 1624, subd. 2; McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454; *Swim v. Juhl*, 72 Cal.App. 363, 237 P. 552, are not in point.

The judgment is affirmed.

GIBSON, C. J., and SHENK, ED-
MONDS, CARTER, TRAYNOR and
SCHAUER, JJ., concur.



41 Cal.2d 676
**EMPLOYERS MUT. LIABILITY INS. CO.
OF WISCONSIN**
v.
INDUSTRIAL ACC. COMMISSION et al.
L. A. 22765.

Supreme Court of California.
In Bank.
Nov. 13, 1953.

Rehearing Denied Dec. 10, 1953.

Proceeding for workmen’s compensa-
tion benefits by employee who fell on em-
ployer’s floor after idiopathic seizure. In-
dustrial Accident Commission awarded
compensation, and employer’s insurer filed
petition for writ of review. The Supreme
Court, Carter, J., held that since employee
was injured while at work and upon part
of employer’s premises, the injury arose
out of and in course of employment.

Award affirmed.

Spence, Edmonds and Schauer, JJ., dis-
sented.

Prior opinion 253 P.2d 737.

1. Workmen's Compensation ⚖️649

An employee who falls from a height or against an object on employer's premises, in course of employment, is eligible for workmen's compensation even if the fall was due to idiopathic seizure.

2. Workmen's Compensation ⚖️613

To constitute an injury "arising out of employment", injury need not be of kind anticipated by employer or of a kind peculiar to the employment.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Arising Out of Employment".

3. Workmen's Compensation ⚖️610

An injury to a workman is an injury "arising out of employment" if employment is a contributory cause to such injury.

4. Workmen's Compensation ⚖️649

Where employee, while at work, fell on employer's floor after idiopathic seizure, and injured his head, the injury arose out of and in course of employment and employee was eligible for workmen's compensation benefits.

Spray, Gould & Bowers and C. W. Bowers, Los Angeles, for petitioner.

Edmund J. Thomas, Jr., and T. Groezinger, San Francisco, for respondents.

CARTER, Justice.

A panel of the Industrial Accident Commission denied workmen's compensation to the applicant, Fred E. Gideon, employee of Douglas Aircraft Company, Inc., on the ground that, while the head injury suffered by him occurred in the course of his employment, it did not arise out of it. On reconsideration, it found the injury both occurred in the course and arose out of the employment and awarded compensation. That award is here for review.

The facts are not disputed. Gideon was on the job on his employer's premises and working for his employer. He was suffering from a headache after returning from the employer's dispensary where he had obtained aspirin to relieve it, and while walking down an aisle on his employer's

premises, he had an idiopathic seizure not connected with his employment, which caused him to fall to the concrete floor and strike his head thereon, causing the injuries to his head for which compensation was awarded. There is no question that the injury occurred in the course of the employment. The dispute is whether it arose out of his employment.

[1] It is settled in this state and elsewhere that an injury suffered from a fall on the employer's premises, in the course of employment, from a height or on or against some object, arises out of the employment and is compensable, even though the fall was caused by an idiopathic condition of the employee (*National Automobile & Casualty Ins. Co. v. Industrial Accident Commission*, 75 Cal.App.2d 677, 171 P.2d 594, where numerous authorities are cited), and it is pointed out that *Brooker v. Industrial Accident Commission*, 176 Cal. 275, 168 P. 126, L.R.A.1918F, 878, to the contrary, is no longer the law since *George L. Eastman Co. v. Industrial Accident Commission*, 186 Cal. 587, 200 P. 17 and *California Notion & Toy Co. v. Industrial Accident Commission*, 59 Cal.App. 225, 210 P. 524 (see cases collected in Horovitz on Workmen's Compensation, pp. 144 et seq.; Horovitz, *Current Trends in Workmen's Compensation*, pp. 649 et seq.; *Schneider's Workmen's Compensation* (Text—Perm. Ed.), § 1376). The reasoning of those authorities is that the injury for which compensation is sought, was caused by the impact of the employee's body with an object or surface of the employer's premises, and hence arose out of the employment, because such injury was an incident thereof, although the fall may also have been a causal factor which had no connection with the employment. That reasoning is equally applicable where the fall is merely to the floor or ground, in the course of the employment, and death or injury results from striking the floor or ground. It has been held that such injury arises out of the employment, and is compensable, although the fall was caused by a disease of the employee, having no relation to the employment. See *Barlau v. Minneapolis-Moline Power Implement Co.*, 214 Minn.

564, 9 N.W.2d 6; *President and Directors of Georgetown College v. Stone*, 61 App. D.C. 200, 59 F.2d 875; *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 A. 599; *Rockford Hotel Co. v. Industrial Commission*, 300 Ill. 87, 132 N.E. 759, 19 A.L.R. 80; *General Ins. Corp. v. Wickersham*, Tex.Civ.App., 235 S.W.2d 215, writ of error refused, 149 Tex. 679; *Tapp v. Tapp*, 192 Tenn. 1, 236 S.W.2d 977; *Burroughs Adding Mach. Co. v. Dehn*, 110 Ind.App. 483, 39 N.E.2d 499; *Burton-Shields Co. v. Steele*, 119 Ind.App. 216, 83 N.E.2d 623, 85 N.E.2d 263; *Watson v. Grimm, Md.*, 90 A.2d 180; *New Amsterdam Casualty Co. v. Hoage*, 61 App.D.C. 306, 62 F.2d 468, certiorari denied, 288 U.S. 608, 53 S.Ct. 400, 77 L.Ed. 982; *Protectu Awning Shutter Co. v. Cline*, 154 Fla. 30, 16 So.2d 342; *Horovitz, Stepping and Falling*, 4 N.A.C.C.A. Law Journal 64; *Schneider's Workmen's Compensation* (Text—Perm.Ed.), § 1376. In *General Ins. Corp. v. Wickersham*, supra, the court said [235 S.W.2d 217]: "The conflicting views in the cases where the employee is injured by falling on the floor or ground, as distinguished from falling from ladders, or into holes, or against objects other than the floor or ground, are exemplified by the majority and dissenting opinions in *Andrews v. L. & S. Amusement Corporation*, 253 N.Y. 97, 170 N.E. 506, where compensation was denied, and in *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 A. 599, where compensation was awarded. * * *

"The cases denying compensation do so on the theory that a floor presents no risk or hazard that is not encountered everywhere, and that such risks and perils as they do present are only those which confront all members of the public. The cases allowing compensation do so on the theory that the injury need not be the product of a peril or hazard which exposes the employee to extraordinary risk, in order to be compensable, and that the hazard presented by the floor renders the injury compensable, not because it should have been foreseen or expected, but because it is a hazard that is peculiar to the employment, and is one that is incidental to and grows out of the employment. * * *

"It is our belief, and we so hold, that the attempted distinction between cases where the employee falls from a ladder, or into a hole, or against some object, and those where the employee falls to the ground or floor, is without a reasonable basis." There are cases to the contrary but the modern trend is definitely in accordance with the view above expressed.

[2, 3] The contrary holdings in denying compensation overlook several important principles. Though an injury to be compensable must arise out of the employment, that is, occur by reason of a condition or incident of employment, the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere. *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798. If we look for a causal connection between the employment and the injury, such connection need not be the sole cause; it is sufficient if it is a contributory cause. *Colonial Ins. Co. v. Industrial Accident Commission*, 29 Cal.2d 79, 172 P.2d 884. Where a person is required to be on the streets in the course of his employment and falls to the street, the resulting injury arises out of the employment. *State Compensation Insurance Fund v. Industrial Accident Commission*, 194 Cal. 28, 227 P. 168. And finally " * * * reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." *Truck Insurance Exchange v. Industrial Accident Commission*, 27 Cal.2d 813, 816, 167 P.2d 705, 706; *Lumbermen's Mutual Casualty Co. v. Industrial Accident Commission*, 29 Cal.2d 492, 175 P.2d 823; *Industrial Indem. Exchange v. Industrial Accident Commission*, 26 Cal.2d 130, 156 P.2d 926.

[4] Thus in the instant case it is not a ground for annulling the award of compensation that the employee might have had a fall (resulting in bodily injury) caused by an idiopathic condition but occurring at home, on the street or elsewhere when he was tending to his private affairs.

The fact remains that he injured himself while at work, on his employer's premises, the injury being the striking of his head against the floor, a condition incident to the employment. His condition may have been a contributory cause but it was not the sole cause of his injury. It would not be doubted that if an employee fell to the ground or floor in the course of his employment, and as a result was injured, the injury would be compensable whether the cause of the fall was a slippery or defective floor, or was due to nothing more than his innate awkwardness or even carelessness. Certainly, resolving all doubts in favor of the commission's finding that the injury arose out of the employment, compels an affirmance of the award.

Award affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SPENCE, Justice.

I dissent.

The uncontradicted evidence, as stated in the majority opinion, shows that the injured employee, while walking down an aisle on his employer's premises, "had an idiopathic seizure not connected with his employment, which caused him to fall to the concrete floor and strike his head thereon, causing the injuries to his head for which compensation was awarded." I am of the opinion that the record is wholly devoid of any evidence to sustain the essential finding that such injury was one "arising out of * * * the employment" Labor Code, § 3600; and that therefore the award must be annulled.

The decisions of this court clearly demonstrate that a liberal construction has been placed upon the phrases "in the course of the employment" and "arising out of * * * the employment" in line with the statutory direction. Labor Code, § 3202. But there comes a point where so-called liberal construction, if carried beyond permissible limits, can result in nullification of express statutory requirements; and in my view, such point has been reached in the majority opinion. It is clear

that the statutory phrases "in the course of the employment" and "arising out of * * the employment" were not intended to be identical in meaning; but the result of the majority opinion is to make compensable every injury arising out of an idiopathic seizure, provided only that it occurs "in the course of the employment". Hence the requirement that the injury must also be one "arising out of * * * the employment" is in effect eliminated from the statute.

It is true that the courts have encountered difficulty in construing that phrase, but the courts of this state have not heretofore gone so far as to render it meaningless. In many of the "fall" cases mentioned in the majority opinion, the cause of the fall was unknown. In some, the employee fell from equipment furnished by the employer. In others, the employee fell onto or against the equipment of the employer or into an opening or other hazard encountered at the place where the employee was performing his work. The reasoning of some of the cases, like that in the majority opinion, is not entirely clear. But in every well considered case in which an injury resulting from a fall has been held compensable as arising out of the employment, the evidence was such that it might reasonably be inferred either (1) that the fall resulted, at least in part, from some activity connected with the employment or (2) that the ensuing injury resulted, at least in part, from some peculiar condition or hazard which the employee encountered as an incident to this employment. In the absence of any evidence from which one or the other of these two inferences can be drawn, there can be no basis for a finding that the injury was one "arising out of the employment".

In the present case the uncontradicted evidence shows that the fall resulted solely from an idiopathic seizure which was in no way connected with the employment; and that the ensuing injury resulted solely from striking the floor. It is therefore clear that neither of the above inferences may be drawn. The mere existence of an ordinary floor, which has no relation to the injury

other than to furnish the landing place for an employee who suffers an "idiopathic seizure not connected with his employment," cannot fairly be said to constitute a peculiar condition or hazard incident to the employment so as to meet the above-mentioned requirements.

If as a matter of policy, every injury sustained in the course of the employment is to be made compensable, the Legislature rather than the courts should make that determination. But as long as the statute expressly makes the additional requirement that the injury be one "arising out of the employment", the courts should not, under the guise of liberal construction, ignore the statutory mandate.

I would therefore annul the award.

EDMONDS and SCHAUER, JJ., concur.

Rehearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.



41 Cal.2d 689

GARCIA et al.

v.

INDUSTRIAL ACC. COMMISSION et al.

L. A. 22835.

Supreme Court of California.

In Bank.

Nov. 13, 1953.

Rehearing Denied Dec. 10, 1953.

Workmen's compensation proceeding wherein the Industrial Accident Commission granted an unemployment compensation lien against a compromise award, and the employee and his employer's insurer filed petition for review. The Supreme Court, Schauer, J., held that employee's application for adjustment of claim for workmen's compensation for industrial injury, compromise of claim by employee and employer's insurance carrier, and Commission's approval of compromise was sufficient to show prima facie, as against employee and insurance carrier, in absence of evidence presumptively within their power to produce, that the payments of unemployment compensation were for a period when the employee was industrially disabled, and

that a fund existed against which the lien could and should attach.

Affirmed.

Carter, J., dissented.

Prior opinion 256 P.2d 1046.

1. Social Security and Public Welfare ⇌269

Legislative purpose in providing unemployment disability benefits was to provide insurance to individuals unemployed due to sickness and injury for which no other compensation is payable, and not to provide additional benefits to individuals eligible for workmen's compensation. Labor Code, §§ 3202, 3208, 4903(f), 5000-5003, 5100; Gen.Laws Act 8780d, §§ 150, 207.

2. Social Security and Public Welfare ⇌721

To enforce the legislative intention that individual should not be entitled to both workmen's compensation and unemployment compensation disability payments, lien lies against workmen's compensation benefits for unemployment compensation disability benefit payments made during period pending determination of individual's eligibility for workmen's compensation benefits. Labor Code, § 4903(f); Gen.Laws Act 8780d.

3. Social Security and Public Welfare ⇌275

Workmen's Compensation ⇌52

Both the Workmen's Compensation Act and the Unemployment Insurance Act are remedial statutes and are to be liberally construed for their common purpose of providing prompt cash assistance to disabled workmen. Labor Code, § 3201 et seq.; Gen.Laws, Act 8780d.

4. Social Security and Public Welfare ⇌721

Amount payable under agreement compromising claim for workmen's compensation entered into between employee and employer's workmen's compensation insurance carrier and approved by Industrial Accident Commission is considered workmen's compensation against which lien for unemployment disability benefits may be allowed. Labor Code, § 3201 et seq.; Gen.Laws, Act 8780d.

5. Workmen's Compensation ⇌1709, 1723

Final determination as to whether an employee is entitled to workmen's compen-

sation, the amount of such compensation, and the period during which he is eligible therefor, must be made by the Industrial Accident Commission.

6. Evidence ⇨91

While ordinarily the burden of proving every element of a claim is on the one who asserts it, for practical reasons the burden of explanation is sometimes placed on a party-opponent who has information lacking to the one who asserts and seeks to establish a fact.

7. Social Security and Public Welfare ⇨721

Fact that employee claimed workmen's compensation for alleged industrial injury, and that employee and employer's compensation insurer compromised claim which was approved by Industrial Accident Commission was sufficient to show *prima facie*, as against employee and insurer, in absence of evidence presumptively within their power to produce, that payment of unemployment compensation disability benefits were for a period when employee was industrially disabled and that a fund existed against which unemployment compensation lien could and should attach. Labor Code, §§ 3202, 3208, 4903(f), 5000-5003, 5100; Gen. Laws, Act 8780d, §§ 150, 207.

Victor C. Rose, Eugene Marias, Herlihy & Herlihy and E. H. Herlihy, Los Angeles, for petitioners.

Edmund J. Thomas, Jr., T. Groezinger, Everett A. Corten, San Francisco, Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Dep. Attys. Gen., for respondents.

SCHAUER, Justice.

Everardo Garcia, an applicant for workmen's compensation, and Pacific Indemnity Company, carrier of the workmen's compensation insurance of Garcia's employer, seek review of an Industrial Accident Commission award of a lien (allowed pursuant to Lab.Code, § 4903, par. (f)) against \$1,250 payable to Garcia under an agreement between him and Pacific compromising his claim for workmen's compensation.

The lien claimant is the Department of Employment of the State of California. It paid the employee unemployment compensation disability benefits during a period when, although it is not disputed that he was entitled to compensation from one source or the other, it was uncertain whether the benefits should be paid, on the one hand, under the Unemployment Insurance Act, or, on the other hand, under the Workmen's Compensation Act. The subsequent compromise of the employee's claim for workmen's compensation was approved by the commission. There was no direct evidence before the commission as to whether the injury on account of which the employee claimed workmen's compensation was industrially caused and as to whether, if it was, it caused the disability during the period for which unemployment compensation disability benefits were paid. The employee and the workmen's compensation insurance carrier of the employer take the position that there was no evidence before the commission sufficient to support a finding on those matters, and that the Department of Employment, to establish its lien, must prove such matters. The commission and the department take the position that the employee and the insurance carrier, if they object to allowance of the lien, must show that it should be disallowed. We have concluded that the position of the commission and the department is correct.

On August 3, 1950, the employee filed with the commission his application for adjustment of claim for an allegedly industrial injury which was sustained March 17, 1950. Also on August 3 the Department of Employment filed its request for allowance of lien on which was endorsed the employee's consent to such allowance. The department paid the employee unemployment compensation totaling \$496 during the period from June 27 through October 16, 1950.

Hearings on the claim before the commission were continued from time to time because the employee and the employer's insurance carrier were negotiating for a settlement. In March, 1952, the employee and the insurance carrier executed a settlement agreement which recited that there was a

dispute as to liability and compromised the employe's claims against the compensation insurance carrier for the sum of \$1,250. The commission approved this settlement by an order which made no mention of the department's lien claim.

At the department's request the matter was reopened for consideration of the lien claim in the light of this court's decision in *Aetna Life Ins. Co. v. Industrial Accident Commission* (1952), 38 Cal.2d 599, 241 P.2d 530 which decision became final after the commission had approved the settlement. At the hearing concerning the lien all the parties declined to introduce evidence on the question whether, during the period when the department paid the unemployment disability benefits, the employe was disabled by an industrial injury. The referee found that "there is no evidence to establish that applicant [employe] has sustained any injury which arose out of and occurred in the course of his employment or that he suffered any period of disability as result of any such injury, nor is there any evidence that will establish that he is entitled to any compensation by reason of any such period of disability." However, it is not disputed that, as above recited, the claim for workmen's compensation was filed, such claim was compromised, and the compromise was approved by the commission. Upon the record the referee recommended and the commission ordered that the lien be granted. The employe and the employer's insurance carrier exhausted their remedies before the commission, and this review proceeding followed.

[1,2] In *Bryant v. Industrial Accident Commission* (1951), 37 Cal.2d 215, 218, 231 P.2d 32, we emphasized that the legislative purpose in providing unemployment disability benefits for periods and under circumstances not covered by workmen's compensation obviously was not to create duplicating compensations but, rather (in the language of the report of the Senate Interim Committee on Unemployment Insurance, Senate Journal, May 7, 1945, p. 126), was to provide an insurance program "to pay benefits to individuals who are unemployed because of illness or injury for which no compensation is otherwise made."

(Italics added.) The legislative intention that a workman shall be compensated in part for the wage loss resulting from unemployment due to sickness or injury both where the disability is industrially caused (covered by the Workmen's Compensation Act) and where it is not so caused (covered by the Unemployment Insurance Act), but that he shall not be entitled to unemployment compensation disability benefits *in addition* to workmen's compensation for the same period of unemployment, is manifest in the substance of the respective statutes. (See, e. g., Workmen's Compensation Act, Lab.Code, §§ 3202, 3208, 4903, par.(f), §§ 5000-5003, 5100; Unemployment Insurance Act, 3 Deering's Gen.Laws, Act 8780d, §§ 150, 207.) In the *Bryant* case we further held that, to make the legislative intention effective, the Industrial Accident Commission, pursuant to paragraph (f) of section 4903 of the Labor Code, must allow a lien against workmen's compensation for unemployment compensation disability benefits paid under the Unemployment Insurance Act during a period when, pending a determination by the Industrial Accident Commission of a claim for workmen's compensation, there was uncertainty whether benefits were payable under the Workmen's Compensation Act or under the Unemployment Insurance Act.

[3,4] Both the Workmen's Compensation Act and the Unemployment Insurance Act are remedial statutes and are to be liberally construed for the purpose of accomplishing their objects. Obviously, a primary and common object is the prompt cash assistance of a disabled workman. To that end, the immediate payment of benefits under the Unemployment Insurance Act where there is a question whether benefits are payable under the workmen's compensation law, is highly desirable. In the *Aetna* case (*Aetna Life Ins. Co. v. Industrial Accident Commission* (1952), *supra*, 38 Cal.2d 599, 603, 241 P.2d 530) we recognized that the proper conduct of the business of an insurance company carrying unemployment compensation disability benefit insurance would inevitably tend to make it delay payments to the workman in doubtful cases pending determination of the question as

to whether the disability was compensable under the Workmen's Compensation Act, unless such carrier could be assured that payments advanced under such circumstances would in all proper cases be recoverable upon determination of the controlling facts. We specifically held (page 604 of 38 Cal.2d, page 532 of 241 P.2d) that an amount payable under an agreement compromising a claim for compensation entered into between the injured workman and the workmen's compensation insurance carrier of his employer and approved by the commission was workmen's compensation against which the lien for unemployment disability benefits should be allowed.

[5] The final determinations whether an employe is entitled to workmen's compensation, the amount of such compensation and the period during which he is eligible therefor, must be made by the Industrial Accident Commission. In the Aetna case the commission had not made such determinations. This court (page 605 of 38 Cal. 2d, page 533 of 241 P.2d) directed that "if the parties, including Aetna [the unemployment insurance carrier which claimed a lien there], cannot work out an agreement which effects a settlement of Aetna's claim, then the Industrial Accident Commission should determine the period of disability for which the employe is entitled to compensation and allow the claimed lien for the amounts of unemployment disability benefits paid during that period."

[6] As stated above, it is the position of the commission and the department that the lien claimant is not required to produce evidence on which the commission can find that "the employee is entitled to compensation." The department and the commission point out that there is great practical difficulty in requiring the department to produce evidence of the industrial nature of the employe's injury and the period of his disability at a time long after the alleged injury and disability, where the employe who has first hand knowledge of those matters and the insurance carrier who has immediate opportunity to investigate them decline to produce such evidence and in-

stead elect to compromise. Ordinarily, as the employe and the insurance carrier argue, the burden of proving every element of a claim is on the one who asserts it. But for practical reasons the burden of explanation or of going forward with the evidence is sometimes placed on a party-opponent who has information lacking to the one who asserts and seeks to establish a fact. Familiar examples of this procedural device are the doctrine of *res ipsa loquitur* (see, e. g., *Ybarra v. Spangard* (1944), 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; *Dierman v. Providence Hospital* (1947), 31 Cal.2d 290, 294, 188 P. 2d 12) and the use of special presumptions against a defendant in a criminal case where there is a rational connection between a fact proved by the prosecution, and a presumed fact which can best be explained by the defendant (see, e. g., *People v. Scott* (1944), 24 Cal.2d 774, 779, 151 P.2d 517).

[7] Here, it appears from the employe's application for adjustment of claim for workmen's compensation that he claimed an industrial injury which resulted in his leaving work on June 16, 1950; it was agreed between the employe and the workmen's compensation insurance carrier that the employe was away from work until November, 1950; the employe's claim was compromised for a substantial sum, which compromise was approved by the commission; and it was stipulated that the department paid unemployment disability benefits from June 27, 1950, to October 16, 1950. This is sufficient to show *prima facie*, as against the employe who made the claim and his employer's workmen's compensation insurance carrier, in the absence of evidence presumptively within their power to produce, that the department's payments were for a period when the employe was industrially disabled, and that a fund existed against which the lien could and should attach. If there was to be any further showing as to the nature and period of the disability it should have come from the employe or the insurance carrier.

For the reasons above stated the award is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

I concur in the judgment for the reason that the record shows a claim for an industrial injury alleged to have occurred prior to the period during which Garcia received unemployment compensation disability benefits. In such circumstances, the Industrial Accident Commission properly might infer that the disability was work connected and determine that the Department of Employment had established a prima facie case for the amount of its claim.

CARTER, Justice (dissenting).

I dissent.

I reiterate the views expressed in my dissents in *Bryant v. Industrial Accident Commission*, 37 Cal.2d 215, 223, 231 P.2d 32 and *Aetna Life Ins. Co. v. Industrial Accident Commission*, 38 Cal.2d 599, 605, 241 P.2d 530. In the latter case the majority held that a lien for unemployment disability payments must be allowed against the sum a workman was to receive for an injury under a compromise with his employer's insurance carrier. The present case goes one step further and holds that the employee has the burden of proving that the compromised claim was not compensable under the workmen's compensation laws even though it is the payor of the disability payments who is asserting the lien, and for him to be entitled to it, the disability must have been compensable under the workmen's compensation laws. This is squarely contrary to section 5705 of the Labor Code, dealing with workmen's compensation, which provides that: "The burden of proof rests upon the party holding the affirmative of the issue." See also Code Civ.Proc., §§ 1981, 1869. Hence the lien claimant had the burden of proving that the compromise payment was for an injury compensable under the workmen's compensation laws. To escape that proposition the majority reasons that the burden should be on the employee because he is better able to sustain it. While that may be true to some extent, the testimony of the employer and his employees and the data gathered as the result of any investigation made by

the employer's insurance carrier are available equally to the lien claimant and the employee. It would seem to follow, therefore, that with reference to that source of evidence the employee is in no better position than the lien claimant. In any event it would seem that at least some burden rested upon the lien claimant to make a prima facie showing that the employee was in a position to produce evidence relating to the injury which was not available to the lien claimant. No such showing was made. In this state of the record, reliance by the majority upon the doctrine of *res ipsa loquitur* seems rather far fetched. In brief, we have here merely the assertion of a claim for workmen's compensation benefits by the employee, which claim was not pressed because of the compromise. We also have the assertion of a lien by the Department of Employment against the amount of the compromise. At this point the employee is claiming nothing with respect to compensation, but the majority says that the burden is on him to disprove that his injury was employment connected or a lien will attach. Of course, the majority would not hold that the mere assertion of a claim for workmen's compensation by an employee creates a presumption of its validity, as such holding would place an undue burden upon the employer and his insurance carrier. Yet the effect of the majority holding in the case at bar is to create such a presumption. But it is created for the purpose of defeating rather than supporting the claim of the employee. Thus a law which was designed to protect the interests of injured employees is construed to defeat their interests.

The majority also advances the specious argument that unless every claim of lien for disability benefits is allowed against awards for workmen's compensation the payment of disability benefits will be delayed to the detriment of the injured employees. Why this result would obtain is not apparent. The statute defining who is entitled to disability benefits is clear. Deering's Gen.Laws, 1949 Supp., Act 8780d, §§ 201, 205, 206.1, 207, 208. The provisions for payment of such benefits are also clear. Deering's Gen.Laws, 1949 Supp., supra, Act

8780d, §§ 250-254. With respect to the purpose of the Act, section 150 thereof provides: "The purpose of this article is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. *This article shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.*" (Emphasis added.) The majority would thwart this salutary purpose by suggesting to those responsible for the payment of unemployment compensation disability benefits that payment of such benefits be delayed in cases where workmen's compensation is also claimed by the employee until the validity of such claim is determined. In refutation of this argument I venture to suggest that if such a practice should be pursued by those responsible for the payment of such benefits, the Legislature would provide an appropriate penalty designed to correct such an evil. However, as I read the Act, I can see no basis for the unwarranted suggestion contained in the majority opinion.

Because there is no evidence on which a valid lien could be imposed on the amount covered by the compromise, I would annul the award.

Rehearing denied; CARTER, J., dissenting.



121 Cal.App.2d 261

LEHMAN

v.

RICHFIELD OIL CORP. et al.

Civ. 19692.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Action against filling station and parking lot operator for injuries sustained when user of telephone booth slipped on oily spot on step of booth. The Superior

Court, Los Angeles County, Clarence L. Kincaid, J., granted defendant's motion for nonsuit and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where there was adequate evidence of existence of oily spot, and evidence showed that premises had not been inspected in eight hours, and that old automobiles often entered station and dropped oil, such evidence was sufficient to support an inference that defendant failed to exercise care required of him so as to be liable for plaintiff's injuries.

Judgment reversed.

1. Negligence ⇨48

The lawful occupant of land or its improvements is liable for injuries sustained by business visitor by reason of natural or artificial condition thereon, provided, however, that such occupant must have known, or by exercise of reasonable care could have known the condition which, if known, he should have realized as one involving an unreasonable risk for visitor on the premises.

2. Negligence ⇨136(22)

In action against filling station operator by user of telephone booth for injuries sustained about 3:30 P.M. when she stepped on oily spot on step of booth which had been swept out as usual at about 7:30 in the morning but which received no other regular attention, whether oil had existed for a time of sufficient duration to enable reasonably prudent person to discover and remove it prior to user's visit was question of fact for the jury.

3. Negligence ⇨134(2)

In action by business invitee for personal injuries, direct evidence is not essential to proof that a dangerous condition existed so long as by exercise of reasonable care it should have been discovered and remedied, and such fact can be proved by circumstantial evidence.

4. Negligence ⇨48, 136(16)

Whether a defective or dangerous condition of a structure existed long enough for reasonably prudent person to have discovered the peril is a question of fact, and time limitations cannot be imposed in view

of fact that they vary with the circumstances of each accident.

5. Trial ☞165

Granting a motion for nonsuit is justified only when it can be said as matter of law no other finding could reasonably have been deduced from the evidence.

6. Trial ☞165

On a motion for nonsuit the trial court must indulge in favor of plaintiff every legitimate inference which evidence would reasonably support.

7. Trial ☞165

A motion for nonsuit may properly be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

Kenny & Morris, Eleanor V. Jackson, Los Angeles, for appellant.

Spray, Gould & Bowers, Philip L. Bradish, and Robert E. Ford, Los Angeles, for respondent.

MOORE, Presiding Judge.

From an order granting defendants' motion for a nonsuit at the conclusion of appellant's evidence, she prosecutes this appeal against respondent Holtzman only.

The substance of appellant's evidence is as follows: Respondent operates a filling station and parking lot on Grand Avenue in Los Angeles. He maintains for profit a telephone booth for public use. On a busy afternoon, May 7, 1951, about 3:30 o'clock, appellant and her companion, David Eichenlaub, drove to a point on Grand Avenue from which for ten minutes she and David kept the booth under surveillance and observed the movements of respondent and his workmen and others on the premises. She looked intermittently to see whether the booth was occupied. She saw no one in front of the booth. After a discussion on who was to be called, she left

her automobile and proceeded on the side-walk to the booth where she unsuccessfully for ten minutes dialed the numbers she desired. During that interval she watched the activities on the parking lot but saw no one in front of the booth. As she stepped out, she slipped on an oily spot on the step of the booth and thereby suffered a severe injury to her left ankle. She did not look at the sole of her shoe for grease. While waiting for David immediately after her injury, she looked back about nine feet and saw a dark oily spot where she had slipped. She testified that she knew her foot slipped on the dark spot on the step.

David Eichenlaub's testimony follows in its main features that of appellant. He came to her aid where she was leaning on a lamp post. When he arrived he also viewed the spot and said, "It looks like oil." He examined the spot on the step immediately after assisting appellant to the car and saw old grease stains and a fresher oil stain the size of a silver dollar which appeared to have been there several hours but "was still one day fresh." It was flat and had soaked in to some extent. Several days after appellant's injury, he brought her again to the booth. He looked at the step, noted that the stains were still present and took photographs of them. It was proved that every morning about 7:30 one of the employees sweeps out the booth; that it receives no other regular attention. It had been swept out as usual on the morning of May 7 preceding the accident.

The full extent of appellant's injuries is not necessary to a decision of this appeal. Omitting the details, the proof showed that appellant suffered a serious injury to her foot. After a week's suffering, a cast was applied from the knee downward and she was kept in bed about three weeks, unable to care for herself and suffered much pain and discomfort.

Under cross-examination, respondent testified that he runs a service station on the premises described by plaintiff. He has five employees, two operating the gasoline station, three serving with the parking lot and wash rack. His rules require that "the station must be kept perfectly clean for the public." While the booth

is sub-leased to Richfield Oil Company, he manages it. He received 15 per cent of the total revenues earned by the telephone. He built the platform for the booth and agreed to keep it clean. Once a week the entire area around the booth is scrubbed, and is swept every morning. Old cars often enter the station and oil is dropped. A great many people use the booth daily.

[1] Appellant's right of recovery, if any, arises from the rule that the lawful occupant of land or its improvements is liable for injuries suffered by a business visitor by reason of a natural or artificial condition thereon, provided however, that such occupant must have known, or by the exercise of reasonable care could have discovered the condition which, if known, he should have realized as one involving an unreasonable risk for a visitor on the premises. *Hatfield v. Levy Bros.*, 18 Cal. 2d 798, 806, 117 P.2d 841; *Rest. Torts*, sec. 343.

[2] In passing upon respondent's motion, the trial court stated: "I know of nothing under the circumstances here which would necessitate his carrying on a continuous inspection of the premises as remote from the field of major activity of his business as his telephone booth other than he did." The court thereby effectually held that as a matter of law respondent was obliged to inspect the premises adjacent to the booth only once a day. With such we cannot agree. Whether the peril had existed for a time of sufficient duration to enable a reasonably prudent person to discover and remove it prior to appellant's visit was a question of fact for the jury.

[3] Respondent is in error in contending that there was no evidence as to how long the dangerous condition had existed. The circumstances detailed above supplied phenomena of such meaningful consequences that for respondent to disregard them was to scorn the users of deductive logic by the trier of fact and for the court to ignore them was to suspend the function of inference in deriving the truth. The facts before the jury on the trial below include the following, to wit: (1) the lo-

cation of the parking lot on a street of congested traffic; (2) the popularity of the telephone; (3) the constant application of grease and oil by the workmen on the lot; (4) the immediate likelihood of pedestrians to remove grease from any part of the lot to the booth; (5) the failure to sweep the premises around the booth after 7:30 a. m.; (6) failure to find the greasy spot during the eight hours subsequent to the morning sweep; (7) the fact that respondent and his attendants were occupied throughout the day with profitable tasks. Direct evidence is not essential to the proof that a dangerous condition existed so long as by the exercise of reasonable care it should have been discovered and remedied. Such fact, like other facts, may be proved by circumstantial evidence. *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 607, 184 P.2d 708.

By reasonable inference it could have been found that neither the premises in front of the booth nor the booth and its steps had been inspected by respondents within eight hours previous thereto; also that the oily or greasy spot had been on the step for many hours before the accident.

[4-6] Whether a defective or dangerous condition of a structure existed long enough for a reasonably prudent person to have discovered the peril is a question of fact and time limitations cannot be imposed. They vary with the circumstances of each accident. *Travis v. Metropolitan Theatres Corp.*, 91 Cal.App.2d 664, 667, 205 P.2d 475; *Hatfield v. Levy Bros.*, 18 Cal.2d 798, 807, 117 P.2d 841. Granting a motion for nonsuit is justified only when it can be said as a matter of law no other finding could reasonably have been deduced from the evidence. *Finley v. City and County of San Francisco*, 115 Cal.App.2d 116, 119, 251 P.2d 687; *Raber v. Tumin*, 36 Cal.2d 654, 656, 226 P.2d 574; *Barton v. Capitol Market*, 57 Cal.App.2d 516, 520, 134 P.2d 847. On a motion for a nonsuit the trial court must indulge in favor of plaintiff every legitimate inference which the evidence would reasonably support. *Idem*. In *Hamilton v. Pacific Electric R. Co.*, 12 Cal.2d 598, 86 P.2d 829, the plaintiff entered the waiting room and during her

thirty-minute stay she observed no one come in or depart from the room. When attempting to leave, she slipped to her injury on oil immediately in front of the exit door. There was no claim that the company had actual notice of the presence of the oil. In affirming the judgment for plaintiff the court observed that "if no inspection of the waiting room * * * had occurred within 24 hours * * * it fairly might be concluded by a jury that defendant had failed in its duty to plaintiff". Id., 12 Cal.2d at page 601, 86 P.2d at page 830.¹ In *Mattox v. Isley*, 111 Cal.App.2d 774, 778, 245 P.2d 664, this court held that lapse of time is not the only factor in establishing constructive notice of a defective condition, but whether the dangerous condition has existed long enough to have been discovered by a reasonably prudent man *is for the trial court to determine*.

[7] A motion for nonsuit may properly be granted only when disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. *Raber v. Tumin*, 36 Cal.2d 654, 656, 226 P.2d 574. Because the court below invaded the province of the jury by not permitting it to find the ultimate fact of negligence, appellant was deprived of her right to a fair trial.

The authorities cited by respondent do not contradict this conclusion. In *Harpke v. Lankershim Estate*, 103 Cal.App.2d 143, 145, 229 P.2d 103, 104, the plaintiff "did not see anything on the stairway that caused her to slip and fall, and she did not know what caused her to slip." Similarly in *Vaughn v. Montgomery Ward & Company*, 95 Cal.App.2d 553, 557, 213 P.2d 417, 419, the court said, "There is no evidence of any foreign substance on the floor." In the present action there is adequate evidence of the oily spot's existence. In *McKellar v. Pendergast*, 68 Cal.App.2d 485, 156 P.2d

950, there was no evidence presented as to how long the slippery material had been on the floor. In *Girvetz v. Boys' Market Inc.*, 91 Cal.App.2d 827, 831, 206 P.2d 6, 9, the court concluded that "where the only evidence is that the foreign object has been on the floor of the market for 'a minute and a half', it must be held that it is insufficient to support an inference that the defendant proprietor failed to exercise the care required of him." However, in the case at bar, the evidence showed the premises had not been inspected in eight hours.

Judgment reversed.

McCOMB and FOX, JJ., concur.



121 Cal.App.2d 229

CHALFIN v. CHALFIN et al.

Civ. 19442.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Hearing Denied Jan. 11, 1954.

Wife brought suit for divorce, and husband cross-complained for divorce. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment granting wife divorce on ground of cruelty, and wife appealed from portion of judgment approving property settlement agreement. The District Court of Appeal, Moore, P. J., held that record showed that Superior Court did not prejudice rights of wife by its remarks and that Superior Court did not compel wife to agree to settlement against her will.

Judgment affirmed.

I. Trial ⚡367

Every trial judge should listen, hear, and from the evidence determine issues

1. See also *Travis v. Metropolitan Theatres Corp.*, 91 Cal.App.2d 664, 667, 205 P.2d 475; *Ahern v. S. H. Kress & Co.*, 97 Cal.

App.2d 691, 693, 218 P.2d 108; *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 606, 184 P.2d 708.

raised by pleadings, maintain orderly procedure, be patient with litigant and counsel, be not only fair but appear to be fair and sympathetic towards any litigant or witness attempting to impress merits of his cause or sincerity of his testimony, and maintain an open mind until cause is submitted.

2. Divorce ⇨249(1)

Where court, in divorce suit, gained a knowledge of wife's oppressions by husband entitling wife to divorce on ground of cruelty, of wife's requirements, of unlikelihood of reconciliation, and of nature of community property, it was proper for court to submit a judgment of property rights to parties and their counsel so that they might make a property settlement agreement, if possible.

3. Divorce ⇨285

Record of divorce suit established that trial judge did not, by his remarks, prejudice rights of wife, who was granted a divorce, with respect to property settlement agreement by the parties.

4. Divorce ⇨286

Where wife, who was awarded a divorce, and who agreed to property settlement, received a fair settlement, she was not entitled to reversal on appeal of that portion of judgment approving property settlement agreement, merely because she was displeased with remarks made by trial court while property settlement agreement was under discussion.

5. Divorce ⇨285

Record of divorce suit established that trial judge did not compel wife, who was awarded a divorce, to agree to property settlement against her will.

MOORE, Presiding Justice.

This appeal does not involve erroneous rulings, insufficiency of the findings to support the judgment, or insufficiency of the evidence to uphold the findings. Neither prejudicial error in the admission or rejection of proof is asserted, nor is the form of the judgment under attack. Appellant declares that her "appeal is concerned with what transpired during the course of the trial which led to a purported settlement of all issues before the court, except of course, the one issue of divorce which was decided in favor of appellant without contest."

Appellant had sued for divorce on the ground of extreme cruelty. A cross complaint was filed on the same ground. The court proceeded with the trial and developed from appellant evidence that her husband had struck her with his fist, used vile and abusive language toward her, left her alone when she was ill, consorted with strange women, pushed her down with a box mattress, and other cruelties. Near the close of the day, after the court became satisfied that a reconciliation was not probable, the judge indulged in some observations on the situation as it then appeared and attempted to make suggestions that the property of the parties should be agreeably divided by them and avoid a long, protracted trial of charges and counter-charges that could effect no good to either of them but would reflect upon their children. He deprecated appellant's demand for \$225 a month for food bills; said the mother of two small children could not maintain a four bedroom home on the amount of alimony he could conscientiously award; that the home should be sold; that if she takes the home she should be paid alimony for a very short period; that these are something to think about "until tomorrow morning. See what you can work out gentlemen."

A Tentative Settlement.

On the following day after appellant's testimony as to residence had been corroborated, the court inquired about the property settlement. Appellant's counsel having stated that they had reached a tentative

Hahn, Ross & Saunders, Los Angeles, for appellant.

Gralla & Gralla and Henry O. Wackerbarth, Los Angeles, for respondent, Henry O. Wackerbarth and Isador Gralla, Los Angeles, of counsel.

settlement, respondent's attorney detailed that the community property consisted of the home, a 1949 Oldsmobile subject to a litigated lien for \$1,100, household furniture and a half interest in the Pacific Athletic Company. But appellant objected when the same attorney proceeded to suggest that appellant should have the home, the automobile and all the furniture but one of the two king-sized beds, a poker table, a freezer and a movie camera and projector. The house was to be sold, pending which respondent was to pay all its expenses including the hire of the gardener. Out of the proceeds from the sale of the home for \$37,500 more than its mortgage of \$13,000, appellant should receive \$25,000; if sold for less than \$37,500, her share was to be reduced proportionately with a minimum of \$22,500, respondent to pay the deficit. Appellant thereupon voiced her opposition to all of it. The court, addressing appellant's counsel, then stated that any agreement "to be made here in lieu of dragging out all of the ghosts of the past by way of a settlement will have to be agreed on by your client, by both parties of their own free will. I don't want to force anybody into anything."

The court admonished appellant's attorney to explain to her the proposed settlement again and again and also to her brother and to say to them that the court considered it a very fair settlement. The lawyer then stated that it is satisfactory except for a few little details. The court stated, "the court doesn't want to be a party to any stipulation and you attorneys don't want to be a party to any stipulation or any agreement in which both parties are not thoroughly conversant with the terms thereof. And Mrs. Chalfin, if you are of the opinion that you do not understand it or you can't agree to it, I am not going to force you to do anything." To that appellant replied that she did not know the terms until she heard them just read in open court. "You see, I feel I should have known or gone over it a little bit beforehand." Her lawyer thereupon stated that he called her the night before and explained it to her; also, he had just explained it to her in the hall. "She is a sick woman but

I think the settlement is fair and there should be a determination of this case. Her doctor thinks as long as the case is pending she is suffering from a neurosis. * * * I was going to suggest that we enter the stipulation and Mr. Gralla and I * * * reduce the terms to writing and present them to both parties for signature."

"The Court: Well, that might be all right, Mr. Zeman, as far as doing that is concerned. Mr. Gralla has stated here in substance what the terms are but I would want Mrs. Chalfin to not only read it over but under oath in open court state that she has read the agreement, she understands it, and it is satisfactory to her and she signed it of her own free will, without any force or threats, or violence of any kind, because there is no sense in having anyone sign an agreement and then subsequently a couple of weeks later find out that it is not agreeable to them, and then turn around and attempt to break it. Well, let me ask you this, Mrs. Chalfin. Do you think if these attorneys submit this agreement in writing to you by way of a property settlement agreement, and submit it to you by tomorrow morning—I don't know whether you can get it out tonight or not—that you can come back tomorrow morning? * * * Now, you have your own brother here in court and he knows that no one is trying to put anything over on you and you can talk with him tonight and come back tomorrow morning and just have the property settlement agreement drawn up. Come back tomorrow morning. Now, pull yourself together in the meantime * * *. Mrs. Chalfin, your brother has been here in court now and he has heard these terms explained by Mr. Gralla and I know that Mr. Zeman has talked to him about it and you talked with him. And you have got to make up your mind whether or not you want to do this * * *"

When court convened on the following day, Mr. Gralla stated that respondent had met appellant's objections to the agreement as theretofore proposed by a provision that

appellant should have all the household furniture, the freezer, \$25,000 out of the proceeds of the sale of the home regardless of its sale price; also, he will pay her \$4,000 "as additional payment in full settlement of all property rights * * * and the wife is waiving all rights to alimony and support." Thereupon, in response to the court's inquiry appellant stated that the agreement was satisfactory. In addition, the court ordered payment in two equal installments of \$150 a month as support for the two children.

The Court's Language.

At the beginning of the last discussion of the settlement, some points of disagreement appeared to be about to disrupt the hoped-for harmony when appellant's counsel demanded that the \$4,000 be termed "alimony."

"The Court: Well, I will be very frank with you. If it is left up to the court and you are going to leave it as alimony, I won't give her any near figure like \$25,000 out of that house. I wouldn't give her anything like it. I would give her about \$15,000.

"Mr. Hertzberg: Well, I don't think the court has heard all the facts and if you want to go to trial as to the value of this business—

"The Court: We are going to go to trial. I am not going to sit by here and have all these curves thrown from one side and then the other. There is only one thing to do, we are going to hear this thing out, every single witness, every piece of evidence, everything.

"Mr. Gralla: Very well, sir.

"The Court: It might end up with your client losing the case and not getting anything."

Following the foregoing colloquy, the court ordered the trial to proceed whereupon a recess was ordered in the following language:

"The Court: All right, we'll take a recess until 10:30, gentlemen. If you haven't something settled by that time

there is only one thing to do. We will go ahead and hear all the evidence."

After the recess, a general discussion ensued in which details were agreed to and both parties assented to the terms included in the settlement.

The Court's Conduct not Prejudicial.

[1] It should be constantly borne in mind by the judiciary that it behooves every trial judge to listen, hear and from the evidence determine the issues raised by the pleadings; to maintain an orderly procedure; to be patient with litigants and counsel; to be not only fair but to appear to be fair and to be sympathetic towards any litigant or witness attempting to impress the merits of his cause or the sincerity of his testimony; and to maintain an open mind until the cause is submitted.

[2] While the foregoing ethical concepts serve generally as the guiding rules for a highminded jurist, yet it does not follow that their religious application is indicated in every situation. Controversies are legion which the litigants consider of first impression but with the issues of which the trial judge is familiarly conversant. The case at bar did not involve strange or novel questions of fact or of law. Upon the court's having gained a knowledge of appellant's oppressions at the hands of respondent, of her requirements, of the unlikelihood of a reconciliation, of the nature of the community property, it behooved the judge to submit the adjustment of their property rights to the parties and their counsel. He was impelled to do so for the reasons that the lawyers knew intimately the circumstances of each item of the community property and its significance or value to the parties. Also, from the attempts by appellant's counsel he had discovered the latter's aim to becloud respondent's name with accusations that could not be established but which could be of enduring embarrassment if not ignominy to him and his children. For these reasons the judge wisely conceived that if the parties could conclude a property settlement, the controversy might be terminated without the expenditure of days in a trial.

As a suggestion for the guidance of counsel in their conferences concerning an agreement, the court suggested the demands of appellant for food allowance as extravagant. Such observation was based upon practical experience and its wisdom is not doubted. The statement that if appellant gets the home the period of her alimony would be confined to a brief period was for the benefit of counsel. The home was the largest single item of their property. It would be worth much to appellant whereas respondent's business was a holding in a partnership which would be dissolved by a transfer of his interest to another. Also, the preservation of the *status quo* with his partner would enable respondent to support his children.

Complaint is made that the court partially prejudged appellant's physical condition by saying that she was a healthy woman. There had been no intimation that the little woman had suffered any constitutional or hereditary weakness or that she had been deprived of her powers or talents by reason of respondent's behavior. Her contention that the court's observation as to her physical condition was a "partial prejudgment of her personal financial requirements," is to ignore a judge's knowledge of her allegations as well as of the fundamentals of life. Whatever her financial "requirements" might be they were to be satisfied out of the community estate. Naturally, if proof should be made of a diseased physical condition not hitherto mentioned, the brevity of the alimony term would be exchanged for a longer period. But the court's admonitions were aimed to assist the lawyers in reaching an agreement.

When the stipulation as to a division was announced, appellant registered her objection or approval to each item. In practically every instance where she protested, the language used was changed to accord with her wishes. Her counsel repeatedly approved the settlement and stated to the court that he had explained the settlement "to the whole family last night" and he considered it fair while no objection came from them. The court reiterated in his colloquies with counsel that the agreement was for

the parties and the lawyers to make. "I am not going to force you to do anything."

When the final draft of the agreement had been drawn, it had the cordial approval of appellant's counsel as well as of members of her own family. She accepted it and the court approved.

[3, 4] From the initial proposal that appellant take \$25,000 out of the home as her share with the understanding that such sum would be proportionately reduced by the percentage of the reduction of the sale price below \$37,500 over and above the mortgage of \$13,000, she constantly gained in the negotiations until, upon her insistence, she was to receive \$25,000 net, whatever the sale price might be. Also, she received *all* the furniture. In fact, she left the conference with an agreement whereby she was to have substantially all the property accumulated during their marriage. While respondent was to retain his partnership interests in the Pacific Athletic Company, appellant never once intimated that she would prefer it to the furniture, the \$29,000 and support for her children. It appears to have been the consensus (1) that respondent should continue with his business and (2) that it was worth less than the amount awarded appellant. From such facts it is clear that appellant suffered no prejudice by reason of the statements of the court. If she received a fair settlement, whatever might have been the language of the court, she cannot have a reversal merely by reason of her displeasure at the conduct of the judge.

Not Compelled by the Court.

[5] Appellant argues that even though her counsel advised her to accept the settlement, they "had no other choice in view of the foregoing," referring to the quoted statements of the judge. The answers thereto are: (1) She insisted upon her own demands for a larger share until they were met; (2) she was assured repeatedly that she should make no settlement unless she chose to do so of her own free will; (3) she was attended by her own attorney, a capable and honorable lawyer, at every stage of the proceeding and he visited with her and

her family in the evening and explained to her why the settlement proposed should be consummated; and (4) notwithstanding the advice of her counsel she held out for the last farthing.

The position assumed by the judge did not deprive her of her day in court. The court never forbade appellant to introduce pertinent and competent evidence either of her husband's cruelties or of their joint property or of the needs of the children. No question of what the community property embraced was ever raised. In fact not an error is assigned with reference to the court's refusal to hear any evidence. But after she had exacted a net \$25,000 out of the proceeds to be received from the home, she and her counsel joined in accepting the settlement. Thus, she was not coerced by the court.

Authorities.

While the authorities cited by appellant for the purpose of showing the court erred to her prejudice contain some language favorable to her contention, an examination of them reveals no factual situation akin to those at bar. In *Pratt v. Pratt*, 141 Cal. 247, 74 P. 742, the trial judge excluded relevant and competent testimony against which he confessed a prejudice. In *Webber v. Webber*, 33 Cal.2d 153, 199 P.2d 934, 941, the judge, in the course of trial, indicated his unfriendliness to the allowance of alimony and after he had divided the community estate of \$50 between the spouses, he refused to award any alimony to the wife, notwithstanding she had been married 37 years, had reared eight children and was without power or talent to earn a livelihood. Also, the Supreme Court was displeased because the judge referred to the trial as the "washing of dirty linen," there having been no vices or immoralities charged. Again in *Rosenfield v. Vosper*, 45 Cal.App. 2d 365, 114 P.2d 29, clearly the trial judge

committed reversible error in advising defendant to settle for \$7,500. The latter had in his answer denied the value of the services exceeded \$1,000. The plaintiff had originally alleged their value to be \$5,605; two weeks later he filed his amended complaint alleging their value to be \$10,000. This was controverted with the same language used in the first answer. Without having heard any witness for defendant, the trial judge had advised the defendant to pay \$7,500. Other amended complaints were successively filed, progressively increasing his demand until he finally alleged the value of his services to be \$18,000. The latter allegation appears to have controlled the court in its award to the plaintiff.

In the case at bar, nothing was said by the judge to indicate a partiality for, or a prejudice against either party. The fact is that he announced his adherence to a policy of not granting alimony payments for long periods. Such statement is reasonably interpreted to mean that the payment of alimony over extended periods is not to be required except where the needs of the recipient and the circumstances of the parties render it imperative. It does not essentially indicate an inimical attitude toward the law requiring the payment of alimony to a needy spouse.

The approval of the settlement by appellant and her counsel put an end to the controversy. *Adams v. Adams*, 29 Cal.2d 621, 624, 177 P.2d 265. Since the record discloses that she suffered no substantial prejudice in the settlement, *Slavich v. Slavich*, 108 Cal.App.2d 451, 459, 239 P.2d 100, and no showing is made that a different forum would yield a nearer approach to justice, a second attempt would be a vain undertaking.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

THOMAS
v.
HUNT MFG. CORP. et al. *
Civ. 4703.

District Court of Appeal, Fourth District,
California.

Nov. 12, 1953.

Rehearing Denied Dec. 2, 1953.

Hearing Granted Jan. 11, 1954.

Action to foreclose mortgages on real and personal property and to recover upon a guarantee. The defendants filed a counterclaim and cross-complaint, alleging that the loan agreements were usurious. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that findings that plaintiff did not render any services of any kind or nature to corporation to which loan was made, and that provision of contract for payment for alleged services was a subterfuge made for purpose of evading and avoiding the usury laws, were unsupported by substantial evidence.

Judgment reversed.

1. Usury ☞117

In action to foreclose mortgages on real and personal property and to recover upon a guarantee, wherein defendants charged that loan and agreements connected therewith were usurious, and it appeared that contract called for payment to plaintiff of \$100 per month for services rendered to corporation to which loan was made, findings that plaintiff did not render any services of any kind or nature to the corporation, and that contract provision for payment for alleged services was a subterfuge made for purpose of evading the usury laws, were contrary to and not supported by the evidence.

2. Appeal and Error ☞1010(1)

Although the question of whether a contract was usurious is one of fact for trial court, its determination must be based upon some substantial evidence.

3. Usury ☞113

Defendants who sought to avoid foreclosure of mortgages by defense that loan

was usurious, had burden of establishing the evasion of the usury statute by plaintiff.

4. Usury ☞11

The test of whether a contract is usurious is whether there was an attempt to evade the law by the arrangements set forth.

—♦—

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson and Gilbert E. Harris, Los Angeles, for appellant.

Desser, Rau, Christensen & Hoffman (Robert Haves, Beverly Hills, of counsel), for respondents.

MUSSELL, Justice.

In this action to foreclose mortgages on real and personal property and to recover upon a guaranty, defendants, by answer, counterclaim and cross-complaint, allege that the loan and agreements connected therewith were usurious and seek treble damages for interest collected by plaintiff. The trial court rendered judgment in favor of defendants and cross-defendant and plaintiff appeals.

On May 30, 1950, plaintiff, Howard D. Thomas, Jr., entered into an agreement in writing with the defendants Hunt Manufacturing Company and Willis E. Hunt, its president and owner of all of the stock in said corporation. It was agreed therein that Hunt would cause the corporation to issue 313½ shares of the corporate stock to Thomas, the consideration therefor being \$15,000 in cash, "or in discharge of a loan by Thomas to the corporation in the same amount in the event Thomas loans said sum to the corporation prior to its authorization to issue said stock to Thomas. In the event Thomas loans said sum of \$15,000 to the corporation, said loan shall be evidenced by promissory note signed by the corporation and guaranteed by Hunt in favor of Thomas, which said promissory note shall be for a period of 90 days with interest at 6% per annum from and after maturity only." This note was executed by the corporation on May 30, 1950. The agreement recited that Thomas had there-

* Subsequent opinion 269 P.2d 12.

tofore loaned to the corporation the sum of \$5,000, as evidenced by promissory note dated May 24, 1950, payable 6 months after date thereof, with interest at the rate of 1% per annum until maturity and thereafter at the rate of 10%. The agreement further provided that Hunt and Thomas should receive such salaries as the board of directors might from time to time determine; provided, however, that such salaries should at all times be equal and that Hunt and Thomas each should be permitted to draw not to exceed \$4,000 per year as reimbursement of expenses incurred by them on behalf of said corporation. It was also agreed that Thomas would be a director, vice-president and treasurer of the corporation.

Hunt testified that Thomas was director, vice-president and treasurer of the corporation from May 24 to June 30, 1950, and during that time had charge of the corporate office business and was to be compensated for his services as vice-president and treasurer when and if the corporation made enough to compensate him.

The corporation was engaged in the manufacture of reinforced plastic products and at or about the time of the signing of the contract Hunt left for Texas to deliver some unfinished boat hulls to a distributor and to arrange for distribution of corporate products in that and other states. While there Hunt received a telephone call from Thomas in which Thomas told Hunt to "brace himself" because he, Thomas, wanted to "get out", and that Hunt should return as soon as possible. Hunt then returned from Texas in the latter part of June, 1950, and had a conversation with Thomas in which Thomas told him he was dissatisfied with his agreement and that he wanted return of his money immediately. Thomas then had his attorneys prepare a written agreement, which was signed by Hunt, the corporation, and Thomas on June 30, 1950. It was agreed therein that Thomas should have in his own right \$4,305.49 then in his possession. Hunt and the corporation promised to pay Thomas \$10,000 in weekly payments of \$1,000 each beginning July 7, 1950, and in paragraph three of said agreement, promised to pay Thom-

as beginning September 15, 1950, \$200 per month thereafter, plus 6% interest on any unpaid balance of the \$20,000 which Thomas lent to the corporation until the full amount thereof was repaid to Thomas. The agreement then provides as follows:

"4. That Hunt and the corporation do hereby jointly and severally promise to pay Thomas beginning September 15, 1950, \$100.00 per month as a fee for Business Management Engineering services which have been rendered to the corporation and this \$100.00 per month payment is to continue until Thomas has received his \$20,000.00 principal plus interest provided for in paragraph 3, above. However, this Engineering service payment will not enter into the computations for reimbursement of the \$20,000.00 principal."

In an amendment to the agreement it was further agreed:

"1—If payments are made as stipulated herein, there will be no interest on said loans except the interest commencing September 15th, 1950 as provided in paragraph #3 or the original agreement dated June 30, 1950.

* * * * *

"3—When Hunt and/or the Corporation has paid \$5,000.00 to Thomas, the note for this same amount will be returned to Hunt and/or the Corporation marked 'paid in full' and when the full balance of the \$20,000.00 has been paid, plus interest, the note for \$15,000. will be delivered marked 'paid in full'."

Mortgages were executed to secure the payment of the total indebtedness to Thomas of \$20,000 and all the payments due on the contract of June 30, 1950, were made by Hunt and the corporation to and including June 15, 1951. Thereafter Hunt refused to make further payments thereon on the ground that the transaction was usurious and the present action was then filed by Thomas.

The trial court held "that the said loan and agreements were and are a usurious transaction violating the said usury law of the State of California, 2 Deering General

Laws, Act 3757, and Constitution XX, Section 22" and that said loan and indebtedness bears no interest and that defendants and cross-complainants are entitled to recover on their counterclaim and cross-complaint and entitled to a credit of all payments for interest trebled.

Thomas seeks a reversal of the judgment, claiming that it is not supported by any evidence and because it is based on a finding of fact:

"That in truth and in fact said plaintiff did not, had not, has not, and at no time did he ever render any services of any kind or nature whatsoever to said defendant corporation * * * that said provision [for payment] for alleged services was a subterfuge made for the purpose of evading and avoiding the Usury laws of the State of California * * * [Clk.Tr. 27, 28 and 71, wherein it is found that the foregoing allegations contained in paragraph VIII of Respondents' 'Affirmative Defense and By-way of Counterclaim' are true];"

which finding, he claims, is not supported by any evidence because all of the evidence is that appellant did render services.

[1] If the contract of June 30, 1950, is to be construed as usurious, it must be so construed by reason of the provisions of the quoted paragraph, number four, thereof, which provides for the payment of \$100 per month for services rendered until the \$20,000 loan was fully repaid. There is substantial uncontradicted evidence that plaintiff rendered services for the corporation between May 24 and June 30, 1950. Defendant Hunt testified that during this period Thomas had charge of the corporate office business and was to be compensated for his services as vice-president and treasurer when and if the corporation made enough to compensate him; that during the two weeks after the signing of the contract of June 30, Thomas kept office hours, went through the past accounts, set up a cost accounting system, revised the buying and supplying inventory and suggested revision of the payment of the workers. Thomas testified that he rendered the serv-

ices specified in Hunt's testimony; that during this period he devoted a little over 200 hours to corporate affairs; that during his first two weeks he worked four or five days a week and put in 7½ hours per day and that during the last three weeks he put in five days a week and some evenings. In view of the foregoing testimony of both Hunt and Thomas, which is uncontradicted, the finding that plaintiff did not render any services of any kind or nature to the corporation is contrary to and not supported by the evidence.

The finding that the provision of the contract for the payment of alleged services (paragraph four) was a subterfuge made for the purpose of evading and avoiding the usury laws of the State of California is likewise unsupported by substantial evidence. The language used in paragraph four of the agreement clearly states that the payments thereunder are for past services rendered. If the defendants had made the payments at the time specified in the agreement, Thomas would have received \$2,800 for such services as he had rendered to the corporation. In this connection Thomas testified that he was a business management engineer; that he was formerly executive vice-president, general manager and director of the Packard-Bell Company, manufacturers of radio and television sets; that the work he did for the Hunt Manufacturing Company was similar to the work he did for the Packard-Bell Company at an annual compensation varying between \$20,000 and \$50,000, plus stock bonus; that he usually asked \$25 per hour for his services as business management engineer and sometimes got more; that he and Hunt agreed that he, Thomas, was to be paid \$2,800 for his services to the corporation and that this agreement was set forth in paragraph four of the contract of June 30, 1950. Under the provisions of said paragraph, defendants could have paid the indebtedness of \$20,000 due to Thomas at any time after September 1, 1950, in which event defendants would have been discharged from further payments under said paragraph.

It is apparent that the contract of June 30 was drawn for the purpose of enabling

Thomas to dispose of his interest in the corporation and to withdraw from the business. The loans, totaling \$20,000, had been made some thirty days prior to the contract in question and no illegal interest appears to have been charged when the loans were made or in connection therewith. In the amendment to said contract it was agreed that if the payments were made as stipulated, there would be no interest charged on said loans except that provided in paragraph three of the agreement.

[2-4] While the question of whether the contract involved was usurious was one of fact for the trial court, its determination must be based upon some substantial evidence. The burden of establishing the evasion of the usury statute rested upon the defendants. Terry Trading Corp. v. Barsky, 210 Cal. 428, 433, 292 P. 474; Miley Petroleum Corp., Ltd. v. Amerada Petroleum Corp., 18 Cal.App.2d 182, 190, 63 P.2d 1210. The test is whether there was an attempt to evade the law. As was said in Rose v. Wheeler, 140 Cal.App. 217, 219, 220, 35 P.2d 220, 221:

"In a usurious transaction, there must be a loan of money, which is to be repaid to the lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate. And as a necessary concomitant there must exist the corrupt intent to exact the illegal charge for the use of the money lent. Lamb v. Herndon, 97 Cal.App. 193, 197, 275 P. 503.

"The presumptions of law are in favor of legality; and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness. Coley v. Wolcott, 103 Cal. App. 140, 284 P. 241; Shelley v. Byers, 73 Cal.App. 44, 57, 238 P. 177." See also Moore v. Dealy, 117 Cal.App.2d 89, 93-95, 254 P.2d 888.

We conclude from a review of the entire record that the defendants failed to

present evidence upon which the trial court could base a finding that the contract involved was usurious within the meaning of the cited usury law.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



121 Cal.App.2d 342

WRIGHT, by MURPHY et al.

v.

CITY OF SAN BERNARDINO HIGH SCHOOL DIST. et al.

Civ. 4494.

District Court of Appeal, Fourth District,
California.

Nov. 17, 1953.

Action against school district for personal injuries sustained by 16 year old high school junior. At conclusion of plaintiffs' evidence, the Superior Court, San Bernardino County, Martin J. Coughlin, J., granted defendant's motion for judgment of nonsuit and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that where tennis coach before going to office to make bracketings for a school tennis tournament to be held that afternoon told class composed of varsity team, team's managers and those who aspired to make the team to remain in vicinity of gymnasium dressing room or foyer and eye of 16 year old junior was severely damaged when he ran into line of flight of tennis ball which was being thrown by another class member and batted by a third class member, but which struck his eye breaking his rimless glasses, tennis coach was not negligent in failing to be with and to watch pupils and proper supervision did not require him to prevent the activity in the first place or to stop the game.

Judgment affirmed.

1. Schools and School Districts ⇨89.4

The playing of handball is not an inherently dangerous game, as respects liability of school district to injured pupil.

2. Schools and School Districts ⇨89.4

Where school tennis coach before going to office to make bracketings for school tennis tournament to be held that afternoon told class composed of varsity tennis team, team's managers and those who aspired to make the team, to remain in vicinity of gymnasium dressing room or foyer, and eye of 16 year old high school junior was severely damaged when he ran into line of flight of tennis ball which had been thrown which was to have been hit with a tennis racket by another class member but which struck the junior's right eye breaking his rimless glasses, coach was not negligent in failing to be with and to watch class member and proper supervision did not require him to prevent the activity in the first place or to stop the game.

Wilson & Wilson, San Bernardino, for appellants.

Albert E. Weller, Harold M. Manell, Ward O. Mathews, Swing & Gillespie, San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries sustained by the minor plaintiff while a member of a physical education class conducted by the school district. The teacher of the class, Ralph Simpson, was originally made a defendant but the action was dismissed as to him and went to trial as against the school district only. At the conclusion of plaintiff's evidence the court granted the district's motion for a judgment of nonsuit, and the plaintiffs have appealed.

There is no dispute as to the facts. Gerald Wright, a 16-year old junior in this high school, was a member of the tennis and handball class conducted by the district. This class was composed of members of the Varsity tennis team, the team's managers and those who aspired to make the team. Wright, who wore rimless glasses, had been

a member of the class that year and the year before.

On the day in question the teacher, who acted as tennis coach, needed the usual class time to make the bracketings for a tennis tournament, a school activity, which was to be held that afternoon. He met the class at the beginning of the period and told them there would be no supervised activity that morning; that they were to remain in the vicinity of the dressing room or foyer of the gymnasium "until we could work out the bracketing"; and that roll would be taken at the close of the period. He then went into the coach's office, which opened on the foyer with a dutch door the lower half of which was closed, and was working on the bracketing with the assistance of some members of the class. During the period he passed several times through the foyer and knew that there were boys in the gymnasium, but did not enter that room to see what they were doing.

After the teacher's announcement several of the boys put on tennis shoes and entered the gymnasium to play handball. This was done by batting a tennis ball against one wall with their hands. Wright and another boy were playing this game on the west half of the gymnasium floor and six other boys were playing the same game on the east half. Other boys were sitting around watching the activities.

Sometime during the class period two boys, Evans and Griffin, started a different game between the two handball games. In this game Evans would throw a tennis ball toward Griffin, who would bat the ball back with a tennis racquet swung like a baseball bat. The ball was thrown "hard" at times. This was not the usual manner of playing tennis, and had not been previously used during a class period. During the course of his handball game Wright would at times come within two or three feet of the line of play between Evans and Griffin. When the shower bell rang, near the close of the period, Wright was three or four feet to the west of the line of activity between Evans and Griffin. As the bell rang, he turned and ran toward the door leading to the shower, thus stepping into the line of

flight of a tennis ball which had just been thrown by Evans. The ball struck his right eye, breaking his glasses, as a result of which his eye was severely damaged. The tennis ball used in the Evans-Griffin game was like those being used in the handball games, being about 2½ inches in diameter and covered with a cloth fabric with a fuzzy surface.

Wright testified that he saw Evans and Griffin enter the gymnasium and start playing; that he knew the ball was being thrown by Evans toward Griffin, and saw the ball go by a good many times; that he knew there was an established line of play between them, and did not believe there was any risk of being hit by a ball thrown along that line of play; that he did not believe there was any particular risk of injury involved in the game he was playing, or about the game being played by Griffin and Evans; that he was an experienced tennis player, having played an hour every day during one school year and most of another, while wearing his glasses; that he could not play "tennis or any game" without his glasses; that he knew there was some slight risk of injury from playing with glasses on, but this was one of the ordinary risks which he knowingly accepted; that when the shower bell rang he turned and started running, without looking to see where the ball was, as he was in a hurry to take a shower; that nothing had occurred which led him to believe that the Evans-Griffin game had been discontinued; that there was nothing to prevent him from seeing Evans when he first turned to run; and that he saw Evans as he was running and after the ball was thrown.

The appellants contend that the evidence was sufficient to require that the issues of negligence and proximate cause be submitted to the jury; that the respondent was under a duty to supervise the boys of this class; that the evidence amply discloses a breach of this duty; and that such negligence was the proximate cause of the injuries because proper supervision would have prevented Evans and Griffin from starting their dangerous activity in the first place, and because a person of ordinary prudence would have stopped the game. It

is argued that the jurors might have concluded that this "game" was dangerous, that the teacher should have stopped it, and that the respondent should have foreseen that an injury of this type was likely to happen. They rely on *Charonnat v. San Francisco Unified Sch. Dist.*, 56 Cal.App.2d 840, 133 P.2d 643; *Ogando v. Carquinez Grammar School Dist.*, 24 Cal.App.2d 567, 75 P.2d 641; *Buzzard v. East Lake School Dist.*, 34 Cal.App.2d 316, 93 P.2d 233; *Satariano v. Sleight*, 54 Cal.App.2d 278, 129 P.2d 35; *Bellman v. San Francisco H. S. Dist.*, 11 Cal.2d 576, 81 P.2d 894; *Stockwell v. Board of Trustees*, 64 Cal.App.2d 197, 148 P.2d 405; *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044; *Forgnone v. Salvador U. E. School Dist.*, 41 Cal.App.2d 423, 106 P.2d 932; *Lindsey v. DeVaux*, 50 Cal.App.2d 445, 123 P.2d 144; *Rovegno v. San Jose K. of C. Hall Ass'n*, 108 Cal. App. 591, 291 P. 848. In all of those cases the evidence disclosed dangerous conduct of others which exposed the victim to harm, there was a failure on the part of the defendant to exercise ordinary care to stop or prevent the dangerous act, and there was substantial evidence from which the jury could reasonably infer that the harm would not have resulted had this duty been performed.

The rules relating to negligence in supervision and to proximate cause, in such cases, are well settled and need not be here analyzed or repeated. Each case must be decided upon its own facts, and the controlling questions here are whether the teacher of this class did what a reasonable person would have done under the circumstances, and whether it may be said that the evidence is such that reasonable and unprejudiced minds might reach different conclusions in that regard. The issues of negligence and proximate cause are closely connected here, and it would serve no useful purpose to consider them separately.

[1,2] This was a physical education class in next to the last year of High School. The class consisted of a select group interested in making the team, or improving their work on the team, for the purpose of interscholastic competition. The boys had had considerable experience in

using tennis balls in playing both tennis and handball. The playing of handball is not an inherently dangerous game. *Pirkle v. Oakdale Union, etc., School Dist.*, 40 Cal. 2d 207, 253 P.2d 1. The playing of several games on a gymnasium floor at the same time is common, and ordinarily leads to no unusual danger. The fact that this ball was being thrown at the time cannot, in itself, reasonably be said to have created an unusually dangerous situation which should have been anticipated. Balls are thrown and batted in many games, and the danger to be anticipated from the throwing of a tennis ball is certainly much less than that from throwing any other ball, unless it be a ping pong ball. In a tennis game, knocked balls often have a velocity greater than that of a thrown ball, and in a handball game the ball frequently if not usually travels with considerable velocity. Any danger which here appears arose from the fact that Wright was wearing glasses, and the fact that these glasses were rimless increased that risk. That risk was equally great whether the ball was thrown or batted, and did not depend on an unusual speed of the ball. He was conscious of that risk and was willing to take it because he could play no games without glasses. The same sort of injury was likely to happen in any game of tennis or of handball, and regardless of whether the ball was being thrown or batted. The accident did not happen because Evans and Griffin were using a tennis ball in a somewhat different way, but because Wright, with full knowledge of what they were doing, suddenly rushed without looking into their line of play.

The teacher was engaged in other work in the line of his duty, in connection with a tournament which was directly connected with the activities of this class. In view of his duties and the nature of the class and its purposes, it cannot reasonably be said that the teacher was negligent in failing to be with and to watch these boys during this time, or that proper supervision would have required a person of ordinary prudence to prevent the activity in the first place, or to stop the game. The play with tennis balls by older boys would naturally seem harm-

less, no danger appeared during a considerable time, and the danger which suddenly developed could not reasonably be said to have resulted from or been caused by the absence of the teacher. As was said in a New York case, "This is one of those events which could occur equally as well in the presence of the teacher as during her absence." *Ohman v. Board of Education*, 300 N.Y. 306, 90 N.E.2d 474, 475.

It cannot reasonably be inferred that the teacher, if present, would or should have foreseen that the activity of Evans and Griffin would make the situation more dangerous than usual. They were playing with a tennis ball, in line with the usual activity of the class, and over a considerable period their activity had not interfered with the handball games on either side. They were all experienced players, there were fewer players on that half of the floor than on the other, and there was no inherent danger in the game itself or in the fact that a tennis ball was being thrown, rather than batted. The element of danger arose only from the fact that Wright wore rimless glasses, and because of his sudden action in running into another field of play of which he was aware. It cannot reasonably be inferred that this act was one which should have been anticipated in advance. And the time between Wright's sudden act and the injury was so short that the teacher, if present, would have had no opportunity to recognize a new hazard in time to have taken any action to prevent the injury. If it be assumed that any negligence appears, the evidence would not support the conclusion that it was the proximate cause of the injury.

There is some possible danger in any game and in almost every act in life. It cannot reasonably be inferred that the risk here involved was such that a failure to prevent in the first instance, or to later stop, any or all of these games was sufficient to make the respondent responsible for what occurred. In our opinion, the evidence was not sufficient to have supported a verdict for the plaintiffs had one been returned.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

121 Cal.App.2d 347

PEOPLE v. PEREZ.

Cr. 2410.

District Court of Appeal, Third District,
California.

Nov. 18, 1953.

Criminal prosecution on two counts of murder. Defendant pleaded not guilty and not guilty by reason of insanity to both counts. The jury found defendant sane and guilty of second degree murder as to each count. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Paulsen, J. pro tem., held that a statement, by prosecutor at trial on plea of insanity, that jury had caused miscarriage of justice in finding defendant guilty of only second degree murder together with failure of court to admonish counsel was error, but not prejudicial error in light of overwhelming evidence of defendant's sanity.

Judgment affirmed.

1. Criminal Law $\S$ 1186(4)

Where jury had previously found defendant guilty of second-degree murder, prosecutor's statement, at trial of insanity issues, that a grave miscarriage of justice had occurred when jury found defendant guilty of only second-degree murder coupled with court's failure to admonish counsel was error, but not prejudicial error in light of overwhelming evidence of defendant's sanity. Const. art. 6, $\S$ 4 $\frac{1}{2}$.

2. Criminal Law $\S$ 311, 331

In a criminal prosecution defendant is presumed to be sane and it is incumbent upon him to show that at time of commission of the crime he was not able to distinguish right from wrong or know the nature and consequences of his acts.

Lloyd Allan Phillips, Jr., Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Gail Strader, Sacramento, for respondent.

PAULSEN, Justice pro tem.

Appellant was charged by indictment with two counts of murder. Count one charged that on the 16th day of May, 1952, he murdered one Michael Henderson. Count two charged that on the 15th day of May, 1952, he murdered one Joseph Lenz. Appellant entered a plea of not guilty and of not guilty by reason of insanity to each count of the indictment. At the conclusion of the trial of the issues raised by the pleas of not guilty, the jury returned a verdict of guilty of murder of the second degree as to each count. Thereafter, the same jury, following a trial upon the pleas of not guilty by reason of insanity, returned verdicts finding appellant was sane at the time of commission of each offense. This is an appeal from the judgment and the order denying a motion for a new trial.

The only grounds urged for a reversal are: (1) Alleged misconduct of the district attorney, and (2) refusal of the trial judge to admonish the jury in respect thereto. The alleged errors are set forth in an affidavit of the trial judge filed pursuant to this court's order permitting such augmentation of the record. It is thus attested:

"That during the closing arguments of James B. McKinney, in the trial of the defendant Jose Perez, on the issue of the plea of not guilty by reason of insanity, said Deputy District Attorney began his argument by stating substantially as follows:

"In my opinion you jurors caused a miscarriage of justice by your verdict returned finding this defendant guilty only of murder in the second degree."

"That counsel for the defendant strenuously objected at this stage of the proceedings and cited this argument as being extremely prejudicial misconduct on the part of the Deputy District Attorney, and asked the court to instruct the jury to disregard these remarks and to admonish Counsel for the People;

"That the Court failed to instruct the jury as requested, and failed to admon-

ish Counsel for the People, it merely asking the Deputy District Attorney to proceed with his statements and arguments dealing with the trial of the case at hand."

The argument advanced on behalf of appellant is that the deputy district attorney's remarks so influenced the jury that they concluded they must find the appellant was sane at the times the homicides were committed in order to rectify a mistake in not finding him guilty of murder of the first degree.

The questions we are called upon to determine are whether, from an examination of the whole record, the district attorney was guilty of misconduct, and, if so, whether such misconduct and the court's refusal to admonish were prejudicial to defendant's rights. Const. Art. VI, sec. 4½. If this was misconduct, then such misconduct and the refusal to admonish constitute a miscarriage of justice within the meaning of the constitution, unless different verdicts would have been improbable. *People v. Hamilton*, 33 Cal.2d 45, 51, 198 P.2d 873.

While no complaints are made concerning the first phase of the trial which resulted in the verdicts of guilty of murder of the second degree, it was stipulated that the evidence admitted at that time might be considered in the trial of the issues raised by the pleas of not guilty by reason of insanity.

At the time of the trial defendant was twenty-six years of age, and since early boyhood had spent most of his time in state institutions, including the Sonoma State Home for the feeble-minded, the Mendocino State Hospital, Terminal Island, and San Quentin and Folsom prisons. It has never been seriously contended that he did not commit the homicides charged. At the time of the occurrences he, with other inmates, including the two victims, Henderson and Lenz, was confined in the medical ward at Folsom prison. On the night in question, appellant had been drinking intoxicating liquor manufactured by the inmates from potatoes, yeast, sugar and fruit. It is unnecessary to recite in detail all the sordid events of that tragic night. There was

abundant evidence to prove that appellant, without apparent provocation at that time, stabbed and fatally wounded Lenz while the latter was lying in his bed; that thereafter appellant wandered about the ward, menacing the inmates with his knife and forcing several of them to submit to homosexual acts; that he thereafter threatened to kill several persons present and stated in particular that he was going to kill two "rats." Several hours after the first killing Michael Henderson was sitting in front of the prison hospital kitchen on what is known as a gurney. Appellant attempted to break into a cell but was unable to do so. He passed Henderson and several other inmates, uttering a greeting to one of them, turned, and suddenly stabbed Henderson in the left side.

While there was no direct evidence as to the motive for the killings, it was established that for some time appellant had been concerned and incensed because of "rats" and "stool pigeons," although there was nothing to show whom he referred to by such names. The evidence further showed that a knife that had disappeared some time before was found in the possession of appellant, obviously sharpened, and was used in the commission of the homicides. The evidence further discloses the fact that the ward was checked by guards every two hours during the night, and that at such times and after the first killing appellant retired to his bed and remained quiet until after each check was completed.

No attempt was made to deny the commission of the crimes by appellant, but it was seriously urged during the first phase of the case that appellant lacked the mental ability to deliberate and to perpetrate murder of the first degree; that the homicides were committed during periods of sudden anger or moments of terror, and it is conceded that appellant's counsel requested the jury to return verdicts of murder of the second degree. To support his contentions appellant called several witnesses, including two psychiatrists, who testified that in their opinion appellant could not have deliberated, and lacked the mental ability to commit a premeditated murder. The state also

called psychiatrists who testified to the contrary, with the result that the trial of the issues raised by the pleas of not guilty was devoted largely to questions concerning the mental state of the appellant. The court at all times carefully explained the limited purpose of such testimony to the jury, and properly limited its application to the issues then before the court.

At the opening of the trial on the issues of insanity the court again explained the legal principles involved and the distinctions to be observed by the jury, as well as the question of burden of proof and the presumption of sanity. Appellant called four witnesses, all inmates of Folsom prison; all expressed the opinion that appellant was insane at the time of the commission of the homicides. Upon cross-examination, however, it appears obvious that they had in mind conduct of a character that might be designated as insanity by laymen but would have little tendency to prove legal insanity. In each case the events or actions narrated showed erratic behavior or conduct consistent with some form of mental disturbance falling short of legal insanity. Two psychiatrists were then produced by the state who carefully reviewed the whole medical history of appellant, including his experiences in other state institutions, and stated unequivocally that appellant knew the difference between right and wrong, fully understood the nature and consequences of his acts, and was legally sane at the time of the commission of the homicides.

The arguments of counsel and the instructions given by the court at the conclusion of the first phase of the trial are not a part of this record, but no complaints are made concerning them. It must be assumed, therefore, that the district attorney argued that appellant was guilty of murder of the first degree and that the court instructed the jurors that they were the exclusive judges of the evidence and the credibility of the witnesses, and that defendant was conclusively presumed to be sane for the purposes of that phase of the trial.

[1,2] It is to be observed that the remarks of the district attorney and his statement that "In my opinion you jurors caused

a miscarriage of justice by your verdict returned finding this defendant guilty only of murder in the second degree," do not purport to show that his opinion was based on anything other than the evidence. The jury may well have understood that the statement was made in the light of the evidence and the instructions already given by the court. We are of the opinion, however, that such remarks were beyond the issues then being tried and could serve no legitimate purpose in the determination of such issues. Such a statement might well be construed by the jury as a charge of serious error on its part which could only be rectified by bringing in verdicts of sanity in the second phase of the trial. The refusal of the trial judge to admonish under such circumstances might well be construed as an approval by him of such remarks. We have no hesitancy in holding that error was committed, but a careful review of the whole record convinces us that it was not prejudicial. The verdicts of second degree murder could have resulted from a belief on the part of the jury that the homicides were committed on impulse and without time for premeditation, or that appellant lacked the mental ability at that time to commit first-degree murder. It is not possible to determine from the record what the views of the jury may have been on these questions. It may be conceded that there was a great deal of evidence which would warrant a finding that the defendant was a psychopathic personality or that he suffered from some mental or emotional derangement falling short of legal insanity, but such proof does not meet the requirements of the law. Defendant was presumed to be sane and it was incumbent upon him to show that at the time of the commission of the homicides he was not able to distinguish right from wrong or know the nature and consequences of his acts. The jury, under these circumstances, was required to make its findings according to the same legal standards and was not at liberty to substitute a lesser standard as a complete defense. Appellant's evidence, when measured by this standard, was almost negligible, and when it is weighed with the positive and unequivocal testimony produced by the state

it is impossible to see how the jury could have followed the law and reached verdicts other than those rendered.

The judgment and the order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



120 Cal.App.2d 815

BICKHAM

v.

SOUTHERN CALIFORNIA EDISON

CO. et al.

Civ. 19448.

District Court of Appeal, Second District,
Division 3, California.

Oct. 26, 1953.

Rehearing Denied Nov. 20, 1953.

Hearing Denied Dec. 17, 1953.

Action by iron worker who was employed by independent contractor which was constructing building for oil company to recover from the oil company for injuries sustained when metal with which he was working on top of building came into contact with power line which, in violation of general order, was too close to building. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment on verdict for plaintiff, and the oil company appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that although the oil company had nothing to do with installation or maintenance of power line over property on which building was being constructed, it brought itself within requirement of general order regulating vertical distance between power lines and buildings when it undertook to have the building erected beneath the power line at such a height that continuance of the line at its present location would constitute a violation of the general order, and had a duty to act affirmatively to remedy the condition, and its failure to do so constituted negligence as to plaintiff.

Affirmed.

1. Negligence ⇐32(2.8)

Employee of company which was constructing building as independent contractor for oil company in working on such building was engaged in work which was of mutual advantage to himself and the oil company, and was, therefore, a business licensee, or invitee, and it was oil company's duty to furnish him a safe place in which to work.

2. Electricity ⇐16(1)

Although company for which building was being built had nothing to do with installation or maintenance of power line over property on which building was being constructed, it brought itself within requirement of general order regulating vertical distance between power lines and buildings when it undertook to have the building erected beneath the power line at such a height that continuance of the line at its present location would constitute a violation of the general order, and had a duty to act affirmatively to remedy the condition, and its failure to do so constituted negligence as to workman who was shocked when metal which he was carrying on top of building came into contact with power line.

3. Electricity ⇐19(6)

In action by employee of independent contractor who was constructing building for oil company for injuries sustained when metal which he was carrying on roof of building came into contact with power line which was not as far above the building as required by general order, wherein oil company contended employee's handling of metal constituted an independent, intervening agency which removed any negligence of oil company as proximate cause of the accident, evidence presented question for jury as to whether oil company's negligence in failing to affirmatively remedy the condition was a contributorily proximate cause of employee's injuries.

4. Negligence ⇐66(2)

Although one has knowledge of existence of dangerous condition, momentary forgetfulness of danger does not amount to contributory negligence where there is reason to believe that he nevertheless acted with ordinary prudence and caution.

5. Electricity ⇨19(12)

In action by iron worker, who was working on top of building and who was aware of close proximity of power line overhead, for injuries sustained when metal with which he was working came into contact with power line, evidence that iron worker had momentarily forgotten the presence of the power line presented question for jury as to whether he had been guilty of contributory negligence.

6. Electricity ⇨18(1)

Obligation imposed by general order requiring certain vertical distance between power lines and buildings could not be suspended by waiver or express contract, and, therefore, doctrine of assumption of risk was not applicable in action by iron worker for injuries sustained when metal with which he was working on top of building came into contact with power line which was not the required distance above the building.

7. Electricity ⇨17

Company for which independent contractor was constructing building could not ignore or evade its duty to remedy dangerous condition existing because power line was, in violation of general order, too close to building by shifting it to the independent contractor.

Parker, Stanbury, Reese & McGee, Los Angeles, for appellant.

James V. Brewer and Frank G. Howe, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff sued Southern California Edison Company and Golden Bear Oil Company for injuries sustained through an electric shock suffered while he was employed as a workman on the roof of a building then being constructed by the Oil Company upon its property.

Plaintiff is an iron worker, and at the time of the injury was in the employ of Soule Steel Company which was constructing the building as an independent contractor under agreement with the Oil Company. While plaintiff was manipulating a

piece of metal sheeting, in the course of installing a roof on the building, he came into contact with high voltage (16,000 volts), uninsulated wires of the Edison Company which extended over the building. This building was on the south side of Washington Boulevard in Los Angeles, and was being erected between two existing buildings of the Oil Company. The new building was 66 feet wide and on the east side 100 feet deep. The eaves were 18 feet from the ground and the peak of the roof 25 feet. Three power lines extended from a crossarm on a pole in front of the building on Washington Boulevard, over and parallel to the east edge of the roof to another pole on the property. The most easterly wire was 56 inches from the center wire, which was 42 inches from the westerly wire. The distance between the two poles was 151 feet. The crossarm on the street pole was 45 feet above the ground, and that on the other pole 33 feet from the ground. On the street pole was a sign, "High Voltage." There was a conflict in the evidence as to the distance between the wires and the roof, but there was evidence that the distance was not over 5 feet and testimony of a workman that he was 5 feet, 9 inches tall and had to stoop to get under the wires. There was a sag in the wires between the two poles. Plaintiff had been engaged in cutting galvanized sheeting on the roof of the old building to prepare for the installation of a gutter between the old and the new buildings. It was his first day on the job. He was standing on a ladder called a "chicken ladder" which was lying on the steel purlins which extended toward the apex of the roof; the ladder had the same pitch as the roof; he was at the southeast corner of the building facing north; a sheet of aluminum 10 feet long and 26¼ inches wide was passed up to him from the ground. About 3½ inches on one side was bent over at a right angle. The roof sloped up from east to west, and in attempting to place the sheet on the eave of the roof plaintiff discovered that as it was handed to him, and because of the bend, it was necessary to turn it around end for end, and in doing so the sheet came into contact with the wire, with the result that plaintiff

and the sheet of metal were both precipitated to the ground. Plaintiff testified he knew the wires were "hot" but was not going to touch them if he could help it; "the only way I could move the sheet would be to turn it end for end, and as I went to turn the sheet up I momentarily forgot the wires. I had my mind on my work, what I was doing." The wires were those of the Edison Company and it is conceded that the Oil Company had no right to remove them or change their location.

A demurrer of the Edison Company to plaintiff's complaint was sustained without leave to amend, and judgment of dismissal was entered. Nevertheless, the Edison Company paid plaintiff \$11,583, and received a covenant not to prosecute the action further against that company. In a jury trial plaintiff was awarded \$8,000 against the Oil Company. The latter's motion for new trial was denied and the Oil Company appeals from that judgment.

The issues were : (1) Was the Oil Company under a duty to furnish plaintiff a safe place in which to work; (2) if so, did it fail in the performance of that duty; (3) if there was a breach of duty was it a proximate cause of the accident; (4) was plaintiff guilty of negligence as a matter of law; and (5) did plaintiff assume the risk of injury.

With respect to its duty to furnish plaintiff a safe place in which to work appellant does not question the rules relied upon by respondent which we shall notice briefly. In *Martin v. Food Machinery Corp.*, 100 Cal.App.2d 244, 223 P.2d 293, the general contractor directed its employees to reinforce a ladder which had been constructed by the defendant corporation. They did so, and it appearing that the ladder was safe, stepped upon it and fell. The plank which broke had knots in it and was cross-grained. Plaintiffs sued the owner of the building and upon the trial the court directed a verdict in favor of the owner corporation. In reversing the judgment it was said, 100 Cal.App.2d at page 248, 223 P.2d at page 296: "The question as to whether or not the plaintiffs were invitees, under the facts presented, was a question of fact for the jury to determine." Citing *Biondini v.*

Amship Corp., 81 Cal.App.2d 751, 185 P.2d 94; *Buckingham v. San Joaquin Cotton Oil Co.*, 128 Cal.App. 94, 16 P.2d 807. The court quoted from *Miller v. Pacific Constructors, Inc.*, 68 Cal.App.2d 529, 545, 157 P.2d 57, 65, as follows: "The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances in connection therewith which are reasonably safe for the purposes embraced therein. *Mayes v. Splitdorf Electrical Co.*, 94 N.J.L. 460, 111 A. 10."

[1] Plaintiff, as an employee of the contractor was engaged in work which was of mutual advantage to himself and appellant, and was therefore a business licensee, or invitee. Rest., Torts, §§ 330, 332. It was appellant's duty to furnish him a safe place in which to work.

Appellant does not contend that the conditions that existed were safe for workmen engaged in installing the roof. It merely says that it did not own, maintain, control, or have any right of control over the power line, and that the sole responsibility for the location and condition of the line was that of the Edison Company. Plaintiff replies that the wires were maintained in violation of General Order No. 95, Section II, Rule 37, Table 1, Case No. 6, Column E, of the State Public Utilities Code, and that responsibility for maintaining the wires in violation of the order rested upon the Oil Company as well as upon the Edison Company. The order of the commission reads in part as follows: "General Order No. 95. Section 1—General Provisions * * * 11. Purpose of Rules. The purpose of these rules is to formulate, for the State of California, uniform requirements for overhead electrical line construction, the application of which will insure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of

overhead electrical lines and to the public in general. * * * Rule 37 incorporates Table I which specifies: "Basic Minimum Allowable Vertical Clearance of Wires Above * * * Buildings * * * Case No. 6—Vertical clearance above buildings and bridges (or other structures, which do not ordinarily support conductors and on which men can walk) whether attached or unattached. Column E—Supply Conductors and Supply Cables—750-20,000 Volts: 12 feet." Supplement No. 1 to General Order No. 95, effective February 1, 1948, makes the above rule clearly applicable to buildings and does not alter the above requirements. In its brief appellant does not discuss the safety order nor contend that it does not impose a duty upon the owners of buildings as well as upon power companies.

[2] Although appellant had nothing to do with the installation or maintenance of the power line, it brought itself within the requirement of the general order when it undertook to erect a building beneath the power line which would render the continuance of the line within less than 12 feet from the roof of the building a violation of the general order. Until the building was being constructed the location of the power line was not violative of the order; it was the combination of the two that constituted the violation. Upon demand by appellant of the Edison Company, the latter would have been required to change the location of the line. Appellant had a duty to act affirmatively to remedy the condition. By its inaction it could not evade responsibility for the creation and maintenance of a condition which was a violation of law. It is inconceivable that the Edison Company would have refused to comply with the safety order by changing the location of the wires if appellant had requested it to do so.

It is well settled that such a violation of law constitutes negligence as a matter of law. *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279; *Scalf v. Eicher*, 11 Cal.App.2d 44, 53 P.2d 368; *Allred v. Orth*, 206 Cal. 494, 274 P. 955; *Rest., Torts*, § 286.

Appellant contends that plaintiff's actions in handling the sheet of metal constituted an independent, intervening agency which removed any negligence of the defendants as a proximate cause of the accident. This is to say that it was not reasonably foreseeable that workmen engaged in construction work, or persons upon the roofs of buildings, were likely to come into contact with low slung wires. It was said in *Gibson v. Garcia*, 96 Cal.App.2d 681, 684, 685, 216 P.2d 119, 121: "It is well-settled that proximate causation is not always arrested by the intervention of an independent force. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate concurring cause for which full liability may be imposed. *Gerberich v. Southern Calif. Edison Co.*, 5 Cal.2d 46, 53 P.2d 948; *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P.2d 781; *De Corsey v. Purex Corp.*, 92 Cal.App.2d 669, 675, 207 P.2d 616. * * * Numerous cases have declared that if the defendant's conduct exposes persons in the class to which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause. *Prosser on Torts*, pp. 369-372, and cases cited; *Sandel v. State*, 115 S.C. 168, 104 S.E. 567, 569, 13 A.L.R. 1268. As the Supreme Court stated in *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 602, 110 P.2d 1044, 'the fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. *Herron v. Smith Bros., Inc.*, 116 Cal.App. 518 (2 P.2d 1012); *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467 (290 P. 684).' See, also, *Rodriguez v. Savage Transportation Co.*, 77 Cal.App.2d 162, 168-169, 175 P.2d 37."

[3] The very purpose of the safety order was the prevention of contact with the wires by those who might be on or near the roofs of buildings. The standard of conduct was set up for the reason that injury

from contact with high voltage wires in close proximity to roofs of buildings was an occurrence to be anticipated and guarded against. There was sufficient evidence to justify a finding that appellant's breach of the safety order was a contributorily proximate cause of plaintiff's injury. *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 218 P.2d 17.

In support of its contention that plaintiff was guilty of contributory negligence as a matter of law appellant cites *Benard v. Vorlander*, 87 Cal.App.2d 436, 197 P.2d 42 as a case precisely in point. In that case Pacific Gas & Electric Company was furnishing power to the United States Government over a line which had been installed and was maintained by the government on government property. In handling a steel rod plaintiff, a steel worker, caused the rod to be protruded from the building on which he was working so that it extended 12 or 15 feet from the outer edge of the scaffolding, where it came into contact with the power line of the defendant. Judgment for defendant notwithstanding verdict was affirmed on appeal. One ground of affirmance was that the electric company was not negligent since it did not own or have control of, or a duty to maintain, the power line. The second ground was that plaintiff was shown to have been guilty of contributory negligence as a matter of law. The case obviously is not in point as to the first ground of affirmance. As to the second ground the court said, 87 Cal.App.2d at page 448, 197 P.2d at page 50: "He [plaintiff] alleged in his complaint that defendant knew, or in the exercise of ordinary care should have known that plaintiff would move a rod in the manner in which this one was being moved, and that as a result thereof said rod *could reasonably be expected to come into contact with said wires*. If this be true, then plaintiff, in the exercise of ordinary care, should have known the same thing; and it is apparent that he recognized that fact when he amended his complaint to allege that the rod was 'inadvertently' brought into contact with the wire and while he was 'unmindful' of the current in said wire. But the evidence does not show either of these things; and the trial court

said in the opinion which it filed that, on the contrary, the uncontradicted evidence showed that plaintiff 'knowingly, heedlessly, carelessly, recklessly and unnecessarily exposed himself to a notoriously open and obvious danger,' and that by reason thereof he was guilty of contributory negligence as matter of law, which was a proximate cause of the accident. We agree with this conclusion."

[4, 5] As we have stated, plaintiff testified that he knew the wires carried high voltage, but that in his preoccupation with his work he momentarily forgot that fact. This explanation, accepted by the jury, was sufficient to bring into play the rule that momentary forgetfulness is not necessarily negligence as a matter of law. Mr. Justice Temple wrote in *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 125, 126, 40 P. 108, 110, 28 L.R.A. 596: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury." It is settled beyond question that if one has knowledge of the existence of a dangerous condition momentary forgetfulness of the danger does not amount to contributory negligence if there is reason to believe that he nevertheless acted with ordinary prudence and caution. *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 385, 240 P.2d 580. Each case rests upon its own facts. *Andree v. Allyn*, 84 Cal.2d 347, 190 P.2d 949. It was not unreasonable for the jury to conclude that there was insufficient evidence to prove that Bickham was negligent. He was standing upon a ladder on a roofless structure, 18 feet above the ground, receiving metal sheets as they were passed up to him; his movements were necessarily restricted; he had to be careful of his footing and was required to turn the 10-foot metal sheet end for end under difficult conditions. We are aware of no case in which a finding of a jury acquitting plaintiff of contributory negligence

under comparable facts was disturbed on appeal. The cases relied upon by appellant on this point were similar to the Benard case. In all of them in which it was held that contributory negligence was established as a matter of law there was some element of disregard of or indifference to a known danger. In none of them was there under consideration an express or implied finding by court or jury that the accident under consideration was due to momentary forgetfulness of the plaintiff. There is no inconsistency between the holding in any of the cited contributory negligence cases and the rule which recognizes that forgetfulness of a known danger may excuse conduct which would otherwise be negligent.

[6] Appellant argues that the evidence conclusively proved that plaintiff assumed the risk of working in proximity to the wires, that he thereby acquiesced in the violation of the safety order and may not complain even though his injuries resulted proximately from the condition created by the violation. We cannot agree. Such a doctrine would place a premium upon the violation of laws enacted in the public interest. It would retard the growing trend of legislation to regulate dangerous activities in the interest of greater public safety. It was held in *Finnegan v. Royal Realty Co.*, supra, 35 Cal.2d 409, at pages 430, 431, 218 P.2d at page 30, that such violations of law may not be waived. The court said: "Where an ordinance is a police regulation, made for the protection of human life, it is an obligation imposed upon the defendant by a salutary police regulation and the doctrine of assumption of the risk does not apply. * * * Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or express contract. [Citing cases]." Although the doctrine of assumption of risk was submitted to the jury under instructions requested by appellant and the jury's implied finding was in favor of respondent, in view of the rule first stated we need not consider the significance of this finding as an answer to the argument on assumption of risk.

[7] In the oral argument appellant insisted that if the duty to correct the dangerous condition did not rest upon the electric company, alone, the contractor who was erecting the building should have ceased construction until the condition had been remedied. Again we refer to the *Finnegan* case and to the authorities cited in support of the court's statement, 35 Cal.2d at page 433, 218 P.2d at page 32: "Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such person can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor." Appellant had a duty which it could not ignore nor evade by shifting it to the contractor. If the latter, as well as the electric company, also had a duty to refrain from violating the order, this would not excuse appellant.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



121 Cal.App.2d 531

PEOPLE v. JENNINGS et al.

Cr. 5022.

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1953.

Defendant was charged by information with seven counts of grand theft, and one count of criminal conspiracy, and he thereafter moved to withdraw his plea of guilty as to one count and substitute a plea of not guilty. From an order of the Superior Court, Los Angeles County, Orlando H. Rhodes, J., denying motion, the defendant appealed. The District Court of Appeal, McComb, J., held that a motion for permission to withdraw a plea of not guilty was in the nature of a petition for writ of error coram nobis, and question of effec-

tive aid of counsel, which defendant sought to have determined, was outside the scope of such proceeding.

Affirmed.

Criminal Law §997(11, 16)

A motion to vacate a judgment and for permission to withdraw a plea of not guilty is in the nature of a petition for a writ of error coram nobis, and question of whether a defendant's constitutional rights have been violated and his plea of guilty vitiated by lack of effective aid of counsel at trial consequently could not be determined on such a motion.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

William Hartley Acason, in pro. per.

McCOMB, Justice.

Chronology

i. September 4, 1952, an information was filed by the District Attorney of Los Angeles County, charging defendant and his co-defendant, Porter Edward Jennings, with seven counts of grand theft, and one count of criminal conspiracy to cheat and defraud by false pretenses and to commit grand theft.

ii. September 15, 1952, defendant pleaded not guilty in propria persona.

iii. November 12, 1952, Mr. Grant Cooper, an attorney at law, was substituted as counsel for both defendants.

iv. November 12, 1952, an amended information was filed charging defendants in count one with issuing a check without sufficient funds, and with seven counts of grand theft and one count of criminal conspiracy. Thereupon defendants were duly arraigned and each entered a plea of guilty as charged in count one and not guilty as to the other counts.

v. January 19, 1953, Mr. Max B. Sisenwein was substituted as counsel for defendant in place of Mr. Cooper. Defendant moved to withdraw his plea of guilty as to count one and enter a plea of not guilty. This motion was denied, and defendant was placed on probation for five years on con-

dition he serve six months of his probationary period in the county jail, and that he make restitution to persons who suffered losses. On motion of the Deputy District Attorney the other counts of the amended information were dismissed.

vi. January 26, 1953, an order was issued to show cause why defendant should not be permitted to withdraw his plea of guilty and substitute a plea of not guilty. Affidavits were submitted, the matter was heard and argued, and defendant's motion denied. He was then remanded to the custody of the county sheriff.

vii. February 10, 1953, defendant appealed from the order denying his motion to withdraw his plea of guilty and substitute a plea of not guilty.

Defendant predicates his appeal upon the ground that he was not properly represented by counsel since Mr. Cooper, who advised him, also represented his co-defendant; that the two defendants' interests were conflicting and therefore he should have been represented by independent counsel.

This proposition is devoid of merit because the law is established that a motion to vacate a judgment and for permission to withdraw a plea of not guilty is in the nature of a petition for a writ of error coram nobis. (People v. Adams, 100 Cal.App.2d 841, 842[1], 224 P.2d 873; People v. James, 99 Cal.App.2d 476, 479[1], 222 P.2d 117).

It is likewise settled that the question of whether a defendant's constitutional rights have been violated and his plea of guilty vitiated by a lack of effective aid of counsel at the trial cannot be determined by proceedings in the nature of a petition for a writ of error coram nobis. (People v. James, supra, 99 Cal.App.2d at page 479[2], 222 P.2d 117).

In the instant case it is apparent that defendant's petition was in the nature of a writ of error coram nobis, and that the question of effective aid of counsel was outside the scope of such proceeding and the trial court did not err in denying defendant's application.

Affirmed.

MOORE, P. J., and FOX, J., concur.

121 Cal.App.2d 206

RICE BROS., Inc.

v.

GLENS FALLS INDEMNITY CO.

Civ. 8254.

District Court of Appeal, Third District,
California.

Nov. 10, 1953.

Action by insured on contract to indemnify insured against liability for damage to property by accident by reason of ownership, maintenance or use by insured of a motor vehicle. The Superior Court, Yuba County, Warren Steel, J., entered judgment for insured and insurer appealed. The District Court of Appeal, Van Dyke, P. J., held that under oral contract whereby insured agreed to use owner's trucks and drivers at hourly rate and owner reserved to himself complete possession and charge of trucks at all times, the trucks were neither rented nor in charge of insured within policy clause which excluded liability for damage to property rented to or in charge of insured.

Judgment affirmed.

Insurance — 435.15

Under a contract between truck owner and insured whereby owner agreed to furnish, at an hourly rate, trucks, drivers, operating supplies and repairs, and owner reserved to himself complete possession and charge of trucks at all times, the trucks were neither rented nor in charge of insured within policy clause which excluded liability for damage to property rented to, or in charge of insured. Civ.Code, § 1925.

McDougall & Fitzwilliam, Sacramento,
for appellant.

Hewitt & McBride, Yuba City, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff corporation was engaged in the performance of a grading and paving contract in Merced which required the use of a number of dump trucks. It owned and used on the work some 10 or 12 trucks and needed more. It made oral arrangements

with one Holloway for the use of two of Holloway's trucks. They were furnished by Holloway, "fully operated and maintained", that is, they went to the job with drivers, and Holloway paid the wages of the men, paid for the gasoline and oil consumed and for any repairs that might be necessary. Plaintiff paid Holloway \$4.66 an hour per truck. One of plaintiff's own trucks driven by its own servant damaged a Holloway truck. Plaintiff had the truck repaired at a cost of \$947.71. It filed this action against defendant, a corporation engaged in the business of insuring against public liability. Its complaint alleged that on the day the Holloway truck was damaged it was the insured in such a policy issued by defendant corporation and that under that policy defendant agreed to indemnify plaintiff against any liability, within the limits of the policy, "which might arise against plaintiff in favor of any person or persons who should sustain any damage to property by accident by reason of the ownership, maintenance or use by said plaintiff of a motor vehicle"; that on that day a motor vehicle owned and operated by plaintiff had been so negligently and carelessly driven by plaintiff through its employee that it collided with the Holloway truck, damaging that truck in said amount; that after notice and rejection of claim it had paid the amount of the damage to Holloway and that defendant refused to indemnify it against that loss by repayment of the sum paid out. Defendant insurance company denied that the coverage was as alleged and pleaded that the policy contained an exclusion clause which excluded the loss claimed and was in this language: "This policy does not apply * * *, to injury to or damage of property owned by, rented to, in charge of, or transported by the insured."

The trial court found the allegations of plaintiff's complaint to be true, the allegations of the answer to be untrue and gave judgment for the amount demanded. The defendant has appealed.

The issues tried called for the consideration of two contracts, one written, the other oral. No evidence was introduced concerning the negotiations for and the exe-

cution of the written agreement nor was it claimed to be uncertain or ambiguous in its terms. The only part thereof the application of which was in dispute was the exclusion clause. As to the oral agreement between plaintiff-respondent and Holloway the testimony may be narrated as follows:

Jesse L. Rice, an officer of respondent corporation, testified that the agreement with Holloway was oral; that Holloway agreed to furnish two of his own trucks and more of any one else's he could obtain for that purpose "fully operated and maintained", by which was meant that respondent would pay so much for the truck and Holloway would furnish Holloway's driver, gasoline, oil and repairs; that Holloway hired the driver of the truck which was damaged on the job; that assuming a Holloway driver did not perform his work properly respondent still had no right to discharge him; that there was no difference between the work done by the Holloway trucks and the work being done at the same time by respondent's trucks; that if respondent had been using a Holloway truck in a way that Holloway did not like, he could have stopped the truck; that Holloway got no percentage of respondent's contract price on the job; that Holloway could "quit any time he wanted"; that Holloway had no special part of the work to do with his dump trucks and all the trucks worked together. All material hauled by a truck was dumped into a moving spreader box, and the trucks dumped in turn as they came up to the box; that Holloway was not obligated to permit his trucks to be used away from the job; that the Holloway trucks were there for use in doing whatever was necessary to be done on the job and this work was in charge of respondent's superintendent; that Holloway's drivers, as well as respondent's drivers, knew the job and were experienced men, so that when they went on the job they knew where they were going to haul from and where they were going to haul to and needed no instructions on those lines, but respondent's superintendent had the right to direct respondent's truck drivers who were under his complete control, whereas Holloway's drivers were not;

that Holloway's drivers were paid once a month; that respondent carried compensation insurance on Holloway's drivers, but charged the cost back to Holloway; that if a Holloway driver "refused to do the work" respondent would tell Holloway neither the driver nor the truck was wanted any more, but that respondent could not discharge a driver off a Holloway truck; that Holloway did not agree to furnish trucks for any specified period; that Holloway trucks were at all times operated by Holloway drivers who were paid by him; that Holloway could do anything he wanted with his trucks at any time he wanted to, but would get no pay except when his trucks were working on the job; that Holloway had nothing at all to say about the manner or method of doing the work respondent was under contract to perform, though Holloway trucks were actually used in carrying out the contract. No witness other than Rice testified as to the agreement between respondent and Holloway.

The trial court had to determine whether under the contract between respondent and Holloway the damaged Holloway truck was, when the accident happened, owned by, rented to, in charge of, or being transported by respondent. Admittedly it was neither owned by nor being transported by respondent. In determining whether it was rented to or in charge of respondent the trial court was obliged to evaluate the oral contract between respondent and Holloway, and this presented to the trial court primarily a question of fact. The trial court impliedly found that the Holloway truck was neither rented to nor in charge of respondent and therefore that indemnity against respondent's liability for the damage done to it was within the coverage afforded by appellant's policy and without the embrace of the exclusions relied upon by appellant. We think the evidence affords substantial support for the court's conclusions.

A rental of personal property or, as it is phrased in our Civil Code, the "hiring" thereof "is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to

the former at a future time." Section 1925. From the narrated testimony the trial court could conclude that under the contract between respondent and Holloway the parties did not intend to give, and did not give, to respondent any possession of the Holloway truck, nor any use of that truck apart from the services rendered by the driver and the truck in combination; that respondent could not break up this combination and be left with a right either to the possession or the use of the truck. The trial court could also conclude that the contract between respondent and Holloway would not put the truck into respondent's charge and on the contrary that Holloway had purposely reserved to himself complete possession and charge of the truck at all times.

A case from without this jurisdiction is probably closer on its facts than any other that has come to our attention. We refer to Roadbuilders' Hauling Co. v. Constitution Indemnity Co., 165 S.C. 363, 163 S. E. 837, 838, where an insured allowed a construction company to use his truck and driver at an hourly rate. While so being used a construction company employee was injured while riding on the truck with the permission of its driver. Responding to a contention that the incident was covered by an exclusionary clause in the policy which withheld coverage if the vehicle was being rented, the court said: "To 'rent' is to secure the possession and use of a thing for a consideration or hire. * * * 'By the contract of hire, the hirer acquires a qualified property in the thing hired.' * * * The evidence failed to show as a necessary inference that the automobile in question was rented or let out by the plaintiff. It was used by plaintiff in hauling for hire material to be used in constructing a highway; but in so doing plaintiff used its own servant, and never parted with the custody, possession, or management of the automobile. The evidence showed no bailment, 'renting,' or 'letting out' within the meaning of the policy."

In *Entremont v. Whitsell*, 13 Cal.2d 290, 89 P.2d 392, a contract was made between Entremont and the Department of Public Works whereby he agreed to "rent" three dump trucks, with drivers, to the depart-

ment to be used as needed for carrying road building or excavated material in the department's work of repairing highways. A question arose as to whether in fact the agreement constituted a renting of the equipment and responsive to that the Supreme Court said, 13 Cal.2d at page 295, 89 P.2d at page 394:

"Although the solution of the problem is not entirely free from doubt, it is our opinion that this contract did not constitute the renting or leasing of equipment to the department but was a contract calling for the transportation of property by motor vehicle by Entremont. This conclusion follows from the fact that under the contract the possession and control of the trucks and the operators thereof did not pass to the department—the operators did not become the employees of the department—but such possession and control remained in Entremont. The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ.Code, §§ 1925, 1955. The record is clear that the only supervision exercised by the department over the operators of the trucks was to direct them where to load and unload the material hauled, when to go on or leave the job, and to inform the operators whether the load should be dumped or spread. The department had no power to discharge the drivers—that power, and the power of selection, rested in Entremont. That is a factor of some importance in ascertaining whether Entremont or the department controlled the operators. *Lowell v. Harris*, 24 Cal.App.2d 70, 74 P.2d 551. Moreover, the provisions of the contract indicates that it was not the intention of the parties that the department should exercise exclusive control over the operators. The contract required Entremont to keep the trucks in repair; to pay all expenses incidental thereto; to supply all oil, gas and other materials necessary for their operation; to carry compensation in-

surance on the drivers, and expressly provided the operators were the employees of Entremont."

There were various factors in the Entremont case which were recited by that court in its opinion as giving further support to the finding of the Public Utilities Commission under review, that the arrangement between the parties there did not result in a rental of the trucks involved; but nonetheless the foregoing statements of the Supreme Court are most persuasive that the trial court here, in declaring the judgment appealed from, was substantially supported by the evidence.

Other matters are discussed in the briefs but the foregoing makes it unnecessary to discuss them.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



121 Cal.App.2d 237

BURTON

v.

CLOUGH-DETTY MOTORS et al.

Civ. 19497.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Action for a balance claimed to be due plaintiff as salary and commissions under a contract of employment by defendant partnership to buy and sell automobiles. From a judgment of the Superior Court, Santa Barbara County, Ernest D. Wagner, J., for plaintiff in an unsatisfactory amount, he appealed. The District Court of Appeal, Moore, P. J., held that testimony of one of the partners was sufficient to support the trial court's findings against plaintiff on all counts of the complaint except a count on which the court adjudged defendant's

obligation to pay plaintiff the sum awarded him as the reasonable value of his services during the contract period.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

A reviewing court cannot reverse a judgment based on trial court's findings supported by any substantial evidence.

2. Limitation of Actions ⇐28(1)

Claims for additional salary and commissions due claimant for services rendered to defendant in processing automobile sale contracts for a bank and buying and selling automobiles over two years before commencement of action on such claims were barred by statute of limitations. Code Civ. Proc. § 339, subd. 1.

3. Evidence ⇐596(1)

The burden is on plaintiff to establish his claim by full, clear and convincing evidence.

4. Master and Servant ⇐80(10)

In action for additional salary and commissions claimed to be due plaintiff for services rendered in buying and selling automobiles for defendant partnership, plaintiff failed to establish claimed items rejected by trial court, in absence of proof that defendants acknowledged such items, that a balance was struck and agreed on, or that defendants admitted that items were part of alleged account stated.

5. Master and Servant ⇐80(10)

In action for salary and commissions alleged to be due plaintiff for services rendered in buying and selling automobiles for defendant partnership, testimony of one of partners was sufficient to support trial court's findings against plaintiff on all counts of complaint except count on which court adjudged defendant's obligation to pay plaintiff unsatisfactory amount awarded him as reasonable value of his services during period of his employment contract.

6. Appeal and Error ⇐878(1)

On plaintiff's appeal from judgment awarding him unsatisfactory sum as balance due for services rendered under em-

ployment contract, defendants filing no cross-appeal have no standing which would warrant interference with judgment in their behalf.

Charles W. Jamison, Santa Barbara, for appellant.

J. E. Delwiche, Santa Barbara, and Martin S. Ryan, Los Angeles, for respondents.

MOORE, Presiding Justice.

Clough-DeTTY Motors is a partnership composed of the three co-defendants. For about four years the partnership and its predecessors in interest employed plaintiff to buy and sell new and used automobiles in Santa Barbara. In addition to the sums aggregating \$19,699 paid him as salaries and commissions while he was with them, plaintiff claimed a balance due him in the sum of \$5,935.65, and sued to enforce payment thereof. After a trial of the issues raised by his amended complaint and the answer, the court awarded plaintiff the sum of \$2,100 from which he now appeals, contending "the evidence was not sufficient to justify the decision in that a larger award should have been made."

In response to the complaint and the evidence adduced the court made the following findings. Within the two years last past defendants had not become indebted to plaintiff in the sum of \$5,925.65 (count 1). About August 1, 1950, the parties did not account orally together, nor did defendants then agree to pay plaintiff \$5,925.65 (count 2). There was no accounting between the parties about November 9, 1948, showing defendants to be indebted to plaintiff in the sum of \$5,318.40. About April 20, 1949, defendants transferred to plaintiff an automobile for \$1,385 and that sum was credited to defendants but there was no balance then due in the sum of \$3,933.40 to plaintiff. Subsequent to the last mentioned date, defendants did not become indebted to plaintiff for services performed in the sum of \$1,992.25 (count 3), nor did plaintiff and defendants about November 9, 1948, agree in writing on the wages then due plaintiff, nor agree

on an account stated giving a credit to defendants in the sum of \$1,385 for the automobile (count 4.) Since April 20, 1949, defendants did not become indebted to plaintiff in the sum of \$1,992.25 but there remains due to plaintiff from defendants the sum of \$2,150, the reasonable value of services performed by plaintiff for defendants from October 1946 to August 1950 (count 5).

[1] Inasmuch as the reviewing court is powerless to reverse a judgment based upon findings supported by any substantial evidence, *Holmberg v. Marsden*, 39 Cal. 2d 592, 596, 248 P.2d 417; *Richter v. Walker*, 36 Cal.2d 634, 640, 226 P.2d 593; *Horwath v. Roosevelt Hotel Company*, 118 Cal.App.2d 1, 257 P.2d 56, the consideration of this case will be at an end if there is such support for the findings.

Mr. Clough testified that defendants owed plaintiff nothing after August 1950 except the sum of \$600. If the court believed that testimony which, the findings indicate, it did, that should have closed the case with a judgment in favor of plaintiff for the admitted debt of \$600. But despite the court's determination against all allegations of the first four counts of the complaint, it apparently adopted plaintiff's testimony as to count 5 and adjudged defendants' obligation was to pay plaintiff \$2,150 as "the reasonable value" of plaintiff's services performed for defendants between October 1946 and August 1, 1950. Bearing in mind that plaintiff collected from defendants and their predecessors several thousand dollars for services rendered by him during the last mentioned period, the pleadings, findings and judgment present a confusion *de luxe*. However, in view of the one appeal by plaintiff denouncing the excessive meagerness of the judgment of \$2,150, there appears to be no route open to this court but to ascertain whether there is any substantial evidence in support of the findings against the first four counts.

[2] Plaintiff testified that when he complained to Mr. Clough he was spending too much time closing deals and was getting only \$200 a month and must have extra money if he kept the records, Clough told

him to keep a record of his services in processing the contracts for the bank and the value of them. But never did plaintiff make demand for such or any additional compensation until July 1950 when he knew he was leaving defendants. Then for the first time he presented a claim for \$100 a month totaling \$550. Mr. Clough contradicted such testimony and denied any sum was due on account thereof. But if the services had been rendered, the claim would have been barred since the dates of the alleged labors were more than two years prior to the commencement of the action. Code Civ.Proc. § 339, subd. 1; *Horwath v. Roosevelt Hotel Company*, supra.

Notwithstanding plaintiff's testimony that he had earned \$400 as commissions in September 1948, \$200 in October 1948, and \$142.25 in August 1949, he was unable to provide the court with convincing proof that he had performed the alleged services or that he had demanded payment for such services prior to the presentation of his claims in July 1950.

Burton also claimed \$2,883.40 in commissions for the year of 1947. His proof of this was no stronger than that of the commission claims of 1948 discussed in the preceding paragraph. These claims are also barred by the statute of limitations.

Plaintiff's claim consists in part of unpaid salary for three months of 1950 in the sum of \$1,500. While admitting that his salary had been reduced to \$400 per month in 1949 to August 1950, plaintiff thought he should have the same salary as two of the partners and in that way he made up his claim for the item of \$1,500. By such mental gymnastics the court was not impressed of the reliability of appellant's judgment, observation or perspicacity. Mr. Clough testified that appellant's salary was reduced from \$500 to \$400 per month subsequent to September 1949 and it continued at the latter sum to August 1950. The court having adopted such testimony, it

disposed of appellant's claim to the extent of another \$300.

[3,4] Another item in appellant's claim is \$250 for vacation pay. Mr. Clough testified that appellant "took lots of time off * * * three or four days a week * * * and was always paid for it * * * one time he went to Los Angeles * * * was gone over a week * * * had a lot of work to do on his house * * * and was gone over a week * * * added all up, over two weeks a year * * * it was not company business." Because of such testimony the court eliminated the item of \$250. It followed the rule which imposes on plaintiff the burden of establishing his claim by full, clear and convincing evidence. *Wilson v. Bailey*, 8 Cal.2d 416, 424, 65 P.2d 770; *Khoury v. Barham*, 85 Cal.App.2d 202, 211, 192 P.2d 823. Appellant failed to establish certain items of his claim in that he did not prove that defendants acknowledged the items rejected by the court. *Hansen v. Fresno Jersey Farm Dairy Company*, 220 Cal. 402, 408, 31 P.2d 359. He did not show that a balance was struck and agreed upon or that defendants admitted the rejected items were a part of an account stated. *Hill v. Security First National Bank*, 33 Cal.App. 2d 164, 167, 91 P.2d 133.

[5,6] In view of the testimony of Mr. Clough which the court relied upon in denying judgment for any of the items alleged in counts 1 to 4 inclusive the rule must be adhered to that reversal cannot be ordered when there is any substantial evidence to support the finding. No attempt has been made to show proof contrary to the judgment in such amount as to require a reversal. On the other hand, since defendants did not file a cross appeal, they have no standing that would warrant an interference with the judgment in their behalf.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

121 Cal.App.2d 202

FRIEDNASH

v.

LAWRENCE WAREHOUSE CO. et al.

Civ. 19837.

District Court of Appeal, Second District,
Division 1, California.

Nov. 10, 1953.

Hearing Denied Jan. 6, 1954.

Action for conversion of some 37,000 gallons of sweet wine. The Superior Court, Los Angeles County, James Snell, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Scott, J. pro tem., held that where plaintiff procured loan pursuant to agreement, by which plaintiff joined with third person in wine purchase venture, bank took warehouse receipts executed in plaintiff's name as security for loan, plaintiff repaid loan, and bank instructed warehouse to release wine per plaintiff's instructions, warehouse was liable to plaintiff for amount of wine released to third person without plaintiff's authorization.

Affirmed.

Warehousemen §25(7)

Where plaintiff procured loan pursuant to wine purchase agreement with third person, bank took warehouse receipts executed in plaintiff's name as security, plaintiff repaid loan, and bank instructed warehouse to release wine per plaintiff's instructions, warehouse was liable for amount of wine released to third person without plaintiff's authorization, in absence of estoppel or any words or conduct of plaintiff creating ostensible authority in third person to withdraw wine.

Wallace, Garrison, Norton & Ray, Kent A. Sawyer, San Francisco, of counsel, for appellant.

Benj. T. Weinstein, Beverly Hills, and McLaughlin & Casey, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Defendant appeals from an adverse judgment, following trial by court without a jury, in an action for conversion, in which

an award to plaintiff was made in the sum of \$26,754.89, which included \$2,939.76 interest.

Plaintiff and one A. J. Perenchio entered into an agreement on November 20, 1950. Perenchio had 50,000 gallons of wine, stored at the Village Winery in Escalon, California. The purchase price had been 77½ cents per gallon, and Perenchio had paid \$6,750 on account thereof. Plaintiff agreed to invest \$12,000 of his own money and to borrow \$20,000 from a bank, which, added to Perenchio's \$6,750, made the total of \$38,750 purchase price of the wine. Profit on the wine when it was sold was to be divided equally between plaintiff and Perenchio.

The agreement further provided as follows:

"6. Second party (plaintiff) agrees to use his credit and to arrange for the loan of Twenty Thousand Dollars (\$20,000.00) above mentioned, with the understanding that warehouse receipts for said wine shall be used as security for said loans.

"7. It is mutually agreed that warehouse receipts for said merchandise shall be issued and same used as security for the above loan and Second Party (plaintiff) shall be designated on said warehouse receipts as the owner of said wine." (Emphasis added.)

The agreement also provided that said merchandise was to be sold at a time and price mutually agreeable to both parties.

The trial court found that plaintiff paid the \$12,000 and procured a loan of \$20,000 from Union Bank and Trust Co. of Los Angeles to be applied on the purchase price of the wine; that the next day defendant signed and delivered to the bank its warehouse receipt for the wine, stating that it had received for the account of plaintiff for storage in Escalon, California, Warehouse 4261, 50,000 gallons of wine, and, "that said defendant was holding the same for the account of, and that same would be delivered upon the written order of, Union Bank & Trust Co. of Los Angeles, pledgee for Hyman Friednash".

On January 19, 1951, plaintiff repaid the \$20,000 to the bank out of his own funds

and directed the bank to forward its papers concerning the wine to plaintiff. On January 29, 1951, the bank signed and delivered to defendant written instructions for release of the wine, authorizing defendant to deliver it to plaintiff.

In its answer, defendant admits that on or about January 29, Union Bank issued its order to defendant to deliver 50,000 gallons of sweet wine to plaintiff. It alleges that on February 1, 1951, it delivered 50,000 gallons "in accordance with the instructions of plaintiff's agent and/or partner". On appeal defendant admits that it delivered the 50,000 gallons upon instructions of Perenchio. It makes no claim that it delivered the wine to plaintiff, or to anyone upon his instructions or with his knowledge or consent.

The trial court found, that on March 19, 1951, defendant released and delivered pursuant to plaintiff's instructions, 6,000 gallons of wine, and on April 9, 1951, an additional 6,081 gallons of wine, both deliveries, a total of 12,081 gallons, being wine of the type and character described in the warehouse receipt. Defendant made no demand upon plaintiff for payment for these deliveries. The trial court subtracted that amount from the original total of 50,000, leaving only the remaining 37,919 gallons of the amount converted by defendant on February 1, 1951, for which plaintiff would be entitled to reimbursement.

On the sale of the 12,081 gallons which were delivered to plaintiff he received \$8,184.87. Having in mind that he had put \$32,000 into the venture he would have to receive \$23,815.13 out of sale of the remaining wine in order to recover his original investment. The trial court found that the remaining 37,919 gallons were worth \$32,231.15, which was sufficient value to repay plaintiff and Perenchio the amount each had invested with a balance representing a profit. The award to plaintiff of \$23,815.13 (to which interest was added) was an amount sufficient to repay the balance of his original investment rather than the larger amount which was the market value of the remaining wine at the time it was converted by defendant. The trial court found that defendant, in delivering this

37,919 gallons of wine, did not act upon instructions of plaintiff but delivered it to Perenchio without plaintiff's knowledge or consent.

From the entire record in the case it appears that this delivery of wine to Perenchio was without justification or excuse. The contract between plaintiff and Perenchio is not ambiguous as to the rights and powers of the parties and defendant makes no claim that it relied upon any knowledge gained from seeing it in making delivery to Perenchio. The warehouse receipt and release do not mention Perenchio. Plaintiff is the only person named in these documents. The release of January 29, 1951, recites, "You are hereby authorized to deliver to Hyman Friednash the following Merchandise," (describing it).

The reporter's transcript of the trial shows no words or conduct of plaintiff which created ostensible authority in Perenchio to withdraw the wine, or estopped plaintiff to deny that there had been such authorization. There was no evidence of ratification by plaintiff of this act of Perenchio of securing the wine or of the conduct of defendant in releasing it to him.

Defendant's claim that its action was legally correct on February 1, when it delivered the wine to Perenchio must be examined in the light of its conduct thereafter which suggests that neither on February 1 nor thereafter did defendant have any belief or grounds for belief that it was proper to turn the wine over to Perenchio, but that on the contrary it knew at all times that it could release it only on plaintiff's instructions.

We have previously noted that having delivered the entire 50,000 gallons of wine on order of Perenchio and without knowledge or approval of plaintiff, defendant thereafter on plaintiff's order, made the two deliveries to plaintiff—6,000 gallons on March 19, 1951, and 6,081 gallons on April 9, 1951. On April 4, 1951, plaintiff had a telephone conversation with defendant's representative and chief warehouse examiner, Mr. Ely. In that conversation Mr. Ely told plaintiff: "We are holders of the wine for which you took receipts. We will not release anything until we have clear-

ance from you." Plaintiff responded: "You will release nothing until you have a clearance from me." Mr. Ely said, "As I recall it there are 30,000 gallons of wine now." Plaintiff concluded: "Yes, approximately."

It is defendant's theory that because plaintiff and Perenchio had both contributed to the purchase price and were to share in any profits that therefore the defendant could ignore instructions given to it and responsibility accepted by it in dealing with the wine. No authority is cited which supports defendant's contention that plaintiff, as one contracting party is thus powerless to protect his investment, notwithstanding explicit written provisions in the agreement with the other party and in the instructions to the warehouse.

Judgment affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



121 Cal.App.2d 303

RILEY v. RILEY.

Civ. 4760.

District Court of Appeal,
Fourth District, California.

Nov. 16, 1953.

Rehearing Denied Dec. 2, 1953.

Hearing Denied Jan. 13, 1954.

Action to recover from estate under agreement between plaintiff and deceased whereby each bound themselves to contribute a reasonable sum for the support of their children during minority of children. The Superior Court, Orange County, Robert Gardner, J., found that plaintiff's claim was valid and found the amount reasonably necessary for support of children, the executrix appealed and attacked validity of support agreement and court's right to enforce it. The District Court of Appeal, Barnard, P. J., held inter alia, that the agreement was valid since amount reasonably necessary and proportion of that amount each

party should pay was susceptible of proof and could be determined by the court.

Judgment affirmed.

1. Executors and Administrators ⇨202(1)

Where husband and wife bound themselves to contribute a reasonable sum for support of their children during minority of children, the agreement was enforceable against the husband's estate, since the amount reasonably necessary and proportion of that amount each party should pay was susceptible of proof and could be determined by the court.

2. Contracts ⇨9(1)

That which can be made certain is sufficiently certain to make a contract enforceable.

3. Executors and Administrators ⇨202(1)

Under agreement between husband and wife to jointly contribute a reasonable sum for support of children, recovery against estate of husband for support after husband's death was not precluded on theory that claim was equitable whereas action was at law.

4. Pleading ⇨248(4)

In action against estate of husband for support and maintenance of minor children under contractual agreement to provide reasonable support and for such other relief as court thought equitable, amendment alleging that it was necessary to impound funds of estate did not change cause of action and was properly allowed.

5. Executors and Administrators ⇨202(1)

The obligation of a father to support his minor children which is fixed by divorce decree or property settlement agreement does not cease upon the father's death but survives as a charge against his estate.

Bertram H. Ross, Los Angeles, for appellant.

Alford P. Olmstead, John N. Hurtt, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is another chapter in a long controversy, other parts of which have reached this court. *Riley v. Superior Court*, 111

Cal.App.2d 365, 244 P.2d 474; Estate of Riley, 115 Cal.App.2d 495, 252 P.2d 395; Riley v. Riley, 118 Cal.App.2d 11, 256 P.2d 1056.

The plaintiff is the former wife of Chester J. Riley. The couple had three sons. In 1941, they executed a property settlement agreement providing, in part, as follows:

"Second Party agrees that he will contribute a reasonable sum for the support and maintenance of the children of the parties hereto during their separation and Second Party further agrees that he will from time to time direct the Trustee to pay unto First Party reasonable sums of money for the support, care, maintenance and education of the children of the parties hereto. First Party agrees that she will contribute reasonable sums for the support and maintenance and education of the children of the parties hereto. It is understood that, in arriving at the sums to be contributed by either of the parties hereto, the ability of the parties hereto and the needs of said children shall be taken into consideration."

Mrs. Riley later secured a divorce, the decree not mentioning the property settlement agreement or making any order for the support of the children. Chester J. Riley died in 1951, leaving \$1,000 to each of said sons and the remainder of his estate to his sister, Portia A. Riley. The plaintiff filed a claim in the estate, based on the agreement above quoted, for the amounts claimed to be due up to the date of Riley's death, and for a reasonable contribution for the support of the children from that time until they reach the age of 21 years. This claim was rejected by the executrix and Mrs. Riley brought this action.

After a hearing the court found in favor of the plaintiff finding, among other things, that by the property settlement agreement the parties agreed that each of them would contribute a reasonable sum for the support of the children in accordance with the ability of each of them and the needs of the children; that of the amount reasonably necessary for this purpose during the four years prior to his death, Mr. Riley failed to contribute sums amounting to \$12,-

000; that part of Mr. Riley's obligation in this regard accrued and will accrue after his death and in this manner \$9,100 has accrued and will accrue up to the time the children, respectively, have reached the age of 21 years; that the net value of the estate left by Mr. Riley, after all claims and charges have been paid, is in excess of \$150,000; that the claim filed by the plaintiff is a valid and existing claim against the estate for the amounts found due and to become due, which amounts should be paid in the due course of administration; and that the plaintiff is entitled to have \$9,100 impounded and paid into court, to be paid out as ordered. Judgment was entered accordingly and the executrix has appealed.

No attack is made on the sufficiency of the evidence, or on the reasonableness of the awards considered in accordance with the ability of the parties and the needs of the children. Appellant's sole contentions relate to the validity of this part of the 1941 agreement, and the court's right to enforce it in this action. It is first contended that this was not a legally enforceable agreement since the parties failed to determine what percentage of the sums reasonably necessary for this purpose each was to pay. It is argued that since the contract failed to provide how the necessary amounts should be divided between the parties, the only means by which that matter could have been determined was by future negotiation between them; that the agreement was too indefinite and uncertain to be the basis of an action for a breach of contract; and that since the contract was void the court was without power to add the missing provision by determining what proportion of the necessary support each party should pay. In support of this contention the appellant cites such cases as Wineburgh v. Gay, 27 Cal.App. 603, 150 P. 1003; Sarina v. Pedrotti, 103 Cal.App. 203, 284 P. 472; and Avalon Products, Inc., v. Lentini, 98 Cal.App.2d 177, 219 P.2d 485, in which it has been held that to be enforceable a contract must be complete and certain, and that where a contract leaves an essential element to the future negotiation of the parties it is unenforceable. Cases are also cited in which it has been held that the

courts may not, under the guise of construction, make a new contract for the parties or insert necessary provisions which have been omitted.

[1] This contract did not, as the appellants contend, leave the parties free to do as they chose, in the absence of a further agreement. Each party was obligated to furnish for that purpose a reasonable sum, taking into consideration his ability and the needs of the children. While the precise amount each should furnish would naturally vary from time to time, as circumstances changed, both the entire amount which was reasonably necessary and the proportion of that amount each should pay, in view of existing conditions, were matters which were susceptible of proof and which could be determined by the court, and were not matters which necessarily depended upon future negotiation and agreement of the parties. In *Wilson v. Wilson*, 96 Cal.App.2d 589, 216 P.2d 104, 107, it is said:

"At the making of a contract for a right, it may sometimes be impossible to determine details, or the changing situation of affairs may indicate that details also must be subject to modification and, therefore, should not be definitely prescribed and should be left to settlement by an agreement or decree at the time the right is insisted upon. In such cases if the right is absolutely contracted for and the details are of a nature which courts may properly fix and settle, the courts should not hold the contract incomplete, but determine the right and also prescribe and settle the details."

[2] It is an established rule that that which can be made certain is sufficiently certain to make a contract enforceable. *Mancuso v. Krackov*, 110 Cal.App.2d 113, 241 P.2d 1052. From their very nature contracts for support must often be more or less indefinite and uncertain in certain respects, *Coykendall v. Kellogg*, 50 N.D. 857, 198 N.W. 472, and a support contract should not be held unenforceable merely because the precise amount to be paid was not fixed by the terms of the agreement. *Henderson v. Spratlen*, 44 Colo. 278, 98 P. 14, 19 L.R.A.,N.S., 655. While a divorce de-

cree, rather than a contract, was there involved these principles were largely recognized and applied in *Lufkin v. Lufkin*, 209 Cal. 710, 290 P. 8. Under the circumstances here appearing, it must be held that the contract in question was not so indefinite and uncertain as to be unenforceable.

The other only point raised by appellant is that the allowance for support after the death of Mr. Riley cannot be supported since this was an action at law on a rejected claim, and not an equity action. It is argued with respect to this part of the judgment that recovery could be had only in an equity action, citing *Newman v. Burwell*, 216 Cal. 608, 15 P.2d 511; *Guardianship of Cornaz*, 8 Cal.2d 347, 65 P.2d 784; *Dabney v. Däbney*, 9 Cal.App.2d 665, 51 P.2d 108. It is further argued in this connection that the court erred in permitting the respondent to amend her complaint, thus permitting her to change her cause of action in this regard.

[3-5] There is no merit in this contention. In *Taylor v. George*, 34 Cal.2d 552, 212 P.2d 505, 507, the court said:

"In California the rule is that the obligation of a father to support his minor child which is fixed by divorce decree or property settlement agreement, does not cease upon the father's death, but survives as a charge against his estate",

citing two of the cases relied on by the appellant. In the claim filed in this estate a part of the demand was stated to be a reasonable sum for the support and maintenance of said children until they reach the age of 21 years. This claim was attached to the complaint as an exhibit, and the prayer was for a named amount and "for such other and further relief as the court deems equitable." Evidence was received on that phase of the case and, at the conclusion of the trial, the court permitted an amendment in this connection alleging that it was necessary to impound funds to meet that part of the obligation. The cause of action was not changed by the amendment, which was properly allowed. *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 278 P. 1038; *Big Boy Drilling Corp. v. Rankin*, 213 Cal. 646, 3 P.2d 13. All of the issues,

legal and equitable, were before the court and the relief granted was well within those issues.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



121 Cal.App.2d 276

In re HOLT.

Civ. 8384.

District Court of Appeal, Third District,
California.

Nov. 13, 1953.

Case arising out of divorce proceeding by mother of minor child. On petition by probation officer the Superior Court, Madera County, Stanley Murray, J., adjudged child to be ward of Juvenile Court and committed child to custody of probation officer of Merced County, and mother appealed. The District Court of Appeals, Peek, J., held that the trial court had jurisdiction to enter the order and that there was no indication that order was improperly made.

Judgment affirmed.

1. Appeal and Error ⇨907(3)

Where mother of child adjudged ward of juvenile court appealed, on judgment roll alone, from the order committing such child, it was presumed, in absence of anything to the contrary, that evidence was sufficient to support order.

2. Courts ⇨475(15)

Superior court had jurisdiction to adjudge child a ward of juvenile court where divorce proceeding was pending between parents, even though Superior Court hearing divorce case has extensive power relative to welfare of children.

3. Infants ⇨16.10

In proceeding on petition of probation officer to have child of divorced parents declared a ward of juvenile court, order stating that child was a minor, that his

home was rendered unfit by depravity of parents, and that child came within provision of statute, complied with statute requiring that trial court make finding of fact. Welfare and Institutions Code, §§ 700(d), 739(d).

4. Infants ⇨16.12

In proceeding on petition of probation officer to have child of divorced parents declared ward of juvenile court, order which adopted probation officer's recommendation that child be allowed to stay with parental aunt was not defective by reason of failing to specify with adequate particularity the home in which child was to be placed.

5. Infants ⇨18

Juvenile court is in no sense a trial court, and procedural technicalities are largely done away with.

6. Infants ⇨16.5

In proceeding on petition of probation officer to have child of divorced parents declared a ward of juvenile court, record did not establish that order adjudging child a ward was granted as punishment to mother for past behavior.

J. D. Boyle, Madera, for appellant.

Walter L. Chandler, Dist. Atty., Madera, for petitioner and respondent.

E. L. Coffee, Madera, for father.

PEEK, Justice.

This appeal is presented on the judgment roll alone. From the brief of appellant (which is not contradicted by respondent) it appears the case arises out of a divorce proceeding by the mother of the infant Homer Allen Holt, a child who, at that time, was approximately two and one-half years of age. When the divorce proceedings came on for hearing in the Superior Court, the judge thereof referred the matter to the probation officer of Madera county. Thereafter said officer filed a petition in said court seeking to have the child declared to be a ward of the juvenile court. Citations were issued to the petitioner and to the father of the child requesting them to appear and show cause why the child

should not be declared a ward of said court. The minutes of that proceeding show that all of the interested parties were present and sworn to testify. After due deliberation the court made its order adjudging the child to be a ward of the juvenile court and ordered him committed to the custody of the probation officer of said Merced county. It is from the order so entered that the mother has now appealed. Numerous contentions are made, none of which are well founded.

[1] At the outset it is to be noted that "when an appeal is taken on the judgment roll alone * * * and when the record on appeal from an order does not show the evidence on which the order is based it will be presumed that the order was properly made and that the evidence necessary to sustain it was presented to the court * * *". It necessarily follows that appellant's first contention is without merit—that is—that the court was without power to order the custody and control of the child to be taken from her without giving her a hearing in the matter. In the absence of anything to the contrary and in accordance with the rule above mentioned this court must presume that the juvenile court did exactly what it said it did in its order, that it "required proof of the facts alleged in said petition and the truth thereof [was] established to its satisfaction by the testimony of Virginia Weber, Probation Officer."

[2] It is next contended that a juvenile court may not take jurisdiction of a custodial matter when that very question is then pending in a divorce proceeding. In the case of *Dupes v. Superior Court*, 176 Cal. 440, 168 P. 888, 889, a like question was presented. It is true, the court there said, that in a divorce proceeding the superior court has extensive powers relative to the welfare of children of the parties engaged in such a proceeding. However, "The mere fact that a litigation is pending between the parents, and that an order regarding the custody of the children has been made therein, does not take away the power of the state nor prevent the exercise of that power under the juvenile court law."

[3] The appellant's next contention is that the court did not comply with section 739 of the Welfare & Institutions Code in that it made no finding of fact. In its order, however, the court specifically found the infant was under the age of twenty-one years; "That the home of the minor * * * is an unfit place by reason of the depravity of his parents;" and that the infant was a person coming within the provisions of section 700(d) of that Code. Such findings substantially comply with the provisions of section 739(d) of said Code. In *re Ortiz*, 74 Cal.App.2d 810, 169 P.2d 664.

[4, 5] Appellant's fourth contention is that the court erred in not designating with particularity the home in which the child was to be placed. This contention is likewise without merit. The court, in effect, adopted the recommendation of the probation officer wherein it was recommended that the child remain with his paternal aunt. As was held in the case of *People v. Superior Court*, 104 Cal.App. 276, 282, 285 P. 871, 874; "Technicalities and formalities are largely done away with, and its simple procedure is designed * * * to enable the judge thereof to best guide and control its wards, with more consideration for their future development than for their past shortcomings." In no sense is it a trial court. See also *In re Halamuda*, 85 Cal.App.2d 219, 192 P.2d 781. The very nature of the work of the juvenile court would be destroyed by compelling strict compliance with the traditional court procedure.

[6] It is appellant's final contention that a child may not be taken from the mother as punishment for her previous conduct; that such an order must be predicated upon present existing conditions. In *Dupes v. Superior Court*, 176 Cal. 440, 168 P. 888, 889, the court there held that "In passing upon the question regarding the fitness or unfitness of the mother, the court will be aided by evidence of her conduct in the past". Under the circumstances it cannot be said that the court was either punishing the mother or that the evidence disclosed

by the record was not sufficient to sustain the attacked order.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.



121 Cal.App.2d 267

PRA et ux. v. BRADSHAW et ux.

Civ. 19738.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Action by lot owners against owners of adjoining lot to quiet title to portion of plaintiffs' land upon which defendants constructed an encroaching brick wall. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment quieting title subject to right and easement of defendants to maintain wall in its present form, condition, extent and location so long as it remained in existence in such form, extent and condition, with minor repairs, and defendants appealed. The District Court of Appeal, Moore, P. J., held that where defendants fixed boundary line of their lot, not by survey according to description in deeds, but by using existing fence and telephone poles as basis for line, and plaintiff acquiesced in such boundary line until a survey subsequently showed it to be wrong, acquiescence would be considered as a mistake, and either party was free to claim true line, and that defendants had acquired no title to portion of plaintiff's land upon which the wall stood, either by limitation or by agreement.

Judgment affirmed.

1. Boundaries ⇨48(7)

Where lot owner fixed boundary line of his lot, not by survey according to description in his deed, but by using existing fence and telephone poles as basis for such line, and adjoining landowner acquiesced in such boundary line until a survey subsequently showed it to be wrong, acquies-

cence would be considered as a mistake, and either party was free to claim the true line.

2. Adverse Possession ⇨95

In suit to quiet title to land on which defendants constructed an encroaching brick wall, evidence sustained finding that defendants had not paid taxes on the land occupied by the wall for five years, and had not acquired title by adverse possession.

3. Boundaries ⇨37(5)

In suit by lot owners against owners of adjoining lot to quiet title to portion of plaintiffs' land upon which defendants constructed an encroaching brick wall, evidence sustained finding that no agreement had been made fixing boundary in such manner as to make land on which wall stood a part of defendants' lot.

Harry G. McMahon, Arcadia, for appellants.

Montgomery G. Rice, Los Angeles, for respondents.

MOORE, Presiding Justice.

Respondents sued to quiet title to land on which appellants constructed an encroaching brick wall. By the judgment, title was quieted subject to the right and easement of appellants to maintain the wall in its present form, condition, extent and location so long as it remains in existence in its present form, extent and condition, with minor repairs.

Respondents own lot 39 of Ramona acres which they purchased in 1941. Appellants own lot 38 which bounds lot 39 on its north side. They face Nicholson Avenue on the west. Appellants purchased their property in February 1936. At that time no markers could be found. Appellant fixed the dividing line between the two lots with the assistance of his vendor and one Milam, the reputed owner of lot 39. This was accomplished by using (1) the fence standing between the rear portions of the two lots, (2) a telephone pole on the east side of the street which fronts the two lots that lie adjacent to the east ends of

38 and 39, and a telephone pole across Nicholson Avenue.

Appellant commenced the construction of the wall in 1939 and by December 22 of that year, 40 feet of it had been built. It was assessed to lot 38 in 1939 and was so assessed for each succeeding year. It was never assessed to respondents or to lot 39. In 1949 respondent discovered by means of a survey that the wall encroaches on lot 39. Prior to such discovery, respondents believed the wall to mark the common boundary of the two contiguous lots.

[1] Inasmuch as the boundary was properly described in the deeds of both parties, there had been no dispute as to the boundary prior to the survey. There had been only a mistaken acquiescence in what was believed to be the true boundary. In such situation, appellant asserting the south side of the wall to be the south boundary of lot 38 and respondents' acquiescing in such assertion, such acquiescence by respondent in a wrong boundary is considered in both law and equity as a mistake and either party is free to claim the true line. *Rast v. Fischer*, 107 Cal.App. 2d 129, 133, 236 P.2d 393; 4 *Thompson on Real Property*, p. 210, sec. 3115. See *Fallert v. Hamilton*, 109 Cal.App.2d 399, 402 et seq., 240 P.2d 1007; *Lentell v. McBride*, 7 Cal.2d 263, 264, 60 P.2d 289.

In *Rast v. Fischer*, supra [107 Cal.App. 2d 129, 133, 236 P.2d 394], where it was found that there had been no agreed boundary "but rather a mistaken acquiescence in what was believed * * * to be the true boundary" and the prevailing party had paid taxes on his property as described in his deed, the court said:

"Thus we have at the outset a situation in which there was no disputed boundary, but a mistake as to the true boundary by the parties concerned. As was said in *Pedersen v. Reynolds*, 31 Cal.App.2d 18, 28, 87 P.2d 51, quoting from 4 *Thompson on Real Property* * * * 'An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line.' * * * So here, the par-

ties, instead of having a survey according to the descriptions of their deeds, assumed that the stakes found by them denoted the true line and accepted it. In such circumstances their acquiescence is treated as a mistake and neither party is estopped from claiming the true line. *Pedersen v. Reynolds*, supra; *Janke v. McMahon*, 21 Cal. App. 781, 133 P. 21; *Garrett v. Cook*, 89 Cal.App.2d 98, 200 P.2d 21.

"So far as the claim of adverse possession is concerned, the evidence supports the view that the successive owners of the two parcels acquiesced in the mistaken boundary, but that they paid taxes according to the descriptions in their respective deeds."

No question is made of respondents' ownership of lot 39 or that they have paid all taxes assessed to it. In view of the finding of such important facts, how can the determination of the trial court be successfully attacked?

No Title By Limitation

[2] Appellants proved that they paid taxes on lot 38 from 1937 to 1952. They contend that they paid taxes on the strip occupied by the wall which stands on lot 39. But such contention was not borne out by the evidence. Not a tax receipt in evidence proves that appellants ever paid taxes on any part of lot 39. While there was proof that the wall was assessed to lot 38 as an improvement, there was no evidence that the strip of land which the wall occupied was ever so assessed. It appears that the tax assessor committed the same error that the landowners made in assuming that the wall stood on lot 38. In the absence of such proof, the finding that appellants had not paid taxes on the land occupied by the wall for five years was justified.

Likewise, there was no proof of adverse possession. While appellants claimed they had occupied a strip on the north side of lot 39 from Nicholson Avenue on the west to the rear end of the 273-foot lot, yet there was no proof of such occupancy except the 88 feet on which the wall stands. The wall is not a continuous pile but has had gaps for twelve years.

In fact, while 40 feet of the wall had been completed in 1939, the record is silent as to when the remaining 48 feet were constructed. Neither is there proof that it had been held adversely for five years prior to the commencement of the action. Moreover, to be strictly technical, the claim of adverse possession fails in that the wall was never closed.

No Agreement Fixing Boundary

[3] Mr. Bradshaw testified that he had an express oral agreement in June 1936 with Mr. Milam whereby the common boundary was fixed at a line which now extends along the south side of the wall. Such agreement having been assertedly made thirteen years prior to the trial, the court was not obliged to adopt it as true. The frailty of human memory is a fact of universal acceptance. Not only had a long period of years elapsed since the asserted conversation occurred but appellant offered no corroboration thereof. According to Mr. Bradshaw's testimony his conversation with his grantor, McDonald, was in progress when Milam stopped by to see what was going on. At that time there was no dispute as to the location of the line. All three men knew the deeds conveying lots 38 and 39 contained the correct description of their boundaries and they knew that if they were not clearly marked by stakes on the ground they could be definitely ascertained by the transit and compass. Instead of using those scientific devices they attempted to fix the common boundary by taking turns at sighting from the telephone pole on the west side of Nicholson Avenue to the pole 600 feet to the east. Fixing an invisible line by sighting around one telephone pole to another is not proof of a zeal to be accurate when dealing with the rights of another. Since the conversation with Milam and McDonald occurred in 1936 and the construction of the wall did not commence until 1939 and inasmuch as instrumentalities were during those three years available for fixing the common boundary line between lots 38 and 39, it is understandable why the trial court was not enthusiastic over the testimony of appellants and therefore could make no

finding that Mr. Bradshaw had an express agreement with Mr. Milam as to the location of the dividing line between the two lots.

When Mr. Milam joined in the conversation, he was not attempting to fix his boundary line. He did not know its location was uncertain; he did not know that his remarks would be used to establish a claim to property. He was approaching his seventy-fifth year and was enfeebled by disease. The asserted contract fixing the boundary line between the two lots therefore depended upon faint proof; so faint in fact that the trial court was compelled to find that the proof of the contract had failed.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



121 Cal.App.2d 225

SCHOLZ v. SCHOLZ.

Civ. 19560.

District Court of Appeal, Second District,
Division 3, California.

Nov. 12, 1953.

Action by a wife for a divorce. From so much of an interlocutory judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., granting plaintiff a divorce, as declared certain improved real property plaintiff's separate property, defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to support the trial court's finding that defendant gave such property to plaintiff in consideration of her promise to marry him, so that it became her separate property.

Judgment affirmed.

I. Divorce ⚡253

In wife's divorce suit, evidence was sufficient to support trial court's finding that defendant gave plaintiff real prop-

erty occupied as their home in consideration of plaintiff's promise to marry defendant, so that such property became plaintiff's separate property.

2. Appeal and Error 931(1)

On appeal, all substantial conflicts in evidence must be resolved in respondent's favor and all legitimate and reasonable inferences indulged to uphold trial court's findings, if possible.

Frank J. Kashare and A. L. Abrahams, Los Angeles, for appellant.

James P. Brice, Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an interlocutory judgment of divorce. He asserts in his brief that he appeals only from the part of the decree which states that certain improved real property is the separate property of plaintiff.

The complaint, filed on July 10, 1951, alleged extreme cruelty as the ground for divorce; and it alleged that the parties owned certain community personal property. The answer alleged that the community property included improved real property at 2319 and 2319½ Earl Street of the approximate value of \$13,000. Defendant appeared at the trial in propria persona and contested only the allegations of the complaint pertaining to the property.

The court found that the parties were owners of the following community property: Hollywood Hair Dryer Company, and the machines and equipment used in the operation thereof which are encumbered by a mortgage in the amount of \$2,464.28; certain household furniture and equipment; and two Ford automobiles. It found further that the improved real property at 2319 and 2319½ Earl Street (house and lot) in Los Angeles is the separate property of plaintiff, having been acquired by her on November 22, 1944, prior to her marriage to the defendant; and that on February 10, 1947, plaintiff executed a declaration of homestead thereon for the joint benefit of herself and defendant.

The court awarded to the plaintiff the household furniture and equipment at the Earl Street addresses, the 1935 Ford automobile, and one-half the proceeds from the sale of the assets of the hair dryer company over and above the chattel mortgage. It assigned the homestead to plaintiff, free and clear of any interest the defendant may have thereunder. It awarded to the defendant the 1948 Ford automobile and one-half the proceeds from the sale of the assets of the hair dryer company.

Appellant contends that the evidence was not sufficient to support the finding that said real property is the separate property of plaintiff.

Plaintiff testified that in 1943 (prior to their marriage) she and defendant took up residence together; defendant told her that if she would marry him he would buy a home for her; in 1944 they went to see the property on Earl Street, and decided that it was the home they wanted; she told defendant she did not have any money for the down payment, and he replied that he could borrow it; he borrowed \$3,000 and gave plaintiff \$500; she put the \$500 in her checking account and wrote a check for that amount to "bind the deal"; escrow was opened in plaintiff's name, and defendant paid \$2,500 into escrow as additional down payment on the house; the deed was executed in the name of "Mabel Iris Thompson," which was her name before she married defendant; she purchased the furniture which was in the house for \$500 and signed a note for that amount; the house had five rooms, and there was an apartment of three rooms adjoining the house; at the time they purchased the property the house was rented for \$85 a month and the apartment was rented for \$50 a month; at that time defendant told her it would be her home—he would give it to her—and that the income from the property would pay for it; she made the payments on the house and on the furniture from said income; in 1944 she also purchased about \$1,200 worth of furniture and paid for it with money which was her life savings; about six months after they had purchased the property they moved into the apartment; about a year later they

moved into the house and rented the apartment for \$50 a month; later they raised the rent to \$75 a month; she and defendant were married December 21, 1946; at the time of their marriage the furniture in the house had been paid for; in February, 1947, defendant was working for Murphy Appliance Company, in which company he owned an interest; said company went into bankruptcy and defendant told her that his creditors would "attach the house" and for her to homestead it; she did not homestead it with any idea of giving defendant a half-interest in it; she never agreed that in case of divorce that the property should be shared and shared alike; in 1949 defendant forced her to sign a note for \$3,495.30 and she also signed a mortgage covering said property, as security for the note, but she did not receive any of those funds; on August 1, 1950, she and defendant separated.

Defendant testified that at the time the house was purchased he was still married to his former wife; he, at no time, told plaintiff that he would buy a home for her—they purchased the home with the understanding that it would be "their home"; many times they said that if anything happened they would share everything equally, and the reason the house was homesteaded in both names was that regardless of what happened to the business they would still have a home; when they separated it was "still decided" that they would share everything alike; later defendant went to see plaintiff's attorney who told defendant that he thought plaintiff was entitled to the home and he was going to see that she got it; the house and furniture were purchased for \$10,500 and the payments on the house were \$75 per month; the payments on the furniture, which cost \$500, were \$25 a month; at the time of their marriage the furniture was paid for; at the time of trial the balance due on the purchase price of the property was \$1,200; he still owes the \$3,000 (which he borrowed for the down payment) and he is paying interest on that amount; there is no lien on the house for said sum; prior to their marriage, plaintiff collected the rents and "turned" most of them over to defendant;

after their marriage, plaintiff continued to collect the rents, and she gave them to defendant; defendant deposited them in his bank account and made the payments on the house and furniture from that source; the rent was not sufficient at all times to make the payments on the house—there was approximately \$15 a month deficiency; defendant also paid the taxes and insurance on the property; when he was in business he borrowed money for business purposes and he used the home as collateral; when they separated the subject was brought up as to what there was to share since there were so many loans against the house, and he promised that he would sacrifice his business and pay the loans; he sold his business and paid the loans, except the \$3,000; he paid about \$9,000.

[1, 2] The evidence was sufficient to support a finding that appellant made a gift of the real property to respondent (wife). She testified that appellant told her that if she would marry him he would buy a home for her. She also testified that, when the property was purchased, appellant told her that it would be her home—he would give it to her. The title to the property was taken in her name. Statements of the trial judge indicate the basis for his finding that the property was the separate property of the wife. The judge said: "The Court has to find as between those two conflicting positions. And such a thing is not always easy to do. If the Court should find there was an agreement if the parties came to a parting of the ways it should be equally divided, then, I assume, that is what would have to be done; but if it came to the conclusion that the plaintiff's version was correct and that it was a gift in promise of marriage, in consideration for a promise to marry, why, then, of course the Court would have to hold that it was not community property." The evidence presented a question of fact as to whether the real property was the separate property of the plaintiff. In *Richter v. Walker*, 36 Cal.2d 634 at page 640, 226 P.2d 593 at page 596, it was said: "And, of course, as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts

must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." The finding of the court that the real property is the separate property of the plaintiff is supported by substantial evidence.

In view of the above conclusion, it is not necessary to consider appellant's further contentions that there was a resulting trust in his favor as to one-half of the real property, and that there was an oral antenuptial agreement to treat the real property as community property.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



121 Cal.App.2d 190

VERDIER v. VERDIER.

Civ. 15767.

District Court of Appeal, First District,
Division 1, California.

Nov. 9, 1953.

Hearing Denied Jan. 6, 1954.

Suit for partition of property. An interlocutory decree was issued directing the sale of property. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered order confirming the referee's sale, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where typed decree presented to trial judge directed sale "at public auction, to the highest and best bidder for cash" and before signing decree judge substituted "at private sale" for "at public sale" but left rest of clause intact, judge intended a private sale in accordance with statute.

Order affirmed.

1. Partition ⇨102

Where proposed interlocutory decree presented to trial judge, in partition action, directed sale "at public auction, to the highest and best bidder for cash," etc., and judge substituted "at private sale" for "at

public sale" but left rest of clause directing manner of sale intact, judge contemplated a private sale in accordance with statute, and other repugnant language directing manner of sale was to be ignored. Code Civ.Proc. § 775.

2. Appeal and Error ⇨707(1)

Contention that trial judge was without authority to make change in proposed decree because proposed form of decree was submitted by stipulation could not be considered on appeal, in absence of record of what transpired when parties presented their stipulation to judge.

3. Judgment ⇨331

Where trial court amended proposed form of decree submitted by stipulation in partition action before signing decree, there was every presumption in favor of the regularity of his action.

4. Judgment ⇨526

Changes made in an official writing when the record shows the changes are appropriate aids to its interpretation.

5. Partition ⇨102

Where trial court before signing proposed interlocutory decree in partition action requiring that real estate be sold at public auction, substituted words directing private sale, facts that referee conducted sale as private sale and trial court confirmed sale were contemporary interpretations tending to prove that private sale was originally intended. Civ.Code, § 3535.

6. Judgment ⇨524

Judicial orders and decrees are subject to same rules of interpretation as other writings.

Julian D. Brewer, San Francisco, for appellant.

Paul C. Dana and Morgan J. Doyle, San Francisco, for respondent.

FRED B. WOOD, Justice.

The principal question upon this appeal turns upon the interpretation properly to be made of a certain provision of the interlocutory decree in this partition suit, a decree which ordered the sale of real prop-

erty and appointed a referee to conduct the sale.¹

The decree as typed and presented to the trial judge directed the referee to sell "at public auction, to the highest and best bidder for cash, lawful money of the United States, such sale to be in the same manner as in sales of real property on execution, and upon and after notice not less than that required by law for sales of real property on execution * * *." The judge by pen struck out the words "at public auction" and inserted in lieu thereof the words "at private sale," leaving physically intact the remainder of the clause above quoted.

Defendant interprets this clause literally, as directing a "private sale" to be conducted in the manner of a sale (at public auction) of real property on execution. Such a direction, defendant says, is an anomaly, legally ineffective and void because the applicable statute requires a "private sale" of real property in a partition suit to be "conducted in the manner required in private sales of real property of estates of deceased persons." Code Civ.Proc. § 775.

If defendant's interpretation of the decree were correct there would be merit in her conclusion, but hers is not the correct interpretation.

[1-4] When the trial judge substituted the words "private sale" for "public auction" he clearly evinced an intent to order a private sale, as was within his discretion to do under section 775 of the code.² We assume that he intended a legally effective sale (a private sale in the manner required therefor by section 775) and that his failure to strike out the words directing a sale in the manner of sales on execution was inadvertent. It was not necessary for him to prescribe the manner of sale, when or-

dering a private sale, for the statute prescribes the manner. Nor could he effectively prescribe a different manner. Accordingly, in effectuation of the trial judge's clearly manifested intent, we should ignore those words ("in the manner of sales on execution," etc.) just as if they had been physically deleted from the decree. Changes made in an official writing, when the record shows the changes, are appropriate aids to its interpretation. *Blumenthal v. Lieberman*, 109 Cal.App.2d 374, 376-377, 240 P.2d 699, modification of findings of fact and judgment; *In re Haines*, 195 Cal. 605, 614-616, 234 P. 883, changes made in a legislative bill during the course of its passage.

We are further aided in this view by the canon of interpretation that when a provision of a writing (in this case, the provision for sale in the manner of sales on execution) is wholly repugnant to and can not be reconciled with the intent of the writer as that intent (to require a private sale) clearly appears from other portions of the document, the repugnant provision will be ignored. See *Reuter v. Board of Supervisors*, 220 Cal. 314, 318, 30 P.2d 417, ignoring as void a repugnant proviso of paragraph 4 of section 7½ of article XI of the state Constitution; *La Arcada Co. v. Bank of America*, 120 Cal.App. 397, 402, 7 P.2d 1115, rejecting as repugnant the words "mortgage" and "mortgaged" appearing in a deed of trust.

[5] We observe, also, that the referee conducted this sale in the manner required in private sales of real property of estates of deceased persons, and that the trial judge confirmed the sale. That is an interpretation by the officer charged with carrying out the mandate of the interlocutory decree, and by the very judge who rendered that decree, identical with and persuasive of

1. Defendant has appealed only from the order confirming the sale, not from the interlocutory decree. Time for appeal from the decree long since expired.

2. Defendant also contends that the trial judge was without authority to make this change because the proposed form of decree was submitted to him by stipulation. Such a contention is not available in the absence of a record of what

transpired when the parties presented their stipulation to the judge, especially upon a collateral attack such as is here made. There is every presumption in favor of the regularity of the action of the judge in amending the form of the document and in signing and filing it. If a further stipulation was necessary to sanction the amendment, it must be presumed that an appropriate stipulation was given by the parties.

the construction which we place upon the clause in question. "Contemporaneous exposition is in general the best", Civ.Code, § 3535, a maxim of general application in the interpretation of writings. See *Carter v. Commission on Qualifications, etc.*, 14 Cal. 2d 179, 185, 93 P.2d 140, interpreting a provision of the state Constitution; *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 753-754, 47 P.2d 273, construing a contract.

[6] It appears from the cases that have come to our attention, that questions of interpretation pertinent to our inquiry have arisen more frequently concerning provisions of the Constitution, the statutes, and contracts than in relation to judicial orders or decrees. But they are all "writings," to be construed in accordance with substantially the same canons of interpretation. Thus, in *Ex parte Ambrose*, 72 Cal. 398, 14 P. 33, our Supreme Court said, "the same rules of interpretation apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing, * * *." 72 Cal. at page 401, 14 P. at page 35. When considering the proper construction to be placed upon certain provisions of a judicial decision, our Supreme Court made this significant comment: "Neither of these constructions would do more violence to the text than is often done in making a clause of a statute or of a contract conform to the evident intention of the legislature or of the parties as gathered from the context and a comprehensive view of the circumstances." *City and County of San Francisco v. Center*, 133 Cal. 673, 680, 66 P. 83, 86.

We conclude, therefore, that the interlocutory decree, properly interpreted, ordered that the property be sold "at private sale." It was not necessary in the decree to describe the manner of such a sale. Section 775 supplied that description, by positive mandate. The interlocutory decree imported no jurisdictional defect into the proceeding for sale of the property. At most, it contained an ambiguity which could have been resolved of record prior to the sale if defendant had brought the ambiguity to the attention of the trial judge by an appropriate motion or to the attention of a re-

viewing court by direct appeal from the interlocutory decree, neither of which was done.

The order confirming the sale is affirmed.

PETERS, P. J., and BRAY, J., concur.



121 Cal.App.2d 402

In re VEDDER'S ESTATE.

ABBEY v. ERPS.

Civ. 4755.

District Court of Appeal, Fourth District,
California.

Nov. 20, 1953.

Proceedings in the matter of the estate of a decedent wherein objections were filed to proposed compromise of estate's quiet title claim against decedent's grantee who filed cross complaint to quiet title and for damages. From an order of the Superior Court, Orange County, Raymond Thompson, J., authorizing the compromise, the objector appealed. The District Court of Appeal, Griffin, J., held that record failed to show an abuse of discretion by court in granting the compromise.

Order affirmed.

1. Executors and Administrators Ⓒ87

Trial judge, when determining whether compromise of estate's claim, in quiet title action wherein there was cross complaint for damages, should be accepted, could properly consider possibility that claim of estate predicated on fraud was barred by limitations. Code Civ.Proc. § 318.

2. Executors and Administrators Ⓒ87

The settlement of a claim due to or from a decedent's estate is within the discretionary power of the administrator and of the probate court, and upon appeal a judgment of settlement will not be disturbed unless an abuse of discretion is clearly shown.

3. Executors and Administrators ⚡87

In proceeding on objection to proposed compromise of estate's quiet title claim, based upon fraud allegedly perpetrated by grantee of decedent, wherein grantee had filed cross complaint to quiet title and for damages, record did not show an abuse of discretion by court in authorizing the compromise.

Hurwitz & Hurwitz, Newport Beach, for appellant.

Chas. D. Swanner, Santa Ana, for respondent.

GRIFFIN, Justice.

Decedent Fred F. Vedder, in October, 1941, conveyed certain property in Orange County to Carolina Kerr. Vedder subsequently built a small house on it, went into possession, and apparently paid taxes on it until his death.

E. R. Abbey, as public administrator, was appointed administrator of his estate, and the only asset was the claimed interest of deceased in the property. It was alleged to be of the value of \$6,000. The administrator instituted an action against Carolina Kerr to quiet title to the property, based upon fraud or an allegation that the property was held in trust by defendant for the benefit of the estate.

It appears that upon Vedder's death, through the actions of the sole heir, Mary Jane Erps, the furniture was removed, the house was padlocked, and the yard allowed to deteriorate. The public administrator claimed to have no knowledge of the recorded deed to Carolina Kerr until about November, 1952, when she filed a cross-complaint in the quiet title action so alleging, and in which she sought to quiet title to the property and also asked for damages against plaintiff for wrongfully depriving her of its possession, etc., and claiming that any claimed fraud in obtaining the deed in 1941 was barred by the statute of limitations.

Mary Jane Erps appeared through her attorney and asked the court for permission to intervene in that action. The public administrator, after conference with the at-

torney for Carolina Kerr, and the attorney for the estate, petitioned the court to compromise the action commenced against Carolina Kerr and also her claim for damages, etc., representing that by her cross-complaint she sought \$2,000 damages plus \$50 per month loss of use of occupancy of the house since the death of deceased, and also sought title to the property; that unpaid claims against the estate existed and that the property should be sold under the compromise agreement and the estate paid \$500 and the actions were then to be dismissed with prejudice; that petitioner sought to withdraw as administrator of the estate and substitute another because of a possible personal liability, and demanded of the sole heir indemnity from any personal liability in the action if she insisted that he remain administrator of the estate. Petitioner claimed that she refused the request.

Mary Jane Erps filed objections to the proposed compromise. The time for hearing the objections and also the motion to intervene were set for the same time. The court granted the motion to compromise and denied the motion to intervene.

The only question presented on this appeal is whether the compromise was for the best interests of the estate or of Mary Jane Erps, the sole heir, and whether the court abused its discretion in authorizing the compromise and denying the claim of the objector.

The argument is that the sole reason to compromise the claim was for the public administrator to escape personal liability under the allegations of the cross-complaint and not for the best interests of the estate, and that no sufficient showing was made by petitioner to authorize the court to grant the petition, citing *Estate of McAllister*, 134 Cal.App. 349, 353, 25 P.2d 507; and *Estate of Lucas*, 23 Cal.2d 454, 467, 144 P.2d 340.

The evidence comes to us on a settled statement of facts and the clerk's transcript. The only objections made to the petition to compromise are that prior to the time Carolina Kerr retained counsel, she offered to compromise said action with

objector for the payment of the funeral and medical expenses of the decedent, the total of which was greatly in excess of the sum of \$500; that after the complaint was filed and Carolina Kerr retained an attorney, the attorney offered to recommend to Carolina Kerr a settlement based on selling the property, which is the subject matter of this action, and then dividing the proceeds, the sum of which would be approximately \$2,500; that objector's attorney advised her the public administrator's cause of action was valid and a recovery was probable; that it was not barred by the statute of limitations; that the \$500 compromise would be inequitable; and that it was not for the best interests of the estate to so compromise said claim.

A counter-affidavit was submitted by Carolina Kerr, in which she denied that she ever made the offer mentioned by the objector since, at that time, she had not even filed her cross-complaint and that since the objector received the proceeds of a life insurance policy in excess of \$5,000, she would not have entertained any such claimed compromise; that the only reason she was then willing to compromise her claim under the cross-complaint was due to the fact that she had effected a sale of the property and it had been in escrow for nearly a year and she would suffer damage if it was not completed; that the deed of the property to her from Vedder was recorded in 1941, with full knowledge of Vedder, who paid for the recordation; that the statute of limitations for any claimed fraud commenced to run from that date; that Vedder, by the tax receipts, knew that the property was vested in Carolina Kerr's name since 1941, and prayed that the compromise claim be approved.

At the hearing the court asked counsel for objector if he had any evidence to offer in support of the objections, and he replied that he had none. Petitioner, public administrator, testified that he was advised by the attorney for the estate that Carolina Kerr had a good defense because of the statute of limitations and that Carolina Kerr had a good cause of action on her cross-complaint for damages; that he felt it was in the best interests of the estate to

accept \$500 which would help defray the funeral expenses and pay other creditors since there were no other assets in the estate; that if the law suit was unsuccessful the creditors would receive nothing. He then stated that he knew generally what the subject matter of the suit was but knew none of the details; that neither he nor his attorney had interviewed any prospective witnesses and he did not discuss with objector's attorney the merits of the law suit.

Petitioner's attorney testified he examined the cross-complaint and suggested that objector's attorney petition for letters of administration in the estate instead of the public administrator, and carry on the action if she so desired so that the new administrator might become liable in case a judgment was rendered on the cross-complaint; that objector's attorney refused and that he "researched" the question and was of the opinion that Carolina Kerr had a good defense on the statute of limitations and that he was of the opinion that there was a good cause of action on the cross-complaint; that in his opinion the offer to compromise should be accepted and would be for the best interests of the estate.

Objector contends that the evidence produced to support the order of compromise was only a conclusion of law and not sufficient to justify the order, and that under section 318 of the Code of Civil Procedure, the five-year statute of limitations was applicable, citing 25 Cal.Jur. [Trusts], p. 269, sec. 131; and *Von Zastrow v. Schiffbauer*, 114 Cal.App.2d 500, 250 P.2d 624.

[1] The pleadings in the action between the administrator and Carolina Kerr are not a part of the record on appeal. It cannot here be determined whether section 338 of the Code of Civil Procedure, which provides that an action based on fraud must be instituted within three years after discovery of the fraud, was or was not applicable. The facts rather indicate that if fraud was pleaded as indicated by the public administrator, it was, or could well have been, discovered more than three years prior to the commencement of the action. *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 P. 771; *Lady Washington Consolidated*

Co. v. Wood, 113 Cal. 482, 45 P. 809. At least there was some doubt in petitioner's mind and possible doubt in the trial judge's mind whether a recovery could be had in any event, and the trial judge was authorized to consider this possibility in authorizing the compromise.

[2] The settlement of a claim due to or from a decedent's estate is within the discretionary power of the administrator and of the probate court, and upon appeal the judgment will not be disturbed unless an abuse of discretion is clearly shown. Estate of Newmark, 67 Cal.App.2d 369, 154 P.2d 20; Estate of McAllister, 134 Cal.App. 349, 25 P.2d 507.

[3] Since objector has failed to show such abuse of discretion, the order appealed from should be affirmed.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



In re BLAIR'S ESTATE.*

BONNEN et al.

v.

RUOFF et al.

Civ. 19824.

District Court of Appeal, Second District,
Division 2, California.

Nov. 12, 1953.

As Modified on Denial of Rehearing

Dec. 10, 1953.

Hearing Granted Jan. 11, 1954.

Proceeding by administratrix of widow's estate for family allowance from husband's estate. The Superior Court, Los Angeles County, Victor R. Hansen, J., granted family allowance of \$500 per month for period widow lived after husband's death and two adult children of husband by prior marriage, one of whom was executor of husband's estate, appealed. The District Court of Appeal, Fox, J., held that where widow, upon husband's death, constituted the family but no application was made for family allowance during widow's lifetime by either widow or guardian appointed after widow was declared incompetent, court had no jurisdiction to make the allowance after the widow's death.

* Subsequent opinion 269 P.2d 612.

band's death and two adult children of husband by prior marriage, one of whom was executor of husband's estate, appealed. The District Court of Appeal, Fox, J., held that where widow, upon husband's death, constituted the family but no application was made for family allowance during widow's lifetime by either widow or guardian appointed after widow was declared incompetent, court had no jurisdiction to make the allowance after the widow's death.

Reversed.

1. Executors and Administrators ⇐173

Purpose of statute providing that the widow and minor children are entitled to reasonable allowance out of estate of husband and father as shall be necessary for their maintenance, according to their circumstances, during the progress of the settlement of the estate is to protect, and to provide for, the family during a period of readjustment. Probate Code, § 680.

2. Executors and Administrators ⇐194(2)

Where widow, upon husband's death, constituted the family within statute providing for family allowance, but no application for such allowance was made during widow's lifetime by either widow or guardian appointed after widow was declared incompetent, court had no jurisdiction to make the allowance after widow's death. Probate Code, § 680.

Leon U. Everhart, Pasadena, Edward Payson Hart, Montgomery G. Rice, Los Angeles, for appellants.

Harry A. Pines and Adele Walsh, Los Angeles, for respondent Riley.

Roy B. Woolsey, Los Angeles, for respondent Bonnen.

FOX, Justice.

Alfred G. Blair passed away in July, 1950. He left surviving his widow, Susan Ann Blair, and two adult children by a prior marriage, Naomi Blair Ruoff and Alfred Granville Blair. Mrs. Ruoff is executrix of decedent's estate. In August, 1950, the widow was declared an incompetent and Mrs. Ruoff was appointed guard-

ian of her person and estate, which estate was sufficient to meet her needs. As such guardian Mrs. Ruoff received authorization in the guardianship proceeding to spend \$500 monthly from Mrs. Blair's separate estate for her care and maintenance. Mrs. Blair died in May, 1951. Phoebe L. Bonnen was appointed administratrix of her estate. She later resigned and was succeeded by Rebecca Riley, a sister of Susan Ann Blair. Alfred G. Blair left an estate sufficient to provide a family allowance for his widow, but no application therefor was made during her lifetime. Phoebe L. Bonnen, however, as administratrix of Mrs. Blair's estate, filed such a petition which was adopted by her successor. The court granted a family allowance of \$500 per month for the period Mrs. Blair lived after Mr. Blair's death. Mrs. Ruoff and Alfred Granville Blair challenge the jurisdiction of the court to make such an order after the widow's death. Their position is well taken.

[1,2] The order is based on section 680¹ of the Probate Code. The purpose of this section, as its language plainly indicates, is to protect and provide for the family during a period of readjustment. In re Estate of Jacobs', 61 Cal.App.2d 152, 156, 142 P.2d 454. The amount of the allowance is to be fixed by the court in view of the family needs and circumstances, taking into consideration such matters as the size, habits and mode of living during the life time of the decedent and the educational and health requirements of the several members of the family. It must be "such reasonable allowance * * * as shall be necessary" for the "maintenance" of the family "according to their circumstances." This implies that before making the order the court must ascertain the circumstances of the family, and demonstrates that there must in fact be a family whose circumstances may be considered by

the court in determining what would be a "reasonable allowance" for them out of the decedent's estate. The requirement that the allowance must be for the *maintenance* of the family is emphasized in Bell v. Bell, 2 Cal.App. 338, 340, 83 P. 814, and presupposes the existence of a family for whom provision must be made. In order, therefore, to warrant a court in making an allowance under section 680, Probate Code, there must be a family as therein defined to maintain. Here the widow, upon Mr. Blair's death, constituted the family, but she too had passed on when the court undertook to make an allowance for her "maintenance." In the absence of any person to be maintained who falls within the purview of section 680 of the Probate Code that section has no application. Consequently, the court had no jurisdiction to make the award which was in reality for the benefit of Mrs. Blair's estate.

In re Heywood's Estate, 149 Cal. 129, 84 P. 834, supports our conclusion. There a daughter, Agnes Maud, was a minor at the time of her father's death. After attaining her majority she filed an application for, among other things, a family allowance. Her petition was denied because she "had attained and passed her majority before application was made." She no longer came within the purview of the statute. Hence there was no authority to grant a family allowance. See, to the same effect, State ex rel. Case v Superior Court, 23 Wash.2d 250, 160 P.2d 606, 607, 608, where the widow died before her application was passed upon.

Petitioner urges that the section providing for family allowance must be liberally construed and, as evidence thereof, points to the fact that the allowance may be retroactive to the death of the decedent. The authority for this, however, is found in the *express* language of the section² which gives the court such discretion.

1. Section 680 reads in part: "The widow, * * * and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, * * *."

2. Section 680, Probate Code, reads in part: "Such allowance * * * may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

Petitioner relies on *In re Lux's Estate*, 114 Cal. 73, 81, 45 P. 1023, 1026. That case is not applicable. There an allowance had been made for the widow during her lifetime. Payment, however, had not been made pending an appeal from the order. The widow died before the appeal was determined. It was contended in the Supreme Court that "the right died with her as to all the allowance not actually paid her before her death." The court, however, held that "the order, like any money judgment, was the property of the respondent [widow]." When the application was made the widow met the requirements of the code for a family allowance, hence the court had jurisdiction to make the award. Her subsequent death could not deprive her estate of the payments that had accrued.

Petitioner also relies on *Monahan v. Monahan's Estate*, 232 Mo.App. 91, 89 S.W.2d 153, 158. The inapplicability of that case, however, is clear for under the Missouri statute "The right to such maintenance becomes vested in the surviving spouse immediately upon the death of the mate." It is not claimed that the right to a family allowance is vested in this state.

Petitioner, however, argues that although the matter of a family allowance is a privilege and can be waived, yet Mrs. Ruoff, as the guardian of Mrs. Blair, had no authority to waive it and that Mrs. Ruoff willfully failed to exercise the privilege for her ward because the granting of an allowance to the widow would correspondingly reduce her father's estate and consequently affect the amount she would receive from it. If Mrs. Ruoff was guilty of any breach of duty in failing to obtain a family allowance for Mrs. Blair out of Mr. Blair's estate there is no doubt an appropriate remedy for any aggrieved parties. That remedy, however, is not an award for a family allowance based on a posthumous application since the court had no jurisdiction to make such an award.

The order is reversed.

The petitions of respondents for rehearing are denied.

MOORE, P. J., and McCOMB, J., concur.



121 Cal.App.2d 252

In re VOKAL'S ESTATE.

SAMMONS v. DAVISON et al.

Civ. 19589.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Petition by trustee for instructions to pay attorney's fees for services rendered the trustee in attempting to enforce trustee's personal claim against the trust. The Superior Court, Los Angeles County, J. F. Moroney, J., entered an order denying the petition, and the trustee appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that the trust was not liable for such attorney fees.

Affirmed.

1. Trusts ⇐179

In all matters connected with his trust a trustee is bound to act in the highest good faith towards his beneficiary and may not obtain any advantage by the slightest misrepresentation, and concealment, threat or adverse pressure of any kind is unlawful so long as the confidential relation exists.

2. Trusts ⇐173

A trustee or other fiduciary owes undivided duty to his beneficiary and cannot place himself in any position which would expose him to the temptation of acting contrary to best interest of his beneficiary, and violation of such duty constitutes a fraud against the beneficiary.

3. Trusts ⇨166(1)

A trustee is subject to removal whenever his private interests conflict with his trust duties.

4. Trusts ⇨330

Where beneficiary of trust finds it necessary to contest unfair charges of trustee and to have trustee's account surcharged for sums that have already been paid, the trust is not liable for fees of counsel employed by trustee for resisting such action of the beneficiary.

5. Trusts ⇨227

After attacking trust by urging payment of unjust charges, the trustee is not entitled to collect from the trust his own counsel fees.

6. Trusts ⇨330

Where trustee by reason of his own greed or indifference has breached his duty to the trust and has thereby brought on litigation against it, his expense must be borne out of his own property.

7. Trusts ⇨227

The fees of an attorney whose services in trust litigation were for a trustee and were detrimental to the trust itself are not chargeable to the trust.

8. Trusts ⇨227

A trustee cannot compel the trust to pay his attorney's fees unless services so employed were incurred in management and preservation of the estate, and he cannot incur indebtedness on behalf of the trust for fees incurred in litigation hostile to the trust estate.

9. Trusts ⇨227

Trust was not liable for fees of attorney employed to serve trustee by attempting to enforce trustee's personal claim against the trust.

10. Trusts ⇨227

Where executor or testamentary trustee is himself a practicing lawyer, and he elects to act as his own attorney in matters incident to administration of the trust estate, he will not be permitted to receive an allowance against the trust estate for his professional services.

11. Appeal and Error ⇨984(5)**Trusts** ⇨227

A court sitting in equity is vested with wide discretion in awarding counsel fees for services to a trust and its findings will not be disturbed in absence of a showing of palpable abuse of such discretion. Probate Code, § 1122.

J. Marion Wright, Los Angeles, for appellant.

Lawler, Felix & Hall, by Edward T. Butler, Los Angeles, for respondents.

MOORE, Presiding Justice.

As one of the trustees and as the attorney for the testamentary trust created by decedent, appellant and his cotrustee in January 1952 filed the first account current of the trust and presented their claim for trustee's fees. Also, at the same time appellant filed his *ex parte petition* for allowance of attorney's fees in the amount of \$12,000 for services alleged to have been performed for the trust. The court having ordered service of the petition, Freda Vokal, surviving wife of decedent, and their son, Donald P. Vokal, beneficiaries of the trust, and Charles Davison, co-trustee, filed objections to the allowance of the attorney's account. Appellant thereupon retained Marion Wright, Esquire, to defend his claim to such fees.

Six days were consumed in the trial of the objections to the first account current. By reason of his research, conferences, attendance upon the hearing and study of previous records of the trust, attorney Wright made demand upon the trustees for \$1,362.50. Such demand having been rejected, appellant filed with the court his petition for "instructions to pay attorney's fees for services rendered trustee." The contest over appellant's petition closed with the court's order sustaining the objections, denying the petition and adjudging that the charges of appellant for services alleged to have been rendered as such attorney are not chargeable against the trust estate or its income. From such order comes this appeal.

Appellant contends that the service of counsel rendered to him as trustee in resisting efforts to remove him and to surcharge his account are necessary to the proper administration, preservation and execution of the trust; that it is the duty of the testamentary trustees to resist efforts to remove him or to surcharge his accounts, and therefore, the trust becomes obligated to reimburse him for his expense of such resistance.

Such contentions are beside the mark. When appellant filed the first account current and his ex parte petition it was the duty of the trustees either to approve and pay the charges of the attorney or to reject his account and resist payment to the last. The latter is exactly what the objectors did at the hearing on appellant's ex parte petition. They concluded and contended that the charges of appellant were exorbitant and illegal.¹ He claimed \$15 per hour for 40 hours devoted to his personally typing copies of documents and in performing messenger services. He made a charge for 84 hours expended in transferring to the trust, and in the sale of, listed securities and for 38 additional hours in writing letters and in making telephone calls with reference to those securities for which he made a charge of \$1,830. Also, he included in his account 55 hours expended in preparation of the executor's supplemental account relative to a group of bonds valued at \$21,000 which had been reserved by the estate to meet possible tax deficiencies. For such service he had demanded payment of \$825. Not only were such labors done for the benefit of the Vokal estate, but they constituted a part of the legal work for which the estate's attorney would draw statutory fees.

In addition to his excessive charges for his services rendered to the trust, appellant listed services he claimed to have rendered the Vokal estate. The court found on the trial of the instant matters that out of the 679 hours for which appellant demanded compensation from the trust, 304 hours had been expended in the administration of the Vokal estate, for which appellant had al-

ready been paid. In his first statement to the court filed January 21, 1950, he presented a claim for \$21,635.58 for trustee and attorney's fees. In advising the court concerning that claim, appellant, then its attorney and an executor of the estate, said, "Excepting routine matters therefrom the petitioner has expended in excess of 300 days in the performance of his duties and will be required to expend an estimated 60-90 more before pending matters are disposed of."

A study of the record discloses that such charges were not wholly a case of unintentional debits against the estate or the trust. When he stated in closing the estate that he would be required to expend from 60 to 90 days more of service for the fees he had included in the charge of \$21,635.58, he could have intended nothing other than that the alleged "60-90 more days" of service would be given the estate for which \$21,635.58 would have already been paid him. It was a substantial cause for the award to appellant of the latter sum for all his legal services past and future to the estate. Thereafter, as attorney for the trust, appellant demanded payment of some of the same items included in his executor's report. For instance, as an executor he had been paid for his services relating to federal and state taxes on inheritances and income. But when he made up his first account current and his ex parte petition for fees as attorney for the trust he charged 68 hours of time expended on the identical matters for which the estate had already paid him. If the time expended in transferring the securities retained by the executors was all or part of the "60-90 more" days charged for future legal services in the final report of the executors and included in the \$21,635.58 paid, why should he have charged it as a service performed for the trust two years after he had been paid for it by the estate? The court below determined that it was a duplicate charge and the facts justify the finding.

Another item charged in appellant's account for legal services was that of renegotiation of excess profit taxes. He had

1. No objection was made to the account of the "trustees" for their services in the sum of \$3,350.

already been paid by the estate for such services. Not only had he been paid but his service proved to be of no benefit to the estate for the reason that he had failed duly to file claims for a refund of such tax. But his charges included those for labors beyond the trust. He expended 28 hours of legal service on the personal affairs of beneficiary Rogers and charged the item to the Vokal trust. He made charges against the trust for legal service rendered to a stranger to the trust for drawing a contract for a beneficiary and for advising as to the law of domestic relations.

Appellant deems himself to have been aggrieved by the trial court's overruling his objections to the admission of any reference to the service for, and the charges he had made against the estate and the award made by the probate court. Particularly does he inveigh against the court's admitting in evidence the facts concerning the award to appellant of \$21,635.58 at the time of settling the final account of the executors, which he says is a final order. The record discloses that such proof was pertinent to the issue of whether appellant was entitled to *any* item of his claim.

In his ex parte petition appellant had included service in the execution of the will and in the administration of the estate of decedent. In the trial of the first account current it was proved that appellant had obtained a judgment against the estate for \$21,635.58 for commissions and fees as executor and for services as attorney for the estate, whereas there was due him only \$14,635.58. At the trial it was the duty of objectors to obtain from appellant a surcharge of the \$7,000. The latter sum had been procured by appellant in the following manner: While still acting as attorney for decedent's estate, he sent two statements to the office of decedent's business which had been operated under the fictitious name of "Special Tools and Machinery Company." He collected the \$7,000 without order of court. When appellant prepared his final account as executor, in describing his services for which he demanded fees, he included the same items for which he had already collected the \$7,000. In no statement or pleading thereafter did he

acknowledge the \$7,000 to have been paid. Neither did he, at the hearing of the estate's final account and his demand for \$21,635.58, advise the commissioner who presided that he had already received the \$7,000. But he prepared the formal order distributing the trust estate, subject to his charge of \$21,635.58. By his previous collection of the \$7,000, the order for its duplicate payment and the concealment of those facts from the court, his co-trustee and the beneficiaries, appellant obtained an advantage and exposed himself to the temptation to act contrary to their best interests. Appellant contends that the trial of his accounts as executor and as attorney for the estate prejudiced his claim for the services listed in his ex parte petition. He insists that at the hearing on the first account current, the only issue was the value of the services he had reported in his "petition for fees." Such contention cannot be approved. If the charges for the services itemized in his ex parte petition had previously been paid, it could cause no prejudice to show that fact wherever or whenever or however such payment might have been made. If he held a judgment of record for \$7,000 against the estate, was it not late enough to demand a surcharge thereof? The trust is a mere succession of the estate. The beneficiaries are identical; the assets are exactly the same with the exception of the diminution or augmentation that may have resulted from probate of decedent's estate or from the operation of the business.

Appellant's charges against the estate for the services of attorney Wright in the sum of \$1,362.50 were noncompensable. While appellant was awarded \$2,000 for his services as trustee, his demand for payment of his "legal services" was contested and rejected. Such alleged services were foreign to the trust and contributed no benefit to the trust estate. *Dingwell v. Seymour*, 91 Cal.App. 483, 513, 267 P. 327.

[1,2] In view of the facts found, in order to authorize payment of the account rendered by appellant, the trust would have to pay a trustee for a disservice to the trust. In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary

and may not obtain any advantage by the slightest misrepresentation. Concealment, threat, or adverse pressure of any kind is unlawful as long as the confidential relation exists. The trustee or other fiduciary owes undivided duty to his beneficiary and cannot place himself in any position which would expose him to the temptation of acting contrary to the best interests of his beneficiaries. *Overell v. Overell*, 78 Cal.App. 251, 256, 258, 248 P. 310. Any violation of such duties constitutes a fraud against the beneficiaries. *Churchill v. Peters*, 57 Cal.App.2d 521, 531, 134 P.2d 841; *Fields v. Michael*, 91 Cal.App.2d 443, 448, 205 P.2d 402.

[3] Moreover, a trustee is subject to removal whenever his private interests conflict with his trust duties. *Moore v. Bowes*, 8 Cal.2d 162, 165, 64 P.2d 423. While there was no attempt by objectors to remove appellant from office, it was not inappropriate to appraise his lack of loyalty to the trust by showing his disinterested, if not adversary, acts. Objectors' sole purpose in the proceeding was to obtain a full satisfaction of the judgment he held against the estate for \$21,635.58 which had been allowed for his service as executor and attorney for the estate and to defeat any allowances for his repetitious claims, and his demands for excessive charges. By their resistance to his claims they caused him to acknowledge his error as to the \$7,000 item and to correct his wrong. Had he not done so, the court would have made an order for the surcharge just as it denied his many unusual charges.

[4] Because he had the hardihood to resist the demands of objectors by employing an attorney to appear in court and contest their objections, must the beneficiaries suffer the expense of such employment? Both reason and ethics compel a negative. When a beneficiary finds it necessary to contest the unfair charges of a trustee and to have the latter's account surcharged for sums that have already been paid, it is shocking to say that he must pay not only his own attorney to effect his purpose, but also, the fees of the counsel employed by the faithless or careless trustee for resisting such action of the beneficiary. See *Metzen-*

baum v. Metzenbaum, 115 Cal.App.2d 395, 401, 252 P.2d 31, 966. To pay such an expense of a trustee would be to place a premium on his dishonesty or indifference to duty and at the same time penalize the beneficiary.

The instant proceeding was instituted by appellant for the sole purpose of compelling the trust to pay Mr. Wright's fees for prosecuting appellant's demand. But even if, in the trial of the first account current, appellant's removal had been an issue he could not be reimbursed for his payment of counsel for attempting to collect exorbitant charges made as attorney for the trust. Since appellant's removal was not an issue at the hearing of the first account current, it played no part below in the present matter, and, therefore, cannot be considered on appeal. 3 Cal.Jur.2d 604.

Furthermore, if his removal had been an issue at the trial of the first account current as contended, appellant would not be entitled to his attorney's fees. In *re Titcomb*, 80 Misc. 612, 142 N.Y.S. 1030, 1032. In the *Titcomb* case, the trustee purchased certain bonds without authority of court. While the estate was in probate he sold the bonds and reported the sale. He was denied compensation for counsel retained to defend him against removal for his unauthorized act. The court there said, "There can be no allowance to the trustee for fees incurred in the proceeding, if by reason of his having improperly applied the moneys of the estate or invested the same in securities unauthorized by law he was at the time of the commencement of the proceeding unfit for the due execution of his office. Not only were these bonds a form of security unauthorized by law, but in the taking of them the interests of the estate were subordinated to other interests. So much of the items of counsel fees as were incurred in the removal proceeding must therefore be disallowed." If a trustee, who has merely made an unauthorized investment of trust funds without loss, is not entitled to reimbursement for counsel fees in defending himself, then a trustee who as attorney for his trust has made unauthorized charges against a trust and had taken a judgment against the estate which be-

came the corpus of the trust estate for \$7,000 more than was due him and permitted it to remain of record until he was moved by fear either of public opinion or judicial decree to acknowledge satisfaction thereof, should be required to pay his own expense in defending his unjust claim.

Also, by the same proceeding, appellant's attempt to collect certain noncompensable claims for several thousand dollars was defeated. In other words, Mr. Wright was retained by appellant to defend and establish appellant's right to \$12,000 to which the court in this very proceeding adjudged he was not entitled. It included sums far in excess of those customarily charged for such services and in order to defeat appellant's claim thereto the beneficiaries were required to employ counsel to protect the trust estate.

[5-9] After attacking the trust by urging the payment of unjust charges, the trustee is not entitled to collect from the trust his own counsel fees. That would be paying for a service against the trust. *Bogle v. Bogle*, 51 N.M. 474, 188 P.2d 181, 183. Where a trustee by reason of his own greed or indifference has breached his duty to the trust and has thereby brought on litigation against it his expense must be borne out of his own property. *Dickerson v. Camden Trust Company*, 1 N.J. 459, 64 A.2d 214, 218; *Lape's Administrator v. Jones*, 15 S.W. 658, 12 Ky.Law Rep. 875. The fees of an attorney whose services in trust litigation were for a trustee and were detrimental to the trust itself are not chargeable to the trust. *Estate of McLellan*, 14 Cal.App.2d 271, 274, 57 P.2d 1338. A trustee cannot compel the trust to pay his attorney's fees unless the services so employed were incurred in the management and preservation of the trust estate. Certainly, he cannot incur indebtedness for fees incurred in litigation hostile to the estate. *Ellis v. King*, 336 Ill.App. 298, 83 N.E.2d 367. It follows that appellant, having employed attorney Wright to serve him by attempting to enforce appellant's personal claim against the trust to its detriment, cannot collect from the trust the val-

ue of such attorney's services. *Estate of McLellan*, supra.

[10] There is another reason why the court below properly rejected appellant's claim against the trust for Mr. Wright's services. It was found that appellant sought compensation for 141 hours of his own time he had served the trust. It is the invariable rule of the courts to reject demands of trustees for services they employed themselves to perform as attorneys. *Estate of Scherer*, 58 Cal.App.2d 133, 139, 136 P.2d 103. Also, it was there held that where an executor or the testamentary trustee is himself a practicing lawyer, and elects to act as his own attorney in matters incident to the administration of the trust estate, he will not be permitted to receive an allowance against the trust estate for his professional services. *Estate of Parker*, 200 Cal. 132, 135, 251 P. 907, 49 A.L.R. 1025. If he is not entitled to compensation for his own services incident to the administration of the trust, why should he collect for the services of another lawyer employed to enforce payment of a claim against the trust?

[11] Because the fees of Mr. Wright are not proper expenses of the trust and are not payable out of the trust estate, on review, the evidence will be viewed in the light most favorable to the judgment. The findings will not be disturbed if there is any substantial evidence to support them. *Shapiro v. Equitable Life Assurance Society*, 76 Cal.App.2d 75, 96, 172 P.2d 725. A court sitting in equity is vested with wide discretion in awarding counsel fees for services to a trust and its findings will not be disturbed in the absence of a showing of a palpable abuse of such discretion. *Probate Code*, § 1122; *Estate of Willardson*, 101 Cal.App.2d 777, 780, 226 P.2d 369; *Johns v. Peterson*, 52 Cal.App.2d 720, 724, 126 P. 2d 903; 4 Cal.Jur.2d 471.

Because the litigation for which appellant demands compensation was of no benefit to the trust and was caused by no fault of the beneficiaries, the expense thereof must be borne personally by appellant who caused the controversy and incurred the debt. *Dingwell v. Seymour*, 91 Cal.App.

483, 513, 267 P. 327; *Dickerson v. Camden Trust Company*, 1 N.J. 459, 64 A. 214, 218.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



121 Cal.App.2d 392

MENDOZA v. ENRICO et ux.

Civ. 4711.

District Court of Appeal, Fourth District,
California.

Nov. 19, 1953.

Action for damages sustained when defendants' overtaking automobile struck rear of truck upon which plaintiff was riding. Verdict was for defendants, and plaintiff moved for new trial. The motion for new trial was heard in Superior Court, San Bernardino County, by Harry Deirup, J., who had not been present at the trial of the action and who was assigned to substitute for judge who had presided at trial but who was unable to hear the motion, the motion was granted, and defendants appealed. The District Court of Appeal, Griffin, J., held that the substitute judge had the same power and was subject to the same duty as the former judge would have had, and no abuse of discretion was indicated.

Order affirmed.

1. New Trial ⇐114

Where at hearing on motion for new trial, judge who presided at trial was absent from county and substitute judge was assigned, such substitute judge had power to pass on the motion. Code Civ.Proc. § 661.

2. New Trial ⇐72

In considering motion for new trial, trial court has duty to scrutinize and review evidence, and if in its opinion facts are insufficient to justify decision, or if it believes weight of evidence to be against decision,

a new trial should be granted, even though inferences court may draw are opposed to those drawn by jury.

3. Appeal and Error ⇐933(1), 979(2)

Presumption favors order of new trial by trial court, and where new trial is granted on grounds of insufficiency of evidence, District Court of Appeal will not interfere in absence of manifest abuse of discretion.

4. New Trial ⇐70

In action for damages sustained in accident occurring when defendants' overtaking automobile struck truck upon which plaintiff was riding, where after verdict for defendant plaintiff moved for new trial and substitute judge who had not been at trial and did not have transcript of trial ordered a new trial on ground of insufficiency of evidence, no abuse of discretion was indicated.

Spray, Gould & Bowers, Robert E. Ford, Los Angeles, for appellants.

Jerome Weber, Los Angeles, for respondent.

GRIFFIN, Justice.

This action was for damages for claimed personal injuries to plaintiff resulting in a jury verdict for defendants. It was tried by Judge Mitchell. The motion for new trial was heard by Judge Deirup and was granted on the ground of insufficiency of the evidence. No transcript of the testimony at the trial was furnished him. Apparently neither counsel for plaintiff nor for defendant knew of Judge Mitchell's absence from the county until the motion came on for hearing. Counsel for defendants who tried the case died prior to the hearing of the motion.

At the hearing it was stipulated by respective counsel that the assigned judge was duly requested and authorized to act in said court; that he had all the powers given by section 5, Article VI of the California Constitution; and that the trial judge was absent from the county and could not hear the motion.

Counsel for plaintiff then asked the court if he might briefly review the facts as pre-

sented to the trial court in the light most favorable to the defendants. A map was used in demonstrating what the several witnesses testified to in respect to the collision and resulting injuries. He stated that defendants' car struck a truck in which plaintiff was riding as a passenger. Plaintiff was seated on some boxes in the rear of the truck and defendants' car ran into the back end of the truck while attempting to pass it when both were going in the same direction. Plaintiff was thrown out and sustained injuries.

Defendant Mrs. Enrico's testimony was that at approximately 200 feet from the intersection she decided to pass the truck, started to turn out, and that the truck driver, without any signal, crossed over the center line and the accident happened. Counsel for plaintiff stated that at the trial Mrs. Enrico said she remembered nothing; that she made a very poor witness; and that her story was impossible because the accident could not have happened in the manner she indicated.

Counsel for plaintiff further stated that defendants' car "laid down heavy skid marks for 144 feet"; that the driver thereof struck the truck and defendants' car traveled about 30 feet more before it came to a stop; that the police cited her for speeding and passing a car within 100 feet of an intersection, and that she pleaded guilty to both charges.

Some testimony was placed before the jury in reference to insurance and Workmen's Compensation Liability Insurance payments about which plaintiff's counsel objects. It is further claimed that the trial court erred in giving certain instructions. There is indication that the jury was confused as to the result of its verdict when it retired from the jury box. It was conceded that plaintiff was not charged with any contributory negligence on his part. The truck driver was not made a party defendant.

No objection was made at the hearing about the assigned judge deciding the motion at the time indicated upon representations made by the respective counsel as to what the evidence of the respective parties showed, and no request was made at

that time for a continuance so that the reporter might attend or read his notes or any part thereof under section 660 of the Code of Civil Procedure.

Counsel for defendants then stated that he was somewhat in the same position of the assigned judge in arguing the facts on the motion. He claimed that the truck driver pleaded guilty to operating without a driver's license, and making an illegal left-hand turn. He referred to the diagram in evidence and stated he had reviewed his file in respect to the evidence and that he had a partial transcript of the evidence pertaining to the cross-examination of plaintiff; that although he was not present at the trial "I have had the advantage as Your Honor has in reviewing the trial, reviewing my file on it * * *"; that moving pictures were taken of plaintiff by defendants in reference to his claimed disability in performing his labors, and that he was "going to submit it on that basis". Thereafter the motion was granted.

On this appeal, defendants' counsel states that the question to be determined is "Can a trial judge, other than the one who presided at a trial, not having heard any of the evidence or any transcription thereof, grant a motion for new trial on the ground that the evidence was not sufficient to justify the verdict of the jury?" In support of his negative claim he cites Section 661 of the Code of Civil Procedure; *Francis v. Superior Court*, 3 Cal.2d 19, 28, 43 P.2d 300; and *Kuhlken v. Mangini*, 207 Cal. 44, 276 P. 577.

[1,2] The cases relied upon by defendants are factually dissimilar. It is true that section 661, *supra*, requires that a motion for new trial shall be made before the judge who presided at the trial, if such judge is available; that the motion be heard and determined whenever practicable by the judge who heard the evidence at the trial of the case, and who was therefore best prepared and qualified to pass on the merits of the motion. However, section 661 also provides the method for the hearing of such a motion by another judge if the trial judge is absent from the county and does not return to hear it. The judge here assigned who heard the motion had jurisdic-

tion and power to pass upon it. *Frazure v. Fitzpatrick*, 21 Cal.2d 851, 136 P.2d 566; *Sweeley v. Leake*, 87 Cal.App.2d 636, 640, 197 P.2d 401. In considering such a motion, it is not only the court's province but it is its duty to scrutinize and review the evidence and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify the decision or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury. *Ogando v. Carquinez Grammar School District*, 24 Cal.App.2d 567, 569, 75 P.2d 641.

The case of *Row v. Biehl*, 133 Cal.App. 263, 24 P.2d 186, decided by this court [hearing denied by the Supreme Court] is directly in point. We there held that where the record on appeal discloses that the judge who passed upon defendant's motion for new trial had before him the undisputed physical facts of the accident and of the intersection where the accident occurred, and sufficient undisputed evidence from which he reasonably could have held that contributory negligence as a fact was established by the greater weight of the evidence, a manifest abuse of discretion was not shown by the fact that the judge did not have before him a written transcript of the testimony, and that where plaintiffs did not request the reporter to attend the hearing of the motion for a new trial or to read his notes or any part thereof, they waived the right to object to the proceedings on the ground that no written transcript of the evidence was presented at the time of making the motion for new trial.

[3, 4] The presumption is in favor of an order granting a new trial and against the judgment, and when a new trial is granted on the ground of insufficiency of the evidence, an appellate court will not interfere with the order in the absence of a showing of a manifest or unmistakable abuse of discretion. The judge hearing the motion in the instant case stands in the shoes of the former judge and has the same power and is charged with the same duty as the former judge would have, if the motion had come before him. *Sweeley v. Leake*, 87 Cal.App.

2d 636, 197 P.2d 401. No abuse of discretion in granting the motion is here indicated.

Order granting a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



121 Cal.App.2d 318

BRIGGS v. BRIGGS.¹
Civ. 19684.

District Court of Appeal, Second District,
Division 2, California.

Nov. 17, 1953.

As Modified on Denial of Rehearing

Dec. 4, 1953.

Hearing Denied Jan. 13, 1954.

Action to recover unpaid balance of installment note pursuant to right of payee under provision in note to accelerate payment of unpaid balance upon default in payment of any monthly installment for more than 90 days. The Superior Court, Los Angeles County, James H. Pope, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that defendant as one of joint tenants of realty awarded to plaintiff by property settlement had a claim for only one-half of unearned premiums on fire and public liability policies covering such realty.

Judgment reversed with instructions.

1. Appeal and Error ⇨931(1)

In reviewing the evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged to uphold conclusions of trial court.

2. Insurance ⇨115(2)

Partnership consisting of husband and wife did not have an insurable interest in realty held by husband and wife in joint tenancy.

3. Husband and Wife ⇨279(1)

Where claim of dissolved partnership, consisting of husband and wife, against

joint tenancy for premiums allegedly paid by partnership for fire and public liability policies on realty held by husband and wife in joint tenancy was transferred to husband by property settlement, but such settlement had the effect of adjusting all differences between husband and wife, husband's claim for unearned premiums was wiped out by property settlement and any subsequent promise by wife to pay husband for unearned premiums was unenforceable.

4. Husband and Wife ⇨14(3)

Fire and public liability policies covering realty held by husband and wife as joint tenants belonged to the joint tenants and when such realty was converted by property settlement to separate property of wife, title to the policies remained in statu quo, and husband as one of former joint tenants had a claim for only one-half of unearned premiums thereon. Insurance Code, § 305.

5. Bills and Notes ⇨129(2)

Where payee had right under provisions of installment note to accelerate payment of unpaid balance upon default in payment of monthly installment for more than 90 days and evidence was insufficient to sustain finding that at such time payee was indebted to maker in an amount equivalent to unpaid installment for maker's share of unearned premiums on fire and public liability policies covering realty, formerly held by the parties in joint tenancy but awarded to payee by property settlement, payee was entitled to accelerate and to recover judgment against maker for unpaid balance of note plus interest and reasonable attorney's fee and costs.

Milton M. Cohen, Jr., Hollywood, for appellant.

Benjamin J. Goodman, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant is payee and respondent is the maker of a promissory note given pursuant to a property settlement between them. The note provides for monthly payments by the maker and gives the payee the right to accelerate the payment of the unpaid balance due if the maker should fail to make

an installment payment within ninety days after its due date.

Respondent made five monthly payments, then failed to make the next payment which became due December 15, 1950 and also the three succeeding payments. On March 9, 1951, appellant gave notice of her intention to declare a default in the payment of installments and demanded payment of the balance due. Respondent refused to pay but tendered all the past due installments. Such tender was refused.

Appellant commenced this action to collect on the instrument. Respondent answered and on the day of the trial, with the permission of the court, filed a "supplement to fifth separate defense of defendant." Judgment was for respondent based on his fifth separate defense, and the findings thereon are substantially as follows: that two properties were conveyed to appellant in the property settlement including the home; that both were covered with fire insurance and besides, the home was covered by a policy of public liability insurance; that at the time of the conveyance to appellant, the unearned premiums on such policies aggregated \$103.35 which by the settlement became respondent's property; that such sum was a valid offset against the \$90 due appellant by Mr. Briggs on December 15, 1950, leaving a balance in her hands to the credit of respondent in the sum of \$13.35; that in January 1951, at a time when appellant acknowledged that the \$90 check due and payable on December 15, 1950, had not been delivered, and when she had not been given notice of respondent's default on the last mentioned day, she caused her agent to transmit to respondent her check for \$36.81 in payment of a portion of respondent's refund on one of the insurance policies; that respondent and appellant informed the latter's agent that \$58.70 and \$7.84 were due upon the refunds of other policies and respondent requested same to be forwarded to him which had not been done.

[1] Inasmuch as the reviewing court is bound by the rule that all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences be indulged to uphold the conclusions of the trial

court, *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, the judgment herein is secure against the attack of insufficiency of the evidence if there is substantial evidence to support the findings.

Respondent presents two versions of the evidence to sustain the finding. (1) The insurance premiums were paid by a partnership which consisted of appellant and respondent. Prior to the property settlement, the partnership was dissolved and by the provisions of the agreement, all assets of the partnership were transferred to respondent who now argues that the unearned premiums of the policies were assets of the partnership. The fact that they were not mentioned specifically in the property settlement does not defeat the argument since the agreement states "all assets" and indicates that the listing of items does not limit the "all." Respondent sold his interest in the policies to appellant, but did not receive payment prior to December 15, 1950.

[2, 3] In considering the foregoing as a support for the finding, several problems are presented. The property insured was held by respondent and appellant in joint tenancy and there is no evidence that it belonged to the partnership. The agreement for a property settlement stated that the property in question was community in character. The policies were in the names of the parties as joint tenants. The partnership did not have an insurable interest. Then in the light of those facts, the policies were void, or the partnership was a creditor of the joint tenancy for the cost of the policies. Since the partnership was such creditor, the claim for the cost of the policies was by the property settlement transferred to respondent, but the effect of such settlement was to adjust all differences between appellant and respondent, whether listed or not, if less than \$2500; hence the claim is wiped out. There is evidence that subsequent to the settlement, appellant agreed to pay respondent for the unearned premiums. But how could such evidence aid respondent if no valid claim on his part existed for those premiums? A promise to pay a sincerely contested claim

might become a contract. But such rule is not applicable here by reason of (a) appellant's promise to pay the total sum claimed and (b) the prior settlement.

[4, 5] (2) The second explanation of respondent omits any consideration of the partnership and argues that he had the policies; that any claim thereto by appellant is waived by the property settlement whereby all listed items and all unlisted items less than \$2500 in value were allocated to the parties, and that respondent sold the policies to appellant as he argued in (1) above. The problem here is how did respondent get the policies? The policies covered the property held by the parties as joint tenants. Therefore, the policies belonged to the joint tenants. When the property was converted to separate property of appellant, the title to the policies remained in statu quo, Insurance Code, § 305, and respondent as one of the joint tenants had a claim for only one half of the unearned premiums. The value of his share was not enough to offset the \$90 he owed appellant on the promissory note involved herein. He had merely a claim to one half of the \$103.35 due as unearned premiums. Even if that sum had been collected by appellant, her debt to respondent on account thereof would have been only \$51.67 which could not have been set off against the \$90 installment due her on the promissory note. Hence, respondent's setoff was a myth and judgment for the entire amount of the note should have been entered in favor of appellant.

It is, therefore, ordered that the judgment be and is reversed and the court below is instructed to prepare findings in accordance herewith and to enter judgment in favor of plaintiff in the amount of the principal of the note less the payments already made, including interest and a reasonable attorney's fee and costs.

FOX, J., concur.

McCOMB, J., did not participate in the foregoing opinion.

Hearing denied; SCHAUER, J., dissenting.

121 Cal.App.2d 211

OGULIN v. JEFFRIES et al.

Civ. 8280.

District Court of Appeal, Third District.
California.

Nov. 10, 1953.

Action against police officers and their bonding company for false arrest. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J., held, inter alia, that the evidence supported determination that a private citizen had made the arrest complained of and had turned plaintiff over to one of the defendant officers.

Affirmed.

1. Appeal and Error ⇨994(3)

It was for trial judge who heard testimony and who observed witnesses to determine what weight should be given to their testimony.

2. Appeal and Error

⇨930(1), 931(1), 1001(1), 1010(1)

Where evidence is conflicting, appellate court will presume that evidence in support of verdict or findings is true, and will construe evidence and resolve every substantial conflict as favorably as possible in support thereof, and if there is sufficient evidence to support the verdict or finding, the appellate court is bound by the decision of the trial court.

3. False Imprisonment ⇨31

In action against police officers and their bonding company for false arrest, evidence sustained determination that private citizen had arrested plaintiff and had then turned him over to one of the defendant officers. Pen.Code, §§ 837, subd. 1, 841, 847.

4. Arrest ⇨64

A private citizen in order to make a lawful arrest without a warrant must act promptly at time of the offense and in order to justify any delay between time of offense and time of arrest, there must have been a continued attempt to make the arrest. Pen.Code, §§ 837, subd. 1, 841, 847.

5. False Imprisonment ⇨31

In action against police officers for false arrest wherein plaintiff contended that purported arrest by private citizen was invalid because made after unreasonable delay and that, therefore, the officer to whom the citizen had purportedly turned over plaintiff had, in fact, made the arrest, evidence supported determination that citizen, who went next door to call police after alleged misdemeanor and who made arrest some twenty minutes thereafter upon being told by officer that he could not arrest plaintiff without a warrant because no offense had been committed in his presence, had not unjustifiably delayed in making the arrest. Pen.Code, §§ 837, subd. 1, 841, 847.

6. Trial ⇨404(1)

Finding of trial court in action for false arrest that plaintiff was arrested by private citizen necessarily included finding that there had been no unjustifiable delay between commission of the offense and the arrest. Pen.Code, §§ 837, subd. 1, 841, 847.

7. False Imprisonment ⇨8

A person who is unlawfully detained pursuant to lawful arrest cannot bring an action for the false arrest itself, but may maintain an action for false imprisonment for unreasonable delay in taking him before magistrate within reasonable time after arrest. Pen.Code, § 849.

8. Appeal and Error ⇨1008(1)

In false imprisonment action, whether plaintiff was held in custody after arrest for unreasonable length of time before being taken before magistrate was question of fact to be determined by trial court. Pen. Code, § 849.

9. Trial ⇨404(1)

Finding by trial court in false imprisonment action that plaintiff was not damaged by any acts of defendants necessarily included finding that plaintiff was not detained in jail an unreasonable length of time after arrest and before he was taken before a magistrate. Pen.Code, § 849.

10. False Imprisonment ⇨31

In false imprisonment action, evidence sustained determination that plaintiff had

not been detained in jail an unreasonable length of time before he was taken before magistrate. Pen.Code, § 849.

Bruce B. Bruchler, Lovett K. Fraser, Lakeport, for appellant.

Frederic S. Crump, Lakeport, for respondents.

SCHOTTKY, Justice.

Plaintiff commenced an action for damages for false arrest against defendants Jeffries and Antrim, who were respectively deputy sheriff and sheriff of Lake County, and their bonding company. The trial court, sitting without a jury, found that defendant Jeffries, the deputy sheriff, did not make the arrest, but that plaintiff was arrested by Mina Young, a citizen, for a breach of the peace committed in her presence, and thereafter delivered to a peace officer of Lake County, and judgment was entered for defendants.

Plaintiff's motion for a new trial was denied and plaintiff has appealed from the judgment.

Plaintiff's principal contention is that the court's finding that Deputy Sheriff Jeffries did not make the arrest, and that Mina Young, a citizen, did arrest the plaintiff for a breach of the peace, is not supported either by the law or the evidence.

It appears from the record that at about 10:00 p. m. on the night of April 2, 1951, in the kitchen of the home of one Mina Young in Clear Lake Oaks, Lake County, there was an argument between Mina Young's daughter, June Poland, and plaintiff. Mrs. Young testified that plaintiff had been drinking, and stated: "Well, they were arguing and they got into a spat and she gave him a shove and he stepped back with one foot in the kitchen and the other on the backporch and when she give him a push he took a swing at her and then I stepped in to stop the fight and I slapped his face and he slapped mine; So I said 'I am going to have you arrested for hitting me' so I went over to the neighbor's next door and called sheriff Jeffries." When defendant Jeffries arrived at the Young home about ten min-

utes later plaintiff had left the kitchen. Defendant Jeffries informed Mrs. Young that he could not arrest plaintiff since plaintiff had committed no crime in his presence, but that if she would sign the arrest book and arrest plaintiff herself and turn plaintiff over to him, he as deputy sheriff would take him in. Thereupon Mina Young signed the arrest book and when she and defendant Jeffries re-entered the house plaintiff was sitting on a chair in the kitchen. (According to plaintiff's testimony he returned to the kitchen about ten minutes after he left and defendant Jeffries came in about ten minutes after he returned.) As to what occurred then, defendant Jeffries testified as follows:

"Q. [By Mr. Fraser] And what did you do? A. Mrs. Young said that she was arresting Harold for hitting her and for me to take him away.

"Q. She said that when you first saw him, in his presence? A. Yes.

* * * * *

"Q. [By Mr. Crump] Would you relate to the court what she said to him and what he said to her, if anything? A. When we walked in Mina Young and myself walked in the house; Harold was sitting on a chair in the kitchen and she says 'I am arresting you for striking me' I believe, and 'here he is, take him away.'"

Penal Code, section 837, subd. 1, provides that "A private person may arrest another: 1. For a public offense committed or attempted in his presence." Penal Code, section 841, provides that "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." Penal Code, section 847, provides: "A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace-officer."

[1,2] Plaintiff quotes testimony of other witnesses contrary to the testimony of defendant Jeffries hereinbefore quoted, and argues that "The plain fact is, and it is established without any question, by the testimony of *all* witnesses, that the defendant, deputy sheriff Lester O. Jeffries, arrested the plaintiff, at night, without a warrant." However, it is apparent that the trial judge believed the testimony of defendant Jeffries, and it was for the trial judge who heard the testimony and observed the witnesses to determine what weight should be given to their testimony. "The court, in reviewing conflicting evidence, will presume that the evidence in support of the verdict or findings is true, and will construe it and resolve every substantial conflict as favorably as possible in support thereof." 4 Cal.Jur.2d, Appeal and Error, sec. 575, p. 449. If there is sufficient evidence to support a verdict or finding, an appellate court is bound by the decision of the trial court. 4 Cal.Jur.2d, Appeal and Error, sec. 606, p. 485.

[3] We are satisfied that there was substantial evidence that Mina Young arrested plaintiff and then turned him over to defendant Jeffries.

Plaintiff next contends that even assuming that Mina Young made the arrest it "was made a full hour after the occurrence of the alleged breach of peace, and after the right to make a lawful arrest without a warrant, for a misdemeanor, had passed."

According to the testimony of plaintiff, himself, the altercation in the kitchen in which June Poland, Mina Young and himself were involved occurred at about 10:00 p. m.; he then left the kitchen for about ten minutes and the arrest occurred about ten minutes after he got back. He placed the time of the arrest at about 10:20 p. m. So instead of one hour elapsing between the time of the alleged breach of peace and the arrest, it is fairly inferable from the record that only about twenty minutes elapsed.

[4] The rule as to arrests is well stated in 4 Am.Jur., sec. 67, page 46, as follows:

"In making an arrest without a warrant for breach of the peace or a mis-

demeanor, an officer must act promptly at the time of the offense. If he does not act immediately after the offense has been committed, he can thereafter make arrests only by procuring a warrant and proceeding in accordance with its terms. The same rule applies to an arrest made by a private individual in cases in which, if he acts immediately, an arrest without a warrant is permitted. In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest. If an officer sees an affray and calls other officers to his assistance, the fact that the actual arrest is made after the affray is over does not make the arrest without a warrant illegal."

Plaintiff relies heavily upon the decision of this court in *Jackson v. Superior Court*, 98 Cal.App.2d 183, at pages 185, 188, 219 P.2d at pages 879, 881, in which we said:

"By the specific provisions of the Penal Code * * * peace officers and private citizens alike may make an arrest without a warrant for a public offense committed or attempted in the presence of the person making the arrest. On such an occasion the powers of arrest possessed by peace officers and by private citizens are equal. But to the right to arrest without warrant the law attaches the following conditions: The arrest must be made at the time the offense or any part of the offense is being committed or within a reasonable time thereafter or upon fresh and immediate pursuit of the offender. 6 C.J.S., Arrest, § 6, p. 590. As stated by the Supreme Court in *People v. Craig*, 152 Cal. 42, 47, 91 P. 997, 1000, 'It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified, if made after the occasion has passed, though committed in the presence of the arresting officer.'

"It was said in *Oleson v. Pincock*, 68 Utah 507, 251 P. 23, 26: 'No hard and fast rule can, however, be laid down

which will fit every case respecting what constitutes a reasonable time. What may be so in one case under particular circumstances may not be so in another case under different circumstances. All that can be affirmed with safety is that the officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business.'

* * * * *

"In line with the authorities cited above we hold that in order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant therefor."

The facts in that case as stated in the opinion, 98 Cal.App.2d at page 184, 219 P.2d at page 880, were:

"On March 26th at about 1:30 P.M. John Borth, a special deputy sheriff who resides at Winton in Merced County, observed one Harvey Jackson, with some other boys, shooting with BB guns at a light bulb affixed to a public building in Winton. Borth knew the boy, who likewise lived in Winton with his parents, petitioners here, and knew his approximate age. He stopped and talked to the boys. When he got out of his car these boys ran away and then came back to talk to him, and he told them they shouldn't be playing around the building and doing what they did. On the following day and around five o'clock in the afternoon Officer Borth, in company with Officer Adcock, likewise a deputy sheriff, went to the home of Harvey Jackson to arrest him for the incident above stated. They had no warrant for his arrest."

[5,6] Clearly in the Jackson case too much time had elapsed and the officer in

whose presence the alleged offense had been committed had gone about matters not connected with the arrest and had not acted with the promptness that is required. However, in the instant case, under the circumstances shown by the record, it cannot be held as a matter of law that Mina Young did not act promptly and as soon as possible under the circumstances in making the arrest, or that she went about other matters unconnected with the arrest. The finding of the trial court that plaintiff was arrested by Mina Young, a citizen, necessarily included a finding that there had been no unjustifiable delay between the commission of the offense and the arrest.

Plaintiff's remaining contention is that assuming that his arrest was legal he is still entitled to substantial damages because he was detained in jail an unreasonable length of time before being brought before a magistrate.

[7] The record shows that following plaintiff's arrest he was taken to the county jail at Lakeport and was confined there from about 11:00 p.m. on April 2nd until early the next afternoon when he was brought before the magistrate in Lower Lake at 2:00 p.m. As stated in *Kaufman v. Brown*, 93 Cal.App.2d 508, at page 511, 209 P.2d 156 at page 158:

"A person detained pursuant to a lawful arrest cannot bring an action for the *false arrest* itself. *Stubbs v. Abercrombie*, 42 Cal.App. 170, 183 P. 458. However, an action for false imprisonment arising from unlawful detention may be maintained if the defendant unlawfully detains the prisoner for an unreasonable period of time and unnecessarily delays taking him before a magistrate within a reasonable time after his arrest. *Williams v. Zelzah Warehouse Co.*, 126 Cal.App. 28, 14 P. 2d 177; Sec. 849, Penal Code; Sec. 145, Penal Code; *Vernon v. Plumas Lumber Co.*, 71 Cal.App. 112, 234 P. 869; 35 C.J.S., *False Imprisonment*, § 51, P. 582; *Roseman v. Korb*, 311 Mass. 75, 40 N.E.2d 255."

Section 849 of the Penal Code provides:

"When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person, must be laid before such magistrate."

[8-10] It should be borne in mind that we have hereinbefore held that the finding that plaintiff was arrested by Mina Young and not by defendant Jeffries is supported by the record, and that Mina Young is not a party defendant in the action. Therefore, defendants would only be liable for damages for the imprisonment of plaintiff if there was an unreasonable delay in taking him before a magistrate. Plaintiff was held in jail overnight and taken before the Justice of the Peace at Lower Lake at 2:00 p.m. the next day. Lower Lake is approximately 25 miles from the county jail at Lakeport. There is nothing in the record to indicate that plaintiff demanded to be taken before a magistrate sooner nor to indicate that under all the circumstances the delay was unreasonable. Whether or not plaintiff was held in custody for an unreasonable length of time before being taken before a magistrate was a question of fact to be determined by the trial court. *Kaufman v. Brown*, supra, 93 Cal.App. at page 514, 209 P.2d 156; *Peckham v. Warner Bros. Pictures, Inc.*, 36 Cal.App.2d 214, 220, 97 P.2d 472. The finding that plaintiff had not been damaged by any acts of defendants necessarily includes a finding that plaintiff was not detained in jail an unreasonable length of time before he was taken before a magistrate. We cannot say as a matter of law upon the record here that this conclusion by the trial court is unsupported.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

121 Cal.App.2d 374

COLORADO CORP., Limited, et al.

v.

SMITH.

Civ. 19618, 19619.

District Court of Appeal, Second District,
Division 3, California.

Nov. 19, 1953.

Hearing Denied Jan. 13, 1954.

Suits by purchasers for specific performance of contracts for sale of realty were consolidated for trial. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgments for defendant, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that provisions in contracts by which purchaser agreed to construct residences on realty purchased, without specifying number, size, or details of construction, were too vague to give rise to a contractual duty, and that, since such provision constituted an essential term of contract, it made entire contract unenforceable in equity.

Judgments affirmed.

1. Contracts ⇨9(1), 39

A contract to be binding must be definite and certain and it will not be enforced unless it is complete and certain.

2. Specific Performance ⇨28(1)

Where specific performance of a contract is sought, terms of contract must be certain and definite in all particulars essential to its enforcement and court must be able to see what is the stipulated performance.

3. Contracts ⇨9(1)

A promise to erect buildings, which does not specify the dimensions and plans or which refers to plans and specifications as a part of contract, though no plans or specifications are attached, is too vague to be enforceable.

4. Vendor and Purchaser ⇨13

Provision by which purchaser agreed to construct residences on realty purchased was an essential term of contract for sale of realty, constituting part of consideration for promise to sell, to better secure vendor in payment of deferred portion of purchase

price to be secured by purchase money deed of trust.

5. Vendor and Purchaser ⇐21

Provision in contract for sale of realty, which had not been subdivided, by which purchaser agreed to construct residences of not less than 1,200 square feet each, without specifying number, size, type, location, cost, appearance, or other details of construction, was too vague and uncertain to give rise to a contractual duty, and where such provision constituted part of consideration for promise to sell to better secure vendor in payment of deferred portion of purchase price, it rendered entire contract unenforceable in equity.

6. Appeal and Error ⇐843(2)

Finding that an essential term of contract was too vague and uncertain to give rise to a contractual duty was sufficient to support judgment refusing to specifically enforce contract for sale of realty, and hence it was unnecessary on appeal to consider the sufficiency of evidence to support other findings.

Irwin M. Fulop, Beverly Hills, and Marvin A. Burnett, Los Angeles, for appellants.

Porter C. Blackburn, Burbank, for respondent.

VALLÉE, Justice.

Appeals by plaintiffs from judgments for defendant in two suits for specific performance of contracts for the sale of realty. The actions were consolidated for trial; separate findings and conclusions were made and judgments entered.

In 19618 the transaction will be referred to as the Woodman transaction. In 19619 it will be referred to as the Sunnyslope transaction.

The Woodman Transaction

The contract consisted of a written offer by plaintiff Bard to buy the realty in his name or in that of his nominee, which was accepted by defendant in writing, and escrow instructions signed by plaintiff Colorado Corporation, Ltd., and by defendant. The purchase price was \$17,500; payable

\$8,750 cash through the escrow and a note for \$8,750 with interest at 5% payable quarterly, principal payable on or before three years from date of the note "on unpaid balances." The note was to be secured by a purchase money deed of trust. It was agreed that the deed of trust should contain a provision that defendant would release parcels of not less than 50 feet by 150 feet fronting on Woodman Avenue, on payment of \$44 a front foot. The contract contained these provisions:

"The buyer herein agrees to construct at such time as he chooses residences of not less than 1200 square feet each on the parcels facing on Gault Street. This is an agreement between buyer and seller only and your escrow is in no way concerned with or responsible for the execution of this agreement. * * *

"This escrow is further contingent upon the purchaser receiving approval from the City of Los Angeles that they will issue building permits on a metes and bounds basis within 45 days from date hereof. If such approval cannot be received, then at the option of the purchaser any monies deposited are to be returned to the purchaser excepting any funds required to pay for expenses incurred in connection with title search and escrow fee."

Defendant agreed to deliver to the escrow an executed deed and to procure for Colorado a policy of title insurance. The escrow was opened on April 27, 1951. The instructions specified 90 days, or until July 26, for completion of the escrow. Plaintiff Colorado Corporation, Ltd., was designated as nominee by plaintiff.

The buyer did not secure the approval of the city of Los Angeles that it would issue building permits on a metes and bounds basis. On June 5, the buyer delivered to the escrow a writing by which it waived this provision of the contract and the instruments required by the contract.

About May 14, defendant delivered to the escrow a grant deed of the property signed by him, but not acknowledged. The deed contained this provision: "Said land shall be used for residence purposes only, each residence to contain not less than 1200 square feet each, exclusive of garages.

Lots on Gault Street are to be not less than 59 foot frontage."

On June 21, thirty-six days prior to the date fixed for close of the escrow, the seller delivered to the escrow a written notice purporting to cancel the escrow instructions and demanded the return of all papers deposited by him in the escrow.

On July 3, the buyer deposited \$8,750 in the escrow.

The court concluded: 1. The contract lacked mutuality. 2. Plaintiffs did not perform all of the undertakings required of them by the contract. 3. The contract was indefinite and uncertain; and as to defendant, it was unjust and unreasonable. 4. There was no consideration to support the contract apart from performance by plaintiffs. Specific performance was denied. Plaintiffs appeal from the judgment. Their assignment of error is that the findings are unsupported by the evidence.

We need to consider only whether the contract is so indefinite and uncertain that it is unenforceable in equity.

[1-3] A contract to be binding must be definite and certain. *Goehring v. Stockton Morris Plan Co.*, 93 Cal.App.2d 417, 420-421, 209 P.2d 41. A contract will not be enforced unless it is complete and certain. *Blake v. Mosher*, 11 Cal.App.2d 532, 535-536, 54 P.2d 492. Where a party seeks specific performance of a contract, the terms of the contract must be certain and definite in all particulars essential to its enforcement. A court must be able to say what is the stipulated performance. *Moore v. White*, 98 Cal.App.2d 510, 513, 220 P.2d 918. In *Cannaday v. Martin*, Tex.Civ.App., 98 S.W.2d 1009, at page 1012, the court said: "A promise to erect buildings where the dimensions and plans are not specified, or which refers to plans and specifications as a part of a contract though no plans and specifications are attached, * * * 'are all too vague,' and are not of 'sufficient definiteness' * * * to be 'enforceable.'" *Williston on Contracts*, Revised Edition, vol. 1, pp. 120, 121, par. 42. This text is supported by the holding in *Greater Houston Suburb. Corp. v. Dupuy & Mullen* (Tex.Civ.App.) 176 S.W. 668; *Bissinger v.*

Prince, 117 Ala. 480, 23 So. 67; *Palombi v. Volpe*, 222 App.Div. 119, 226 N.Y.S. 135, and *American Bridge & Contract Co. v. Bullen Bridge Co.*, 29 Or. 549, 46 P. 138." See, also, *California Refining Co. v. Producers Refining Corp.*, 25 Cal.App.2d 104, 76 P.2d 553; cf. *Ellis v. Klaff*, 96 Cal.App. 2d 471, 216 P.2d 15; *Donnelly v. Adams*, 115 Cal. 129, 46 P. 916; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 82-84, 54 P. 533; *Coghlan v. Salvatore Quartararo*, 15 Cal.App. 662, 666, 115 P. 664; *L. W. Blinn Lumber Co. v. Cohn*, 33 Cal.App. 386, 388, 165 P. 444.

[4] Obviously the clause by which the buyer agreed to construct residences on Gault Street was an essential term of the contract; it was part of the consideration to the seller for his promise to sell, manifestly to better secure him in the payment of the purchase price. Apart from the requirement that the residences should not be less than 1,200 square feet each, the contract is incomplete in not specifying how many residences were to be constructed and is silent as to the size (except that each was to be 1,200 square feet), type, location, cost, appearance, or any other details of construction. Plaintiffs waived their right to secure permission to build on a metes and bounds basis. The sizes of the parcels on Gault Street were not specified. At the oral argument, the parties agreed that the property was not subdivided.

[5] The provision of the contract with respect to the construction of residences on Gault Street is too vague and uncertain to give rise to a contractual duty. It made the entire contract unenforceable in equity.

[6] Since these findings alone support the judgment, it is unnecessary to discuss the sufficiency of the evidence to support the remaining findings. *Sands v. Eagle Oil & Refining Co.*, 83 Cal.App.2d 312, 321, 188 P.2d 782.

The Sunnyslope Transaction

The contract in this transaction also consisted of a written offer by plaintiff Bard to buy in his name or in that of his nominee, which was accepted by defendant in writing, and escrow instructions signed by Colorado, designated by Bard as his nomi-

nee, and by defendant. The purchase price was \$16,000; payable \$4,000 cash through the escrow and a note for \$12,000 with interest at 5% payable quarterly, principal payable on or before three years from date of the note "on unpaid balances." The note was to be secured by a purchase money deed of trust. Defendant agreed to deliver an executed deed into the escrow and to procure for Colorado a policy of title insurance. The contract contained these provisions:

"As a matter of record of an agreement between the parties hereto, when the parcel of land is mapped and subdivided the amount of principal then due is to be divided among all of the lots in the tract and the sum arrived at shall be the amount of money which must be paid to the seller, or his successors in interest, in order for him, or them, to release any particular lot or parcel from the purchase money trust deed in the customary manner, such as partial reconveyances. By 'releases' it is intended between the parties hereto that the seller will execute and forward to Trustee Request for Partial Reconveyance covering each parcel as payment is received from the buyer and such amounts so paid are to be deducted from the principal sum then remaining.

"It is further understood and agreed that any balance of principal still remaining due and unpaid three years after close of escrow must be paid in full at that time.

"The buyer herein agrees to construct at such time as he chooses residences of not less than 1200 square feet each on the parcels facing on Gault Street. This is an agreement between buyer and seller only and your escrow is in no way concerned with or responsible for the execution of this agreement."

The escrow was opened on May 1, 1951. The instructions specified 150 days, or until September 27, for completion of the escrow.

Plaintiff proceeded with plans for subdivision of the property and submitted a tentative map to the Planning Commission of Los Angeles. On July 5, 1951, the Planning Commission approved the tentative tract on various conditions. Bard testified that

plaintiffs did not comply with the conditions because they could not get the property.

Prior to September 29, 1951, plaintiffs deposited \$4,000 and the instruments required by the contract in the escrow.

On October 3, 1951, defendant delivered to the escrow holder a notice in writing purporting to cancel the escrow instructions.

The court drew the same conclusions as to the contract in this case as it did as to the contract in the Woodman transaction. Specific performance was denied. Plaintiffs appeal from the judgment contending that the findings are unsupported by the evidence.

What we have said with respect to the contract in the Woodman transaction is equally applicable to the contract in this case. The provision of the contract in this case with respect to the construction of residences on Gault Street is identical with the provision in the Woodman case. It likewise is too vague and uncertain to give rise to a contractual duty, and renders the entire contract unenforceable in equity.

Each judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



121 Cal.App.2d 241

**RELIANCE LIFE INS. CO. OF
PITTSBURGH**

v.

JAFFE et al.

GANDIN et al. v. JAFFE.

Civ. No. 19556.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

Interpleader action by insurer to determine persons entitled to possession of proceeds of policy. The Superior Court, Los Angeles County, Arthur Crum, J., awarded proceeds to trustee for insured's

minor children, as directed by insured in his change of beneficiary, and the minor children, through their mother as guardian ad litem, appealed. The District Court of Appeal, Moore, P. J., held that where insured, in contemplation of divorce, entered into property settlement agreement with his wife whereby insured agreed to maintain policy, the beneficiaries of which were to be the two children, share and share alike, or survivor of them, and insured subsequently executed change of beneficiary prior to his death, whereby he directed that proceeds of policy be placed in two equal trusts with each child a beneficiary and his sister as trustee, the prior equitable interest acquired by children by virtue of settlement agreement was not affected by attempted creation of trusts, and proceeds of policy could not be awarded to trustee.

Judgment reversed and cause remanded with instructions.

1. Insurance ⚡586

The interest of beneficiary in a policy which authorizes an alteration of its terms is not ordinarily a vested right, but is a mere expectance of an inchoate gift which may be consummated upon the death of insured but which is revocable at option of insured during his lifetime.

2. Insurance ⚡586, 587

Insured may waive his right to change beneficiary and by contract may convert contingent interest into a vested equitable interest in policy which may not be subsequently defeated by an effort to change beneficiary.

3. Contracts ⚡187(1)

Children of parties to property settlement agreement made in contemplation of divorce were entitled, as third-party beneficiaries, to enforce provisions of such agreement made expressly for their benefit in same manner as could a party to the agreement. Civ.Code, § 1559.

4. Insurance ⚡593(1)

Property settlement agreement executed between wife and insured in contemplation of divorce, whereby insured agreed to maintain the policy, the beneficiaries of which were to be his two children, share

and share alike, or the survivor of them, operated as an equitable assignment of proceeds of the policy.

5. Husband and Wife ⚡279(1)

In interpreting property settlement agreement made in contemplation of divorce, language of agreement must control, and not a gratuitous interpretation thereof.

6. Contracts ⚡152

The common or usual meaning will be ascribed to words used in a contract unless the context or the circumstances indicate that in a particular case a special meaning should be attached to them.

7. Insurance ⚡585(1)

In dealing with policies of insurance, the word "beneficiary" ordinarily means that person who is entitled to the proceeds of a policy on the occurrence of the event designated.

See publication Words and Phrases, for other judicial constructions and definitions of "Beneficiary".

8. Insurance ⚡587

Where insured entered into property settlement agreement with his wife in contemplation of divorce, whereby insured was to maintain policy, the beneficiaries of which were to be his two minor children, share and share alike, or survivor of them, and insured subsequently executed change of beneficiary, prior to his death, whereby he directed that proceeds of policy be placed in two equal trusts with each child a beneficiary and his sister as trustee, the prior equitable interest acquired by children by virtue of settlement agreement could not be affected by attempted creation of trusts, and proceeds of policy could not be awarded to trustee.

9. Infants ⚡116

In interpleader action by insured to determine rights of minor beneficiaries to proceeds of policy, prayer of guardian ad litem of minor beneficiaries for attorney's fees was properly disallowed by trial court, in view of fact that no contract had been approved by the court and that judgment was not recovered by or on behalf of the minors, but where holding on appeal

was in favor of guardian ad litem, reasonable attorney's fees would be allowed. Probate Code, § 1509.

Fred H. Steinmetz, Hollywood, and William B. Murrish, Los Angeles, for appellants.

Jess Whitehill, Los Angeles, for respondent.

MOORE, Presiding Justice.

David and Gertrude Gandin had two minor daughters, to wit: Leslie S. and Peggy Dee. In contemplation of divorce, the parents by a writing entered into an agreement for a property settlement. By that document they agreed that a life insurance policy in David's name "is to be maintained by the husband"; the beneficiaries to be Leslie and Peggy Dee, share and share alike, or to the survivor of them." Prior to his death David executed a change of beneficiary whereby he directed that the proceeds of the policy be placed in two equal trusts with each daughter a beneficiary and his sister, Rose Gandin Jaffe, the trustee of both trust, each trust to terminate upon the beneficiary's attaining the age of twenty-one years.

Following the death of David, Rose Jaffe as trustee, and Gertrude Dobree as potential guardian of the persons and estates of the minor children, filed claims with the insurance company after which it filed its complaint in interpleader to determine who is entitled to the possession of the proceeds of the policy. The trial court awarded the proceeds to Rose Jaffe as trustee as directed by the trustor in his "change of beneficiary." The minor children through their mother Gertrude Dobree as guardian ad litem appeal from the judgment contending that the change of beneficiary creating the trusts was contrary to the terms of the property settlement.

[1,2] The interest of a beneficiary in a policy which authorizes an alteration of its terms is not ordinarily a vested right. On the contrary, it is a mere expectance of an inchoate gift which may be con-

summated upon the death of the insured. However, it is revocable at the option of the insured during his lifetime. *Mutual Life Ins. Co. v. Franck*, 9 Cal.App.2d 528, 537, 50 P.2d 480. But the latter may waive his right to change the beneficiary and by contract he may convert the contingent interest into a vested equitable interest in the policy which may not be subsequently defeated by an effort to change the beneficiary. *Chilwell v. Chilwell*, 40 Cal.App.2d 550, 553, 105 P.2d 122; *Shoudy v. Shoudy*, 55 Cal.App. 344, 351, 203 P.2d 433.

[3,4] No question having been raised with respect to the execution of the property settlement, it is assumed to be valid and based upon sufficient consideration. The children as third-party beneficiaries may enforce the provisions therein made expressly for their benefit in the same manner as can a party to the agreement. Civil Code, § 1559. Regardless of whether the insured complies with the terms of the contract, it operates as an equitable assignment of the proceeds of the insurance policy. *Mutual Life Insurance Co. v. Henes*, 8 Cal.App.2d 306, 311, 47 P.2d 513. The question for decision then is what was agreed upon by David and Gertrude.

The pertinent portions of the property settlement are: "(8) Husband and wife agree that the insurance policies and dividends now pending are to be maintained as follows:

"(a) California Western States Life Insurance Policy No. 575435, in the name of Leslie S. Gandin to be maintained by the husband with Peggy Dee Gandin to be named as beneficiary and David Gandin as contingent beneficiary.

"(b) Metropolitan Life Insurance policy #763319M1 in the name of Gertrude Gandin to be maintained by the wife with Peggy Dee Gandin and Leslie S. Gandin to be named as beneficiaries, share and alike, or to the survivor of them.

"(c) Reliance Life Insurance Co. policy #1091164 in the name of David Gandin is to be maintained by the husband, the beneficiaries are to be Leslie S. Gandin and Peggy Dee Gandin, share and share alike, or to the survivor of them. * * *

"(f) Husband and wife agree that in the event of extenuating economic circumstances the husband may in his discretion, discontinue or borrow on any or all of the aforementioned insurance policies maintained by him, so long as the proceeds thereof are used for the benefit of the children, Leslie S. Gandin and Peggy Dee Gandin. The policy maintained by the wife may also, in her discretion, be discontinued or borrowed upon by her so long as the proceeds thereof are used for the benefit of the children, Leslie S. Gandin and Peggy Dee Gandin."

[5-7] Respondent asserts that the word "beneficiary" has several meanings, including a person for whose benefit a trust is created. Also, she contends that the interest David attempted to vest in the children by the creation of a trust was in fulfillment of the property settlement. But in interpreting that contract, its language must control and not a gratuitous interpretation thereof. The common or usual meaning will be ascribed to words used in a contract unless the context or the circumstances indicate that in a particular case a special meaning should be attached to them. In dealing with policies of insurance, the word beneficiary ordinarily means that person who is entitled to the proceeds of a policy on the occurrence of the event designated. In subsection eight of the agreement, several references to "beneficiary" are made. If any other type of beneficiary had been intended, it would have been incumbent upon the parties involved to make the distinction in the instrument.

On the face of the policy in question appears the following: "Beneficiary (unless subsequently changed) Gertrude M. Gandin, wife, if living, otherwise all children of the insured and Gertrude M. Gandin born of this marriage, share and share alike, survivors or survivor, as per endorsement." The language of subparagraph eight of the property settlement quoted above discloses an unequivocal agreement that the life policies be maintained in the form and manner therein particularized and does not mention the possibility of either party's attempting to create a trust with the proceeds of the

policies as the trust estate, with Rose Jaffe as trustee. In the absence of expressions from their property settlement to the contrary, it is not reasonable to conclude that the parties to the agreement intended other than that the specified children were to be changed from contingent beneficiaries to direct beneficiaries.

The children did not have an absolute right to the face value of the policy, since subsection (8), subsubsection (f) of the property settlement gave the father the right to discontinue or borrow on the policy at his discretion. Respondent argues that since the children did not have such a right to the proceeds, the creation of the trusts cannot affect their interest in the policy. But this restriction on their rights is expressed in the agreement and it is reasonable to believe that if other restrictions, such as a trust during their minority, had been contemplated, they also would have been expressed in subsection (8).

The conclusion to be drawn from the foregoing is that the creation of the trusts by David was a unilateral concept on his part in his zeal to give respondent the power to manage the trust estates instead of his former spouse. It was not in contemplation of the parties to the property settlement.

Respondent contends that since the proceeds, if awarded to the children directly, would be held by a guardian of their estates until they reached twenty one, there is no difference between the trust status and direct beneficiary status and therefore the agreement has been complied with. This is not pertinent. The question is not whether the children are getting what they would get in any event, but whether the creation of the trust, regardless of its duration, was contrary to the terms of the property settlement. The fallacy of her position will readily appear if it be assumed that the trust does not terminate until the children attain thirty years. In that event, the financial effect would be different, but the legal question would remain the same.

[8] The attempted creation of trusts by David did not affect the prior equitable interest of the children. Therefore, it was error to award the proceeds of the insurance policy to Rose Jaffe as trustee.

In a prior proceeding in the matter of the guardianship of the persons and estates of the minor children, the court ordered that Gertrude Gandin Dobreer be appointed guardian of the persons of the children and retained jurisdiction of the matter for the purpose of appointing a guardian of the estates upon a showing of the existence of property belonging to the minors which may require a guardian. No evidence was heard at the trial of the present action on the guardianship matter and no guardian of the estates had been appointed.

[9] Appellant's prayer for attorney's fees was disallowed by the trial court. This was proper under Probate Code section 1509 since no contract had been approved by the court and judgment was not recovered by or on behalf of the minors. But since the holding on appeal is in favor of appellant, reasonable attorney's fees should be allowed to appellant. *Leonard v. Alexander*, 50 Cal.App.2d 385, 387, 122 P.2d 984.

The judgment appealed from is reversed and the cause is remanded with instructions to direct the payment by plaintiff of the proceeds of its life insurance policy to such guardian of the estates of the children as shall be appointed and to order the payment by such guardian of a reasonable fee for the services of appellants' attorneys prior to the filing of notice of appeal and the payment also to such attorneys of the sum of \$350 for the prosecution of this appeal.

McCOMB and FOX, JJ., concur.



121 Cal.App.2d 280

ELEY v. CURZON et al.
Civ. 19498.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1953.

Rehearing Denied Dec. 7, 1953.

Hearing Denied Jan. 13, 1954.

Action for injuries which plaintiff asserted were received when plaintiff backed

plaintiff's automobile off and along side of section of highway covered with smoke from brush and timber fire, and was allegedly struck by automobile of one defendant and successively by automobiles of remaining two defendants. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., entered a judgment in favor of defendants and plaintiff appealed from the judgment and also from order denying plaintiff's motion for a new trial. The District Court of Appeal, McComb, J., held that findings that no defendant struck plaintiff were sustained by evidence.

Judgment affirmed and purported appeal from order denying motion for new trial dismissed.

1. Appeal and Error ⇐931(1)

On plaintiff's appeal from judgment for defendants after trial before court without jury in action for injuries resulting to plaintiff from allegedly having been struck by defendants' automobiles, evidence was required to be viewed in light most favorable to defendants.

2. Appeal and Error ⇐1010(1)

Appellate court is bound by findings of fact, supported by substantial evidence, of trier of fact.

3. Automobiles ⇐242(1)

In action for injuries which plaintiff asserted were received when plaintiff backed plaintiff's automobile off and along side of section of highway covered with smoke from brush and timber fire, and was struck allegedly by automobile of one defendant and successively by automobiles of remaining two defendants, plaintiff had burden to prove each affirmative allegation of complaint. Code Civ.Proc. § 1981.

4. Evidence ⇐94

In action for damages burden of proof does not shift but remains with plaintiff.

5. Automobiles ⇐244(1)

In action for injuries which plaintiff asserted were received when plaintiff backed plaintiff's automobile off and along side of section of highway covered with smoke from brush and timber fire, and was struck allegedly by automobile of one defendant and successively by automobiles of remaining two defendants, findings that none of

the defendants struck plaintiff were sustained by evidence. that upon retrial a different judgment will result.

6. Appeal and Error ⇨717

An opinion of trial judge in action for injuries may be used by appellate court in ascertaining process by which a judgment has been reached, but it will not be considered in determining whether findings of court are supported by evidence.

7. Appeal and Error ⇨972

Trial ⇨112

Determination of how much time should be allowed for argument in action for injuries, and as to whether briefs should be filed, is within province of trial court, and his determination will not be disturbed on appeal in absence of showing of prejudice.

8. Appeal and Error ⇨1046(1)

Where delay in trial court's rendering of decision in action for injuries was not an abuse of discretion, and plaintiff did not show prejudice thereby, judgment for defendants would not be disturbed on appeal because of such delay.

9. Appeal and Error ⇨981

Where newly discovered evidence is presented on motion for new trial, trial judge's determination as to whether to grant motion will not be disturbed on appeal in absence of a clear showing of an abuse of discretion.

10. Appeal and Error ⇨981

Where evidence presented on plaintiff's motion for new trial of action for injuries made on ground of newly discovered evidence was either contradictory to that produced by defendants at trial or merely cumulative evidence of that produced by plaintiff, and trial judge believed result would not be different upon retrial even though allegedly newly discovered evidence were considered, and record did not show abuse of discretion, refusal of trial court to grant new trial would not be disturbed on appeal.

11. New Trial ⇨108(1)

A new trial will not be granted on motion for new trial on ground of newly discovered evidence unless trial judge believes

12. Appeal and Error ⇨110

An order denying a motion for new trial is nonappealable.

Irving Sulmeyer, Los Angeles, for appellant.

Kaetzel & Kaetzel, San Luis Obispo, for respondent F. Stuart Curzon.

Clarence A. Rogers, Santa Barbara, for respondent E. S. Johnson.

Marion A. Smith and Robert L. Trapp, Santa Maria, for respondent Harold F. Ashley.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover damages for personal injuries resulting to plaintiff from allegedly having been struck by defendants' automobiles, plaintiff appeals. There is also a purported appeal from the order denying plaintiff's motion for a new trial.

[1] Viewing the evidence as we must in the light most favorable to defendants (respondents) the record discloses that on October 6, 1950, an extensive brush and timber fire developed on property adjoining Highway 101 about a mile or mile and one half north of Nipomo in San Luis Obispo County. This fire started about 7:30 or 8 o'clock in the evening, its origin being some three miles east of the highway. It proceeded in a westerly direction, blown by a wind 45 to 60 miles per hour, until the dense smoke completely enveloped a stretch of the highway in excess of one half mile in length. At about 9 p. m., and for a period of several hours thereafter, the smoke blowing across the highway in that location was very heavy and dense.

Testimony was given by Clyde H. Cint that about 9:00 p. m. he commenced attempting to stop traffic proceeding north on the highway. Sometime after he established himself at the south end of the smoke area, a man came out of the fire and asked him to call an ambulance, stating, "There's a badly injured man in the fire." Mr. Cint

ran into the smoke area and after a search found plaintiff, badly injured. Plaintiff was off the highway and was lying with his head close to a fence which ran along the easterly side of the right of way. Mr. Cint saw that plaintiff was conscious and asked him what had happened. He received the answer, "A truck ran over me, and the truck driver took me by the shoulders and pulled me up to the fence and then ran off and left me." At this time plaintiff was badly injured although he was rational and quite clear in what he said.

On the evening of October 7, 1950, Officer Robert Danneberg, during a visit to plaintiff's hospital room, asked plaintiff what happened. His testimony of the conversation was, "He said he had helped some woman get her car started and he was in the process of getting back to his car. * * he said he didn't know exactly what hit him. * * * He thought it was a car."

At least two other accidents occurred in the general section of the highway covered with smoke. In one of these accidents, defendant F. Stuart Curzon collided with an object in the smoke. He did not know what the object was but believed it to be a truck. In the other accident the cars of defendants E. S. Johnson and Harold F. Ashley collided on the highway in the smoke area.

February 13, 1951, plaintiff filed a verified complaint in the present action which contained separate causes of action against each of the defendants. In each cause of action it was stated, "That the plaintiff is in doubt as to whether he is entitled to redress from the defendant F. Stuart Curzon or the defendant E. S. Johnson, or the defendant Harold F. Ashley, or the defendant Doe One."

At the time of the trial plaintiff stated that he had backed his car off and along side of the highway; he had been struck by defendant Curzon driving at about 50 miles per hour, and thereafter was struck successively by the other two cars of the other two defendants.

On cross-examination he stated he had read the highway reports concerning the various accidents, that he was told of the

presence of certain skid marks on the pavement, that there was much of "presumption and conjecture" in his testimony. That this is true is borne out by the statement in plaintiff's brief as follows: "Counsel for plaintiff, * * * cannot say for sure from looking at the cold record of this case, just how much of plaintiff's testimony is actually first-hand observation at the immediate time of the accident, and *how much is after-acquired* recollection based upon reports given to plaintiff after the accident." (Emphasis ours.)

Questions: First: Was there substantial evidence to sustain these findings of the trial court?

(a) "That it is not true that the injuries or damages sustained by the plaintiff were due to any carelessness, negligence or recklessness of the defendants or either or any of them."

(b) "That it is true that on October 6, 1950, the plaintiff herein stopped his Ford automobile on Highway 101, headed in a northerly direction approximately two miles north of the town of Nipomo, in the County of San Luis Obispo, State of California. That it is not true that plaintiff stopped his Ford automobile to the right of the paved portion of Highway 101, nor is it true that at said time and place plaintiff was standing near the rear of his automobile."

Yes. (a) Plaintiff's own statement to Mr. Cint that he was struck by a truck and that the driver pulled him off the highway and left him by a fence, and the testimony of Officer Danneberg that plaintiff told him he had been helping some woman get her car started, and was in the process of getting back to his own car, and did not know what hit him, constituted substantial evidence to sustain the first questioned finding.

Likewise, defendants Ashley and Johnson denied that their cars had struck plaintiff, while defendant Curzon testified that he did not run off the highway to his right nor did he see plaintiff or hear any cries of distress. The foregoing testimony clearly sustains the first questioned finding.

(b) This finding was sustained by plaintiff's statement to Mr. Cint that he had been

struck by a truck and that the truck driver had pulled him off the highway to the location where he was found. Also there was the testimony of Officer Danneberg that he made an examination of the ground immediately adjoining the area and adjoining the highway on the dirt shoulder and found no gouge marks or skid marks of any nature whatsoever.

[2] It would serve no useful purpose to set forth conflicting testimony since an appellate court is bound by the findings of fact, supported by substantial evidence, of the trier of fact. (*Williams v. General Insurance Co.*, 8 Cal.2d 1, 4 [1], 63 P.2d 289; *Raich v. Schwartz*, 107 Cal.App.2d 364, 366 [3], 237 P.2d 68.)

[3] It is likewise settled that the burden of proof was upon the plaintiff to prove each affirmative allegation of his complaint. Section 1981 of the Code of Civil Procedure provides: "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

[4] In an action for damages the burden of proof does not shift but remains with the plaintiff having the affirmative of the issue. (*Valente v. Sierra Ry. Co.*, 151 Cal. 534, 539, 91 P. 481.)

Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91, is not here in point. In such case the evidence disclosed that plaintiff was injured by a shot which was identified as being the same size and character used by each of the two defendants. The evidence showed that both defendants had shot at a quail and in so doing shot towards plaintiff. Consequently, in that case it was held as a necessary conclusion that the shot came from the gun of one of the two defendants, that one of the defendants had hit him.

[5] In the present case there is evidence to sustain the trial court's findings that none of the defendants struck plaintiff. Therefore *Summers v. Tice*, supra, is of no assistance in solving the present appeal.

[6] There is likewise no merit in plaintiff's contention that the findings are inconsistent with the trial court's statement in its memorandum opinion on denial of the motion for a new trial that, "What really happened on that unfortunate night is largely veiled in smoke and I cannot honestly say who, if anyone, was at fault." An opinion of the judge of the trial court may be used by the appellate court in ascertaining the process by which a judgment has been reached, but it will not be considered in determining whether the findings of the court are supported by the evidence. (*Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 907[6], 185 P.2d 396.)

In view of the fact that the foregoing findings are sustained by the evidence it is unnecessary for us to consider whether other findings questioned by plaintiff find substantial support in the record.

Second: *Did the trial court commit prejudicial error in taking the case under submission, requesting briefs and not deciding it for approximately four months after the date of the trial?*

[7,8] *No.* The trial was concluded on November 23, 1951, and submitted on briefs. Plaintiff's opening brief was filed December 28, 1951; defendant Johnson's April 4, 1952; and plaintiff's reply brief was filed on May 9, 1952. The case was submitted and decided on June 2, 1952. It thus appears that of the six months which elapsed between the closing of evidence and the decision of the case, plaintiff took two months to file his respective briefs, and defendants took three months to file their briefs. After the filing of all briefs the court took approximately one month before rendering its decision. No prejudice has been shown by plaintiff in this delay in the decision of the case, it being in the province of the trial court to determine how much time there should be allowed for argument and whether briefs should be filed. The determination of the trial court in the absence of a showing of prejudice will not be disturbed on appeal. (*Gunn v. Superior Court*, 76 Cal.App.2d 203, 205[1], 173 P.2d 328.)

The correct rule is stated in *Berry v. Chaplin*, 74 Cal.App.2d 669, 672 et seq., 169 P.2d 453, 456, "The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power." Clearly in the instant case there has been no showing of an abuse of discretion.

Third: *Did the trial court commit prejudicial error in denying plaintiff's motion for a new trial?*

[9, 10] *No.* Plaintiff upon his motion for a new trial presented evidence which was either contradictory testimony to that produced by defendants at the trial or merely cumulative evidence of that produced by plaintiff. The rule is settled that where such evidence is presented on a motion for a new trial, the trial judge's determination will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. (*Pandolfo v. Jackson*, 12 Cal.App. 2d 232, 236[4], 55 P.2d 550.)

[11] It is likewise settled that a new trial will not be granted on such a motion unless the trial judge is of the opinion that upon retrial a different judgment will result. (*Bliss v. Security-First Nat. Bank*, 81 Cal.App.2d 50, 59[11], 183 P.2d 312.) In the instant case the trial judge was of the opinion that upon a retrial there would not be a different result even though the allegedly newly discovered evidence were considered. The record fails to show any abuse of discretion. We are therefore bound by his determination.

[12] An order denying a motion for a new trial is nonappealable. (*Caldwell v. Caldwell*, 80 Cal.App.2d 378, 384[4], 182 P.2d 258; *Marr v. Southern Cal. Gas Co.*, 194 Cal. 332, 335[3], 228 P. 534.) The purported appeal from the order denying the motion for a new trial is dismissed.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

121 Cal.App.2d 322

PEOPLE v. DRAGOO.

Cr. 5049.

District Court of Appeal, Second District,
Division 3, California.

Nov. 17, 1953.

Criminal prosecution for unlawfully furnishing and giving away marijuana. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment of guilty and defendant appealed. The District Court of Appeal, Vallée, J., held that notwithstanding defendant's contention that witness's testimony was improbable and false reviewing court cannot reject testimony that has been believed by triers of fact unless it is a physical impossibility that it be true.

Judgment affirmed.

1. Criminal Law ⇨260(11)

Reviewing court cannot reject testimony that has been believed by the trier of fact unless it is a physical impossibility that it be true or its falsity is apparent without resorting to inferences or deductions. Health and Safety Code, § 11713.

2. Criminal Law ⇨553, 1144(13)

The trier of fact may believe and accept portion of the testimony of a witness and disbelieve the remainder or have a reasonable doubt as to its effect and on appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, judgment.

3. Poisons ⇨9

Evidence of police officer to whom defendant gave marijuana was of sufficient character to justify conviction for unlawfully furnishing marijuana. Health and Safety Code, § 11713.

4. Criminal Law ⇨878(4)

In prosecution for unlawfully furnishing marijuana, fact that defendant was acquitted on two other counts of furnishing marijuana to prosecuting witness did not entitle defendant to a reversal on theory that judgment of conviction was inconsistent with judgment of acquittal. Health and Safety Code, § 11713.

Louis Warren, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Dep. Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant appeals from a judgment of conviction of unlawfully furnishing and giving away marijuana in violation of section 11713 of the Health and Safety Code and from the order denying his motion for a new trial. He contends the evidence is insufficient to support the judgment. The contention is without merit.

In the early evening of September 22, 1952, Police Officer Ellena, incognito, seated himself at the bar in a saloon in Pasadena where defendant was employed as a bartender. Defendant had known Ellena about six months. Officer Newland was seated two seats away. Ellena asked defendant to sell him a "joint". Defendant replied, "Sell, hell, I will give you one—never say I didn't give you anything." Defendant then reached in his pocket, pulled out a "brown paper cigarette" and handed it to Ellena. The foregoing was testified to by Ellena. Officer Newland testified he saw defendant reach in his pocket and hand Ellena the cigarette. The cigarette contained marijuana. Defendant denied possession of marijuana and denied giving the cigarette to Ellena.

[1-3] Defendant argues that he and Ellena had had trouble; that Ellena was biased and prejudiced against him; that the evidence is so improbable and false as to be incredible. These were matters for consideration of the trial court and not for this court. "A reviewing court will not hold unsupported the trial court's finding of guilt merely because it might reasonable draw different inferences from those the trial court reasonably drew, or might not be convinced beyond a reasonable doubt of the guilt of the defendant. *People v. Kerr*, 37 Cal.2d 11, 15, 229 P.2d 777; *People v. Tollack*, 105 Cal.App.2d 169, 172, 233 P.2d 121. It is the trier of the fact which must be persuaded beyond a reasonable doubt of the guilt of the defendant. *People v. Smith*, 35 Cal.App.2d 73, 76, 94 P.2d 633.

A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758. In order to say that testimony is inherently improbable, it must appear that what was related or described could not have occurred. *People v. Klinkenberg*, 90 Cal.App.2d 608, 627, 204 P.2d 47, 613; *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836. Testimony which merely discloses unusual circumstances is not inherently improbable. *Kidroski v. Anderson*, 39 Cal.App.2d 602, 605, 103 P.2d 1000. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758. * * * The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836. Unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Our function is to determine whether the evidence, if believed, is of sufficient character to justify conviction." *People v. Whitehurst*, 112 Cal.App.2d 140, 143-144, 245 P.2d 509, 510.

[4] Defendant also contends that because he was acquitted of two other counts of furnishing and giving away marijuana to Ellena which were predicated on the testimony of Ellena, the judgment of conviction is inconsistent with the judgment of acquittal. He argues that since the trial judge acquitted him on the other counts, he necessarily disbelieved the testimony of Ellena with respect to those charges; and that having disbelieved him with respect thereto, he could not reasonably believe his testimony with respect to the offense of which he was convicted. If the judgments are in

fact inconsistent, that fact does not entitle defendant to a reversal. Pen.Code, § 954; *People v. Greer*, 30 Cal.2d 589, 599, 184 P.2d 512; *People v. Whitehurst*, 112 Cal.App.2d 140, 144-145, 245 P.2d 509.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



121 Cal.App.2d 197

SPROUL v. CUDDY et al.

Civ. 19658.

District Court of Appeal, Second District,
Division 1, California.

Nov. 10, 1953.

Action on grounds of negligence and breach of warranty for injuries sustained in fall allegedly caused by reason of fact that lessor delivered invalid walker device which was allegedly unfit for use. The Superior Court of Los Angeles County, Henry M. Willis, J., entered minute order dismissing cause, and lessee appealed. The District Court of Appeal held that where on basis of special defense interposed, a minute order was made dismissing plaintiff's complaint, such minute order was not a "judgment" within code provision that if decision of court upon special defense is in favor of defendant, judgment for defendant shall thereupon be entered, and appeal from such minute order was premature.

Appeal dismissed.

1. Pleading $\hookrightarrow$ 182

In action on grounds of negligence and breach of warranty for injuries sustained in fall allegedly caused because lessor delivered invalid walking device which was unfit for use, where lessor interposed special defense and pleaded document providing that lessee acknowledged that merchandise was received in good condition and that lessee would save and hold harmless

lessor for damage sustained in use of merchandise and name of lessee's husband appeared thereon, lessee by taking no further action by way of denying such defense admitted genuineness and due execution of document. Code Civ.Proc. § 448.

2. Husband and Wife $\hookrightarrow$ 25(1)

Where lessor of invalid walking device allegedly delivered device and statement to effect that lessee acknowledged that device was received in good condition and that lessee agreed to save and hold lessor harmless for damages sustained in use of device and lessee allegedly sustained further injuries when she fell because device was unfit for use, whether name was signed to statement by lessee or lessee's husband would make no difference as far as statement's legal effect was concerned, in lessee's action against lessor on grounds of negligence and breach of warranty.

3. Bailment $\hookrightarrow$ 9

Husband and Wife $\hookrightarrow$ 25(1)

Where lessor delivered invalid walking device and document stating that lessor made no warranty express or implied as to condition, quality or any other matter of equipment, that lessee acknowledged that equipment had been inspected and received in good condition and that lessee agreed to save and hold lessor harmless for any damage sustained in use of equipment, and such document was allegedly signed by lessee's husband as agent for lessee, such document would be available to lessor and would be adequate as defense to action for negligence and breach of warranty.

4. Appeal and Error $\hookrightarrow$ 337(1)

Where, on basis of special defense interposed, a minute order was made dismissing plaintiff's complaint, such minute order was not a "judgment" within Code provision that if decision of court upon special defense is in favor of defendant, judgment for defendant shall thereupon be entered and appeal from such minute order was premature. Code Civ.Proc. §§ 581, 581d, 597.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

George W. Van Dyke and Owen M. Murphy, by Owen M. Murphy, Long Beach, for appellant.

Sampson & Dryden, Los Angeles, by Wendell Mackay, Los Angeles, for respondents.

PER CURIAM.

Plaintiff has filed a notice stating that she appeals "from that certain judgment rendered on the 7th day of August, 1952, in favor of the defendants and against the plaintiff above named, and the whole thereof". We have examined the Clerk's Transcript on appeal and find in it no such judgment although the said transcript has been certified by the trial court as including all of the papers used or considered in the determination of the matter appealed from. We have also examined the original file in this case, No. 591959 in the trial court, and find in it no such judgment. There is included in the Clerk's Transcript a Minute Order of August 7, 1952, which includes, "Motion by attorney for defendant to dismiss 1st and 3rd causes of action is by the court granted. Cause dismissed".

Plaintiff had filed a first amended complaint containing three causes of action, the first two alleging negligence and the third alleging breach of warranty. They set out that plaintiff had undergone an operation and was unable to bear weight on her right leg; that she rented an "invalid walker" device from defendant; that because of negligence on the part of defendant the "invalid walker" was in a condition not fit for the use for which it was rented and that as a proximate result of defendant's negligence and breach of warranty she fell and sustained further injury, and sought damages to compensate her therefor.

Defendant denied negligence and denied any breach of warranty. The second cause of action was dismissed by the court as being substantially the same as the first cause of action. Defendant interposed a seventh special defense, pleading a document which recited that the device was delivered to Mr. Chester H. Sproul and contained the following:

"Licensee—Take Notice—Licensor uses great care to have all of its equipment in

good order and repair, gives no warranty expressed or implied, as to condition, quality or any other matter of any equipment sent out, and will in no way be responsible for damages resulting from use thereof. Licensee acknowledges that the above merchandise and/or equipment has been inspected and received in good condition and accepted as is, and the Licensee agrees to save and hold harmless the Licensor, for any damage sustained in the use of said merchandise and/or equipment."

[1,2] After the word "Licensee" appears the name "C. H. Sproul". Defendant alleged that Chester H. Sproul, as the husband and agent of plaintiff, signed this document but later stated to the court that plaintiff had signed her husband's name and that thereby plaintiff is barred and estopped from proceeding against defendant. After defendant had served and filed this special defense, plaintiff took no further action by way of denying it and the genuineness and due execution of the document were thereby admitted. Sec. 448, Code of Civil Procedure. Whether the name was signed to the document by plaintiff's husband or whether his name was signed by the plaintiff herself, would apparently make no difference as far as its legal effect is concerned in this case.

When the case was called for trial, the court undertook to hear and dispose of the seventh special defense which was interposed as constituting a bar to further proceedings under the complaint. The court ruled that the legal effect of the document thus signed by plaintiff or by her husband was to preclude the action brought by her as set out in her amended complaint, and thereupon made the Minute Order of August 7th, above referred to, stating as follows:

"* * * the motions of the defendant to dismiss causes number three and one are granted, and the cause will be ordered dismissed.

"The motion counsel made this morning that the court proceed to try the special issue without a jury has been abandoned as it is not now germane at all. * * * So, that will be dismissed—that motion will be dismissed.

"The defendants will prepare the form of a judgment. No findings required."

Such a dismissal does not seem to be provided for by Sec. 581, Code of Civil Procedure. The provisions, therefore, of Sec. 581d, Code of Civil Procedure, that an order of dismissal when entered in the minutes shall constitute a judgment would not support plaintiff's assumption that the minute order of August 7, was an adequate substitute for the written judgment which the trial court directed defendant to prepare but which does not appear in the record.

Section 597, Code of Civil Procedure, which provides for trial of special defenses sets out that: "* * * If the decision of the court, * * * upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; * * *."

As stated in *Woodhouse v. Pacific Elec. Ry. Co.*, 112 Cal.App.2d 22, 25, 245 P.2d 701, 703: "If, on the trial of special defenses only, the decision is in favor of the defendant pleading the same, the trial is at an end, *Steiner v. Thomas*, 94 Cal.App.2d 655, 658, 211 P.2d 321; a judgment is then entered for the defendant; and, on a motion for a new trial or upon appeal from the judgment, the decision on the special defenses and all rulings on the trial of them may be reviewed."

"* * * the effect of failure to file the affidavit is merely to admit that the instrument pleaded is what it purports on its face to be; that the matters recited therein are true; and that it was executed and delivered by the parties who signed it, in the capacity in which they appear to have acted. A plaintiff * * * may still attack the instrument for any cause not going to its genuineness or due execution, and may, without further pleading, introduce competent evidence to sustain any other legitimate defense thereto, such as fraud, mistake, undue influence, * * *." 21 Cal.

Jur. 168; *Donovan v. Security-First Nat. Bk.*, 67 Cal.App.2d 845, 852, 155 P.2d 856.

[3] Plaintiff's impression that such a release is not available to defendant or at least is not adequate as a defense to an action for negligence and breach of warranty appears erroneous in the light of the court's holding in *Werner v. Knoll*, 89 Cal. App.2d 474, 201 P.2d 45, 46. In that case defendant interposed a special defense that in an action for negligence setting up as a bar to the maintenance of the action a covenant between the parties that defendant "shall not be liable for any damage arising from personal injuries" etc. The trial court considered this special defense, and, as stated in the opinion at page 475 of 89 Cal.App.2d, at page 46 of 201 P.2d: "A hearing was had at which evidence, both oral and documentary was introduced, including the agreement between plaintiff and defendant. At the conclusion thereof the court found in favor of the defendant that plaintiff was bound by said provision, that it was not against public policy or otherwise invalid and that plaintiff was barred from further prosecution of his complaint and that the same should be dismissed. Judgment was entered accordingly in favor of the defendant from which judgment plaintiff has taken this appeal, * * *." The judgment in that case was affirmed.

Plaintiff's closing brief deplors the failure of the trial court to afford plaintiff an opportunity to offer evidence and have at least a court trial on the issue raised by the special defense. It is unfortunate that this desire of plaintiff was not more clearly conveyed to the trial judge when the matter was being considered.

[4] When, as in this case, on the basis of special defense interposed, a minute order is made dismissing plaintiff's complaint, that minute order is not such a judgment as is contemplated by Sec. 597, Code of Civil Procedure. Plaintiff's appeal is premature, and must be dismissed. The trial court will be reinvested with jurisdiction and power to reopen the case for such further proceedings as appear proper.

The appeal is dismissed.

GREENMAN et al.
v.
ROGERS et al.
Civ. 19510.

District Court of Appeal, Second District,
Division 3, California.
Nov. 17, 1953.

Rehearing Granted Dec. 3, 1953.
See 264 P.2d 92.

Action for damages sustained in accident occurring when father's eastbound automobile in which mother and child were riding, collided with defendants' northbound automobile at intersection. Father, mother and child brought action against defendants, verdict was for defendants, the Superior Court, Los Angeles County, Raymond McIntosh, J., granted a new trial to father as guardian ad litem of child, and defendants appealed. The District Court of Appeal, Vallée, J., held that the order granting new trial was within the trial court's discretion.

Order affirmed.

1. Appeal and Error ⚡1015(1)

Order of trial court granting new trial will be reversed only when it can be said as a matter of law that there is not substantial evidence to support a contrary judgment.

2. Guardian and Ward ⚡126

Parties ⚡6(1)

Every action must be prosecuted in the name of the real party in interest, and actions by ward should be brought in the name of the ward by the guardian, and not in the name of the guardian.

Parker, Stanbury, Reese & McGee, Los Angeles, for appellants.

Joseph Lewis, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants from an order granting a new trial to "Martin Greenman as Guardian Ad Litem of Benita Greenman only," in an action for damages for personal injuries.

The parties were involved in an automobile accident. Martin Greenman was driving one car, accompanied by his wife, and his nine year old daughter, Benita. They brought this action for damages for personal injuries against Lloyd Irwin Rogers, 17 years of age at the time of the accident, driver of the other car, and Lloyd Rogers and Jane Rogers, his parents. Defendants denied negligence, and pleaded contributory negligence and unavoidable accident. The trial was by jury. Verdict was for defendants. On plaintiffs' motion, the court granted a new trial to "Martin Greenman as Guardian Ad Litem of Benita Greenman only." The court did not specify the ground of the order.

The accident occurred at the intersection of Amherst, a north-south street, and Goshen, an east-west street, Avenues in Los Angeles in the late afternoon of June 17, 1951. It was daylight and visibility was clear. Both streets were narrow, Amherst 30 feet and Goshen 26 feet in width. Defendant Lloyd Irwin Rogers was driving north on Amherst; the Greenmans were traveling east on Goshen. A house on the southwest corner of the intersection obstructed the vision of the drivers during the last 100 feet of approach. Martin Greenman had slowed down to 10 to 15 miles an hour before reaching the intersection.

The first time Martin Greenman saw defendants' car, it was 100 feet or more from the intersection; and it was going about 35 to 40 miles an hour. Mrs. Greenman stated that when her husband made the stop, or had slowed down for the intersection, she saw defendants' automobile coming "half-way down the block"; and her husband proceeded to drive into the intersection.

She estimated that defendant driver was traveling "over 25" miles an hour. Mrs. Greenman said their car was "definitely" in the intersection before defendants' automobile entered the intersection. The second time Martin Greenman saw defendants' car, it was about 15 feet from the intersection; at that time he was approximately 10 feet in the intersection and traveling not more than 15 miles an hour. Defendant driver stated that he did not see the Greenman car until it was 10 feet away. He did not testify as to who entered the intersection first.

Martin Greenman testified he was "just about stopped" at the time of the impact. His wife first testified he had "stopped at the intersection" before entering. Later she explained what she meant by "stopped,"—that he had slowed down so that he was barely moving when he applied the brakes. Defendant driver testified he was going approximately 25 miles an hour at the time of the impact.

Just before the collision, Martin Greenman "yanked" his steering wheel to the left and the impact knocked his car slightly more to the left. The two cars came together corner to corner, defendants' left corner to the plaintiffs' right corner. They stopped side by side, the Greenman car slightly farther to the north than the other. The police located the point of impact as being 18 feet east of the west curb of Amherst and 5 feet north of the south curb of Goshen.

[1] The rules which govern a reviewing court in the determination of an appeal from an order granting a new trial are so well known they need not be repeated. The order of the trial court will be reversed only when it can be said as a matter of law that there is not substantial evidence to support a contrary judgment. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689. Manifestly there was sufficient evidence to support a contrary verdict. The court may well have concluded that defendant driver violated section 550(a) of the Vehicle Code, which provides: "The driver of a vehicle

approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

[2] Defendants assert "the order fails to grant a new trial to anyone." Every action must be prosecuted in the name of the real party in interest. An action should be brought in the name of the ward by the guardian and not in the name of the guardian. 20 Cal.Jur. 496, § 12; 13 Cal.Jur. 187, § 38. That Benita Greenman, rather than her guardian, Martin Greenman, should have been named as plaintiff by the court in its order for a new trial is well settled. *Dixon v. Cardozo*, 106 Cal. 506, 39 P. 857; *Fox v. Minor*, 32 Cal. 111; *Alvez v. Toprahanian*, 39 Cal.App.2d 126, 102 P.2d 566; *Looock v. Pioneer Title Ins., etc., Co.*, 4 Cal.App.2d 245, 40 P.2d 526; *Lindsey v. Superior Court*, 100 Cal.App. 37, 40, 279 P. 837. However, courts look to the substance of things rather than to mere names. The reformed system of procedure was designed to enable courts of justice to brush aside technicalities affecting no substantial right and decide cases upon the merits. *Alvez v. Toprahanian*, 39 Cal.App.2d 126, 129, 102 P.2d 566; *Lindsey v. Superior Court*, 100 Cal.App. 37, 41, 279 P. 837.

The order granting a new trial to "Martin Greenman as Guardian Ad Litem of Benita Greenman only," designating the guardian as plaintiff instead of naming the ward as plaintiff, was manifestly not intended as a dismissal of the action as to Benita and should not be given that effect. *Alvez v. Toprahanian*, 39 Cal.App.2d 126, 129, 102 P.2d 566; *Lindsey v. Superior Court*, 100 Cal.App. 37, 40, 279 P. 837. The pleadings throughout, the verdict, and the judgment name Benita as plaintiff and real party in interest. Plainly the court intended that a new trial be granted only to Benita Greenman by Martin Greenman, her guardian. The order should be so construed. The wording of the order was obviously a clerical error and may be corrected by the court at any time. It does not appear that defendants have been misled or prejudiced, and the error complained of has not resulted in a miscarriage of justice. Therefore, the order may not be reversed.

Const. art. VI, § 4½. To hold otherwise would be to ignore matters of substance and give effect to the barest technicality. *Krukow v. Silvius*, 105 Cal.App. 724, 728, 288 P. 684.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



121 Cal.App.2d 272

AMERICAN FOUNDRY
v.
MILOSEVICH et al.
Civ. 19649.

District Court of Appeal, Second District,
Division 3, California.
Nov. 13, 1953.

Action to recover unpaid balance of purchase price of pipes and other materials sold to contractors who filed cross-complaint. The Superior Court, Los Angeles County, William R. McKay, J., rendered judgment for plaintiff and contractors appealed. The District Court of Appeal, Shinn, J., held that evidence supported findings that pipe furnished by plaintiff conformed to description or specification contained in contractors' order and that contractors did not inform plaintiff as to the specifications for pipe in their contract with the State.

Judgment affirmed.

1. Sales ⚡359(1)

In action to recover unpaid balance of purchase price of pipes and other materials sold to contractors, who filed cross-complaint on ground that pipe furnished did not comply with specifications in contract between contractors and state, evidence on

263 P.2d—7

Cal.Rep. 263-264 P.2d—7

issue whether the pipe furnished by seller conformed to the description and specifications contained in contractors' order and on question of contractors' furnishing the seller with information on specifications required for pipes in the particular contract was sufficient to support finding for seller.

2. Trial ⚡398

Where complaint contained a common count for value of materials sold and also one on an open book account, and allegations of these causes of action were found to be true, since findings justify recovery on the express contract, the findings as to implied contract are redundant and should be disregarded.



Irvin Grant, Los Angeles, for appellants.

Stephen Monteleone, Los Angeles, for respondent.

SHINN, Presiding Justice.

American Foundry, a corporation, recovered judgment against Ronald V. Milosevich and Barnislav J. Zarubica, copartners, in the sum of \$4,005.75, being the unpaid balance of the purchase price of pipe and other materials sold to the defendants. The answer of defendants consisted of a general denial. They filed a cross-complaint alleging that plaintiff agreed to furnish pipe which would comply with the specifications under a contract between J. E. Haddock, Ltd. and the State of California Department of Public Works, and a subcontract between Haddock and the defendants, under which defendants were constructing certain public work; the pipe furnished by plaintiff did not comply with said specifications; after it was installed it was tested and developed numerous leaks which defendants were unable to repair; it was rejected by the State and the Haddock Company, and defendants were required to and did replace the pipe, to their damage in the sum of \$6,979.45, for which sum they sought judgment. It was alleged that plaintiff represented that the pipe conformed to

the State's specifications, and warranted that it was suitable for the purposes for which it was intended. Plaintiff answered the cross-complaint, denying that it had any knowledge of the specifications of the State contract, or that it warranted the pipe, and

alleging that it furnished the pipe and other materials as ordered by the defendants.

[1] The court found that pursuant to defendants' request plaintiff submitted the following quotation to defendants:

"March 12, 1951

R. K. Henze
Milosevich-Zarubica Construction Co.
1433 W. Olympic Blvd.
Atten. Mr. J. De Rita

Gentlemen: With reference to your conversation with Mr. Meaglia regarding 4", and 8" Soil Pipe. We are pleased to quote you the following on the above material.

1200'.....4" S.H. Vic. Soil Pipe..... 70.62 Per Hundred Feet.
1450'.....8" S.H. Vic. Soil Pipe.....219.86 Per Hundred Feet

The above prices are net, trusting this meets with your approval, we remain.

"American Foundry
By A. T. Field
A. T. Field
Sales Mgr."

and that defendants orally accepted said quotation, ordered said pipe in accordance therewith, that plaintiff delivered the same, and that defendants accepted and used the pipe in said construction work; prior to delivery the pipe was examined and inspected by said defendants "through inspectors of the State of California" and was approved. It was found that defendants' order called for 4-inch single Hub Victory soil pipe and 8-inch single Hub Victory soil pipe, the same being descriptive names well known in the trade for pipe intended for use in gravity flow under a pressure not in excess of 35 pounds; that plaintiff was not informed as to where the pipe was to be used, nor that it would be required to comply with the specifications of Haddock's contract with the State, nor was plaintiff advised as to the terms of the subcontract between defendants and the Haddock company; that defendants were fully advised by plaintiff that the pipe was not intended to be used under pressure in excess of 35 pounds, but that defendants nevertheless requested delivery of the same. It was also found that the State rejected the pipe because it failed to meet the specifications under the prime contract which called for

pipe that would withstand hydrostatic pressure of 50 pounds, and that plaintiff furnished sufficient sound pipe with which defendants could have replaced the sections of pipe that developed leaks.

It is first contended there was no evidence to sustain the finding that plaintiff manufactured the pipe in accordance with the order of defendants. It is said in defendants' brief "that plaintiff was well aware of the fact that the pipe would have to withstand a minimum hydrostatic pressure of 50 pounds to the square inch." The transcript reference given is to testimony of plaintiff's sales manager, Field, that he was informed of this requirement by defendants' agent after the pipe had been installed.

Defendants contend that De Rita was shown to be plaintiff's agent, and that his knowledge of the specifications should have been imputed to plaintiff. De Rita was a brother-in-law of defendants' office manager, although not an employee. He contacted plaintiff's president, Meaglia, and informed him of defendants' need for pipe. Meaglia told him his company did not sell to contractors, but would make an exception to accommodate De Rita. The latter

called again, giving Meaglia a quotation he had received, and stating that the price per foot should enable Meaglia to tell the type of pipe defendants wished to purchase. The price quoted corresponded to the prevailing price of Victory pipe. De Rita negotiated for himself a five per cent commission from plaintiff. The court impliedly found that De Rita was not plaintiff's agent. This was a fair inference from the evidence that De Rita was negotiating on behalf of defendants.

There was evidence that "Victory soil pipe" was a term used as descriptive of the wall thickness of pipe, and that the lighter pipe has been thus described since 1941 and 1942; eight-inch Victory pipe weighs 115 pounds per five-foot lengths, extra heavy, 150 pounds; soil pipe is used only for drainage purposes and is not a pressure pipe; Victory pipe stands a pressure of 30 pounds, extra heavy, 50 pounds. Plaintiff had been manufacturing the Victory pipe for several years. It was a lighter grade of pipe that had come into use when there was a shortage of material for civilian use. There was evidence that the pipe furnished by plaintiff was Victory soil pipe, as that term was commonly known and used in the trade, and that the pipe furnished by plaintiff conformed to the only description or specification contained in defendants' order; defendants did not inform plaintiff as to the specifications for pipe in their contract with the prime contractor, nor as to the specifications in the contract with the State. Plaintiff's sales manager, Field, testified that after plaintiff had submitted its bid, he asked Mr. Henze, office manager of defendants, where the pipe was to be used and was told "it was up on the freeway." Field asked "what for" and Henze said something about a pressure feed sewer line. Field questioned him as to whether they should use Class 50 water main and Henze replied "No, this calls for soil pipe," and the matter was dropped. The court could have inferred from this testimony that defendants intended to use the lighter Victory pipe and did not expect to receive anything else. It is not questioned that the pipe was inspected by State inspectors before it was delivered. The court was warranted in concluding that plaintiff furnished

defendants with the pipe they ordered, namely, Victory soil pipe of weight and thickness which was customary in the trade. Inasmuch as the offer of plaintiff and its acceptance by defendants constituted the entire contract, and plaintiff fulfilled its contract, it is of no moment that the pipe did not meet the requirements of the contract with the State.

There was a finding that the pipe when put under pressure leaked in not more than 12 places, some due to improper workmanship, in installation, and others due to pin holes in the pipe; that not more than 100 feet of pipe was defective, and that the same was replaced by plaintiff with sound pipe. Defendants question the finding that plaintiff replaced the defective pipe. There was evidence that plaintiff delivered on the job sufficient sound pipe to replace all defective sections, although the same was not used by defendants.

[2] The complaint contained a common count for the value of materials sold, and also one on an open book account. The allegations of these causes of action were found to be true. It is contended that the findings are in irreconcilable conflict, in that plaintiff was allowed to recover on an express contract and also on an implied contract, although it is conceded by defendants that the objection would be untenable if the findings establish liability under an express contract. Since the findings justify recovery on the express contract and are supported by the evidence, the findings as to the implied contracts are redundant and should be disregarded. *Provident Land Corp. v. Bartlett*, 72 Cal.App.2d 672, 165 P.2d 469.

Although the allegations of the cross-complaint as to breach of contract and breach of warranty are negated by the findings to which we have referred, there were express findings that those allegations of the cross-complaint were untrue. The judgment has support in the findings which, in turn, are supported by the evidence.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

121 Cal.App.2d 218

STUBBS v. JONES et al.

Civ. 8293.

Sac. 6327.

District Court of Appeal, Third District,
California.

Nov. 10, 1953.

Action by trustee and beneficiary of express trust, who held all shares of corporation and who dissolved corporation, against other beneficiaries, for declaration that she was authorized to convey real estate formerly belonging to corporation. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment for other beneficiaries and trustee appealed. The District Court of Appeal, Van Dyke, P. J., held that since the specific statutory requirements for dissolution of corporation had been met, corporation was dissolved and trustee held title to real estate

Judgment reversed.

1. Corporations ⇨609

Courts have no control over the winding up and dissolution of corporations so long as statutory requirements are met.

2. Corporations ⇨614(1)

Where trustee, who was also a beneficiary of trust and who owned as trustee all the stock of corporation, which by the sale of its real estate supplied assets for distribution, met statutory requirements for the dissolution of the corporation, the corporation ceased to exist, although the trustee may have been involved in a breach of her duties as trustee in dissolving the corporation. Corporations Code, § 5201.

3. Corporations ⇨617(1)

When a corporation has been wound up and dissolved, in accordance with the statutory scheme therefor, it ceases to exist for any purpose. Corporations Code, § 5201.

4. Trusts ⇨247, 270

Where trustee who owned as trustee all the stock of corporation, which by the sale of its real estate supplied assets for distribution to trustee in trust, dissolved the corporation, trustee had title to real estate subject to the same trusts whereunder she

had held the stock, but other beneficiaries could request court of equity to decree that trust be enforced in compliance with intention of trustor.

5. Trusts ⇨270

Where trustee who owned as trustee all the stock of corporation, which by the sale of its real estate supplied assets for distribution to trustee in trust, dissolved the corporation, trustee had title to real estate and had power and duty to carry out purpose of trustor by selling lands and receiving proceeds from sales into the trust.

Aaron Turner, John Felton Turner, Oakland, Lovett K. Fraser, Bruce B. Bruchler, Lakeport, for appellants.

H. G. Crawford, Lakeport, for respondents.

VAN DYKE, Presiding Judge.

Plaintiff, as trustee of an express trust, brought this action against other beneficiaries of the trust to have it declared that she, as such trustee, was authorized to sell and convey land. From an adverse judgment she appeals.

On November 14, 1938, John L. Stubbs was the owner of all the outstanding stock of Stubbs Company, Ltd., a corporation. On that day he executed a trust indenture, the interpretation of which was the subject of this action. So far as material here the document contains the following recitals: The original and sustained purpose of the organization of said corporation had been to place title therein to the lands of the trustor and his brother, in order, through corporate instrumentality, to subdivide, develop and sell the land and convert it into cash for the benefit of the two men, each of whom in the beginning owned one-half the corporate stock. It had never been the purpose nor the practice of the corporation to use the proceeds of such sales to engage in business other than the carrying out of the original purpose and to ultimately distribute to its stockholders all principal and profit derived from such sales. The trustor, before executing the trust indenture, had purchased all of the stock formerly owned by his brother and had entered into

a contract with the corporation whereby he was to be its manager during his lifetime at a salary to be fixed from time to time by the board of directors. Also the named trustee, plaintiff herein, who was the wife of the trustor, had entered into a contract with the corporation whereby, upon the trustor's death, she would become the corporate manager during her lifetime at a salary of \$150 per month. This contract, said the trustor, would assure his widow a monthly income of that amount. He declared that it was his desire to further insure and protect his widow in the receipt thereof "against any and all possible contingencies" and that he believed that in view of his sole ownership of all the issued stock of the corporation the subject trust would further promote such purposes. Having made these recitals, the trustor declared that he established a trust in all the shares of stock of the corporation. He made the following additional declarations: That he transferred to plaintiff as trustee all of said shares to be held in trust for the uses and purposes declared by the trust instrument; that she would as trustee, have, hold, manage and control the trust property, and receive the dividends, rents, issues, profits, proceeds and income therefrom; that, during the trustor's lifetime, she would pay over to him the whole of said net income. Upon his death she would pay to herself, as beneficiary of the trust, and for her lifetime, the sum of \$1,800 per year in monthly or quarter-yearly installments, less, however, any sum she might have received from the corporation through her contract of management for services rendered. If from that source, however, she did not receive the full management fee, then, as trustee, she was to pay to herself out of the trust property any sum necessary to make up the unpaid balance. If the net income from the trust property, plus her contract earnings, exceeded \$1,800 a year, then the trustee was to divide the excess, share and share alike, between herself and the trustor's four daughters, each of the five to receive one-fifth. The trust was to continue during the lifetime of the trustor and his wife. The trustor reserved the right to revoke the trust, to appoint another

trustee, to change the trust, to withdraw all or any of the trust property and to add other property. When both the trustor and his wife had died the trust was to terminate and its property was to be divided equally among the four daughters. The trustor expressly authorized the trustee during the continuance of the trust to have, hold, manage and control the trust as in her judgment and discretion seemed best.

By her complaint the trustee pleaded the trust indenture, by exhibit; alleged that the trustor had died and that upon his death the corporation still owned the remainder of the property, title to which had been placed in it when the brothers incorporated it and that the stock shares remained in the trust; that the trustor through the board of directors had controlled and directed the corporate business while he had lived; that the property had been subdivided into lots and many of the lots had been sold and that while the trustor lived this course of business had been followed, he continuing in this way to convert the corporate assets into cash which was then paid out and distributed, both principal and income. She alleged that upon the trustor's death she had become the manager of the corporation, pursuant to the alleged contract, and that the corporation continued its said activities until its dissolution. Plaintiff further alleged that about November 20, 1950, she, as the holder of all of the outstanding stock, had instituted proceedings to dissolve and wind up the corporation and that prior to January 1, 1951, these proceedings had been completed and the corporation had been completely liquidated, wound up and dissolved, its entire assets having in the process been conveyed to her in trust and as owner and holder of the outstanding stock. The beneficiary defendants denied these latter allegations concerning the dissolution, the winding up and the conveyance of the assets of the corporation. Plaintiff alleged that a controversy had arisen between herself and the other beneficiaries as to her rights and powers under the trust under the circumstances alleged; that she contended she had full right and power, and that it was her duty, as trustee,

to continue the liquidation and conversion of the estate into cash and to continue to pay out and distribute the same as directed in the trust indenture, in short, to do the same things which had been accomplished through the instrumentality of the corporation. She alleged the beneficiaries controverted her assertions as to such powers and duties, and that as a consequence she was unable to operate or develop the property of the trust estate, subdivide it or enter into contracts for its sale or execute deeds conveying title thereto to purchasers or make any of the payments by the trust agreement directed to be made. She further alleged the trust estate was without funds to pay taxes or to pay the necessary expenses of management, maintenance, care and upkeep and meet the demands which the trustor laid upon the trustee through his trust or to borrow money for any such purposes with the result that the trust estate was in danger of being lost. Thus the issues made by the pleadings centered around the trustees' contentions that she had dissolved the corporation and that it no longer existed; that she had, as sole stockholder, and by conveyance to her as such, succeeded to all of the assets of the corporation and that she, therefore, had power to accomplish by herself as trustee those things which had been accomplished theretofore through the instrumentality of the corporation while it existed.

At the trial evidence was introduced to show that in form at least all of the steps necessary to wind up and dissolve a corporation pursuant to the Corporations Code had been taken, including the execution and filing with the Secretary of State and in the proper county clerk's office of the final certificate that the corporation had been wound up and dissolved. In evidence also was the deed of the corporation conveying all its assets to plaintiff as trustee under the trust. It was contended by the beneficiaries, however, that the preservation and use of the corporation in the conversion of its assets into cash and their distribution to its stockholder was an essential part of the trustor's scheme and that the trustee, in bringing about the dissolution of the corporation and the transfer to her of its assets

in kind, had exceeded her powers and breached her obligations.

The trial court found that the plaintiff had controlled and directed the business and affairs of the corporation through its board of directors which she, as trustee, had caused to be elected until its purported dissolution; that the other beneficiaries had never consented to the dissolution of the corporation or the transfer of its assets in kind to the trustee; that without their consent the plaintiff had instituted the proceedings for dissolution and winding up; that said corporation had been purportedly wound up and dissolved and its entire assets purportedly conveyed in kind to the trustee as owner of the entire outstanding corporation stock with the purpose, said the court, on the part of the trustee of enabling herself to carry on the business theretofore carried on by the corporation, including the subdivision, sale and conveyance to purchasers of the real property involved; that the plaintiff as trustee had had no right or power to operate or develop the property or to subdivide, sell or convey the same; that "there is no property in the Trust Estate except the shares of stock" of the corporation and dividends received therefrom; that, in effect, the corporation had not been dissolved nor its property transferred in kind to the trustee. As conclusions of law from these findings the court found that the proposed dissolution of the corporation had been void and of no effect, and that the purported conveyance was likewise void. Judgment pursuant to these conclusions of law was entered and therefrom the plaintiff trustee has appealed.

[1] The creation of corporations and their winding up and dissolution are exclusively legislative functions over which the courts have no control so long as the statutory requirements are met. "The dissolution of corporations is a peculiar function which resides in the legislature and is conferred upon courts only by explicit legislative authority." 16 Fletcher, *Cyclopedia of Corporations*, Perm. Ed., sec. 8097; *Neall v. Hill*, 16 Cal. 145; *Delaney Producing & Refining Co. v. Crystal Petroleum Products Corp.*, 88 Cal.App. 784, 787, 264 P. 521. Says the same author (Section 8022): "The

general rule is that where a statute confers power on a majority, or a certain per cent, of the stockholders to dissolve, the right is absolute, so far as the motives of the majority are concerned, in the absence of actual fraud, and not subject to judicial review on behalf of minority stockholders."

[2] The pleadings here put in issue the naked power of the trustee, as owner of all the outstanding stock of the corporation, to give her consent to the dissolution of the corporation and through the corporate officers to carry out and to complete that dissolution. No fraud is charged and the record contains no evidence of any fraudulent activity upon the part of the trustee. If we assume for a moment that by the trust indenture it was contemplated, or even required, that in the administration of her trust the trustee was obligated to continue the plan of operation followed by the trustor up to the time of his death, that is, the liquidation of the corporate assets through the medium of the corporation, it still remains true that, so far as the corporation and its affairs were concerned, the trustee, as the holder of the stock, had the statutory power to consent to its dissolution; and if thereafter the corporation was regularly, pursuant to the statutory provisions, wound up and dissolved, and its property distributed in kind to its stockholder, then, notwithstanding the trustee may have been involved in a breach of her duties as such yet the dissolution of the corporation was achieved. The statutes lay down no conditions for the dissolution of corporations other than that the specific statutory requirements be met, and they declare that when that has been done and when winding up has been completed, and the certificate to that effect has been filed where required, the "corporate existence shall cease". Sec. 5201, Corp. Code.

[3] When a corporation has been wound up and dissolved and following the statutory scheme therefor, has surrendered its franchise, it ceases to exist. "According to the principles of the common law, a corporation which has been legally dissolved is dead. It no longer enjoys an existence for any purpose. The necessary effect of such death is not different from the death

of a natural person." 16 Fletcher, *supra*, sec. 8113; Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335; North Hollywood Mortgage Co. v. North American Bond & Mortgage Co., 137 Cal.App. 180, 30 P.2d 446; Sharp v. Eagle Lake Lumber Co., 60 Cal.App. 386, 212 P. 933; Nezik v. Cole, 43 Cal.App. 130, 184 P. 523. The court's findings as to the total invalidity of the dissolution proceedings were in reality conclusions of law. The evidence was without dispute that appellant, acting as a stockholder, and the officers of the corporation, took all action required to dissolve the corporation. The legal conclusion to be drawn therefrom, therefore, notwithstanding the assumed interpretation of the trust indenture, was that the corporation no longer existed. This makes necessary a reversal of the judgment appealed from.

[4, 5] It is apparent, and as to this the parties do not appear to be in dispute, that the main and underlying purpose of the trustor was that the land held by the corporation should be sold, converted into cash and the proceeds of such conversion distributed to the appellant in trust. Whether this was to be accomplished through the instrumentality of the corporation or by other means, it was the purpose, and to all intents and purposes the express command of the trustor, that this ultimate result be accomplished. When it has been done, the trust estate will consist, not of the stock, which will by such action have become worthless; but of the proceeds derived from the sale of the lands. Appellant is still the trustee. As such trustee she is still charged with carrying out this main purpose of selling the land, converting it into cash, and paying the cash into the trust fund. Of course being charged with this duty she is armed with all power necessary to its discharge. If because of her alleged violation of her obligations as trustee, the respondent beneficiaries should ask of a court of equity that she be ousted from her office and if such ouster should be decreed, the court, in the exercise of its general supervisory powers over trusts, would appoint a successor trustee. That trustee, in turn, would be charged with the duty of carrying out, by whatever means and methods were open, the plan and pur-

pose of the trustor that the lands be sold. In saying this we, of course, do not hold that the trustee has in fact, upon a proper interpretation of the trust indenture, violated her fiduciary obligations by bringing about the dissolution of the corporation. It is unnecessary to so decide. It is unnecessary also to discuss what action, if any, would be taken by a court of equity in the way, for example, of ordering the trustee to bring about the creation of a new corporation to serve in the same way in the disposition of the lands as the dissolved corporation was serving. These matters were not at issue in the trial court. As a matter of law, upon the proof of dissolution of the corporation, and of the distribution of corporate assets in kind to appellant, she received and held the same as trustee upon the same trusts whereunder she had held the stock; and until and unless a beneficiary by appropriate action shall have sought and received in a court of equity a decree setting up some regulatory device to control the sale of the lands, the appellant trustee has and ought to have full power to sell them, for only by so doing can her continuing fiduciary duties under the trust indenture be performed. In this action a court of equity has not been asked to oust the trustee or to set up substitutional controls over the sale of the lands. Respondents have based their contentions that the trustee has no power of sale solely upon the proposition that by reason of the alleged total invalidity of the dissolution proceedings the corporation still exists and therefore still owns the land, in which case, of course, the trustee, not having the title, could not sell or convey. These contentions being unsustained and no alternative relief having been asked, there is no good reason why this litigation should not be ended here by reversing the judgment appealed from and directing the court below to enter judgment that the trustee has the power and is under the duty of continuing, as a trustee, to effectuate the plan and purpose of the trustor by selling the lands, converting them into cash, and receiving the proceeds into the trust. It is, accordingly, so ordered.

PEEK and SCHOTTKY, JJ., concur.

GALLUP et al.

v.

SPARKS-MUNDO ENGINEERING

CO. et al. *

BROWN

v.

C. O. SPARKS, Inc., et al.

Civ. 19482, 19483.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1953.

Rehearing Denied Dec. 7, 1953.

Hearing Granted Jan. 13, 1954.

[Actions, consolidated for trial, for death of ambulance driver and for damage to ambulance in collision with tractor and semi-trailer at intersection controlled by traffic lights. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgments on verdict against defendants, and defendants appealed. The District Court of Appeal, McComb, J., held that giving instruction that ambulance driver was not necessarily guilty of negligence if he entered intersection against stop signal constituted prejudicial error since he would have been guilty of contributory negligence as a matter of law, and thus be barred from recovery, if jury found that ambulance was not on an emergency call.

Judgments reversed.

1. Negligence ⇐6, 76, 134(11), 135(5)

If evidence establishes that plaintiff's or defendant's violation of a statute or ordinance proximately causes an injury, and no excuse or justification is shown, responsibility may be fixed upon the violator without other proof of failure to exercise due care, and, in such a case, violation of the statute or ordinance is negligence as a matter of law. Vehicle Code, § 476.

2. Automobiles ⇐245(89)

In actions, consolidated for trial, for death of ambulance driver and for damage to ambulance in collision with tractor and semi-trailer at intersection controlled by traffic lights, evidence raised questions for jury as to whether ambulance entered intersection against red light and as to whether ambulance was on such an emergency call as would exempt ambulance

* Subsequent opinion 271 P.2d 34.

from statute forbidding vehicular traffic to enter intersection when red or stop signal is exhibited. Vehicle Code, § 476.

3. Automobiles ⇐175(2), 210

An ambulance which is not on emergency call at time of entering intersection against red light is subject to statute forbidding vehicular traffic to enter intersection when red or stop signal is exhibited with result that driver of ambulance is, as a matter of law, guilty of such contributory negligence as will bar recovery for damage to ambulance and for death of driver in intersectional collision. Vehicle Code, § 476.

4. Appeal and Error ⇐1064(1)

Automobiles ⇐246(25)

In actions, consolidated for trial, for death of ambulance driver and for damage to ambulance in collision with tractor and semi-trailer at intersection controlled by traffic lights, giving instruction that ambulance driver was not necessarily guilty of negligence if he entered intersection against stop signal constituted prejudicial error, since he would have been guilty of contributory negligence as a matter of law, and thus barred from recovery, if jury found that ambulance was not on an emergency call. Vehicle Code, § 476.

Parker, Stanbury, Reese & McGee and William C. Wetherbee, Los Angeles, for appellants.

Russell H. Pray, William C. Price, Long Beach, and Samuel P. Block, Compton, for respondent Ruth Robbins Gallup.

Flaum & Hecker, Beverly Hills, for respondent L. B. Brown.

McCOMB, Justice.

This appeal is from judgments entered on the verdict of a jury against defendants in two consolidated actions; one for the death of an ambulance driver, son of Ruth Robbins Gallup, and the other for damage to the ambulance owned by plaintiff L. S. Brown, doing business as Arthur Ambulance Service.

The accident out of which these actions arose involved a collision between an ambulance and a tractor and semi-trailer

which carried 17 tons of sand over and above the weight of the equipment. The accident occurred at the intersection of Atlantic Avenue and Washington Boulevard in the eastern part of Los Angeles. Washington Boulevard runs east and west, is about 70 feet wide on the east side and about 56 feet wide on the west side. It is marked on both sides for four lanes of traffic, two going in each direction. Atlantic Avenue runs slightly east by northwest and west by southwest, is 60 feet wide and also marked for four lanes of traffic, two going in each direction.

The intersection is controlled by regular tri-light, red, amber and green, signal lights which were in operation at the time of the accident, which occurred at approximately 10:00 p. m., the weather being clear and the streets dry. Visibility was good.

The ambulance was traveling north on Atlantic in the center lane, or northbound lane, adjacent to and east of the double white line, with red lights, of which there were three, and two sirens, one in the grille and one in the unit mounted on top of the ambulance. Also it had headlights. As the ambulance entered the crosswalk the signal for traffic on Atlantic turned yellow. At that time an automobile was headed west on the east side of Atlantic in the lane north of and next to the double center line of Washington Boulevard and was stopped. Behind it, stopped, was a large truck and trailer equipped to haul cattle, some 60 feet long and approximately 12 feet high. The truck and trailer of defendants was overtaking these two stopped vehicles to their right, in the lane nearest the curb on the north side of Washington, also headed west.

The truck entered the intersection at approximately the moment the signal turned from red to green for westbound traffic on Washington Boulevard at a speed of approximately 25 miles per hour, the driver then being in the act of shifting and speeding up. The impact occurred 10 feet north of the center of Washington Boulevard and 8 feet east of the center of Atlantic Avenue, at which point the left front bumper, fender and grille of the truck collided with the right door of the ambulance.

The ambulance driver came to his death as a result of the accident. He had received a telephone call which led to the trip, whereupon he had instructed one attendant to secure straps, and had, in the regular course of business of the ambulance firm, noted upon a small pad in duplicate certain information including the letters "AE" which were shown to be, in accordance with the regular course of business, an abbreviation to indicate that it was an emergency call for the Arthur Ambulance. The original of this slip was taken by the driver and was found fastened to the clip board on the dashboard subsequent to the accident.

The attendant at the Samaritan Institute who placed the call advised merely the fact that he had a patient to be picked up, the name and address and nothing further. Specifically, he had made no statement one way or another as to the condition of the patient or whether it was an emergency call. The manager of the ambulance concern had instructed the driver at the time of his employment, some four months prior to the accident, that all calls from the Samaritan Institute were to be considered as emergency calls unless instructed otherwise. Mr. Woods, the proprietor of the institute had so instructed the manager of the ambulance concern, and the attendant Smith at the Samaritan Institute who made the call which resulted in the trip on which the accident occurred stated it was the practice to call for an ambulance only in those cases which he was unable to handle in his own car. All witnesses who had experience on ambulances, of which there were several, testified that alcoholics frequently were violent and had to be restrained on occasion, and were often handled as emergency calls.

These are the only questions necessary for us to determine:

First: *Did the trial court err in refusing to instruct the jury at defendants' request as follows?*

"Section 476 of the California Vehicle Code, in force at the time of the accident in question, provides in part as follows:

"Whenever traffic is controlled by official traffic control signals exhibiting the words "Go", "Caution", or "Stop", or exhibiting different colored lights successively, one at a time, or with arrows, the following colors only shall be used, and said terms and lights shall indicate and apply to drivers of vehicles and pedestrians as follows:

"(a) Green alone for "Go".

"1. Vehicular traffic facing the signal shall proceed straight through or may turn right or left or make a semicircular or U turn unless a sign at such place prohibits any such turn. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.

"(b) Yellow or "Caution" when shown following the green or "Go" signals.

"1. Vehicular traffic facing the signal is thereby warned that the red or stop signal will be exhibited immediately thereafter and vehicular traffic shall not enter the intersection when the red or stop signal is exhibited.

"(c) Red alone or "Stop".

"1. Vehicular traffic facing the signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection and shall remain standing until green or "Go" is shown alone."

"Should you find that either the driver of the ambulance, Stanley Homer Robbins, or the driver of the truck, Joe Martin Enos, Jr., entered the intersection of Washington and Atlantic Boulevards in violation of the law just read to you, you are instructed that this constituted negligence as a matter of law."

[1] *Yes.* If the evidence establishes that plaintiffs' or defendants' violation of a statute or ordinance proximately caused an injury and no excuse or justification is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. Violation of a statutory requirement is negligence as a matter of law (*Satterlee v.*

Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279; Clinkscales v. Carver, 22 Cal.2d 72, 76 [1b], 136 P.2d 777; Taylor v. Sims, 72 Cal.App.2d 60, 63[1], 164 P.2d 17.)

[2] In the present case the evidence was in conflict as to whether the ambulance entered the intersection against the red light. The ambulance attendant Vandevort testified that when the ambulance arrived at the second line on the crosswalk going north the signal light changed to amber. There was other evidence which would have sustained a finding that the ambulance entered the intersection against the amber light. On the other hand, it was the testimony of Thomas Durbin, an impartial witness, that the ambulance entered the intersection against the red light, and that the truck entered the intersection with the green light. There was thus presented a question of fact for the determination of the jury as to whether or not the ambulance entered the intersection against the red light. In other instructions the trial court properly left to the jury the question as to whether the ambulance under all the evidence was on an emergency call and therefore exempt from the above quoted provisions of the Vehicle Code. (Head v. Wilson, 36 Cal.App.2d 244, 250, 97 P.2d 509; Colman v. City of Beverly Hills, 40 Cal.App.2d 570, 572, 105 P.2d 153.)

[3] Had the jury found in accordance with the conflicting evidence that (1) the ambulance was not on an emergency call at the time of entering the intersection, and (2) it had entered the intersection against the red light, then the provisions of section 476 of the Vehicle Code would have been applicable with the result that the ambulance driver would have been guilty of contributory negligence as a matter of law.

Second: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"Referring to an intersection at which traffic is controlled by a mechanical device which, operating automatically, directs the

traffic to go or to stop, you are instructed as follows:

"The mere fact that a vehicle enters or crosses such an intersection against a stop signal is not conclusive proof of negligence. This is so because the controlling device may change to give the stop sign either just as a vehicle is entering the intersection or when it is so close that an attempt to stop suddenly would be futile, or would be more hazardous than crossing the intersection, or would be more liable to result in interference with other traffic. The fact that the law recognizes these possibilities, however, does not justify a driver in approaching an intersection at a careless rate of speed. He, too, is bound to know that the signal, being automatic, will not heed his approach and that it may change before he reaches the intersection. The ordinarily careful driver will adjust his speed to that possibility. Failure to obey a traffic signal may or may not be the proximate result of a negligent speed on approach.

"When there is a question whether a driver was negligent in entering an intersection against an automatic stop signal, all the surrounding circumstances should be considered with a view to judging whether his conduct was justifiable, excusable and in the manner of an ordinarily prudent person.

"In giving you this instruction, I do not mean to imply, nor to suggest, that either party, involved in the accident in question, did enter the intersection that is under our consideration against a stop signal, or that either party made a negligent approach to the intersection. Whether or not either of those things was done is a question of fact that you must decide."

[4] *Yes.* The foregoing instruction was erroneous because it told the jury that the ambulance driver was not necessarily guilty of negligence if he entered the intersection against the stop signal. This is not the law assuming that the jury found the ambulance was not on an emergency call. In such case he would have been guilty of contributory negligence as a matter of law and thus barred from recovery.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

The judgments are reversed.

MOORE, P. J., and FOX, J., concur.



STANFORD

v.

RICHMOND CHASE CO. et al.*

Civ. 15536.

District Court of Appeal, First District,
Division 1, California.

Nov. 16, 1953.

Rehearing Denied Dec. 16, 1953.

Hearing Granted Jan. 13, 1954.

Action for injuries to driver of truck being loaded on defendant's premises by employees of defendant using two mechanized fork-lifters. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment from which defendants appealed. The District Court of Appeal, Peters, P. J., held that even though there was no direct evidence as to whether driver was struck by fork-lifter of defendant or whether he suffered fall from truck, giving of a properly conditioned *res ipsa loquitur* instruction was not error.

Judgment reversed as to two defendants and affirmed as to two defendants.

1. Negligence ⇨121(2), 138(2)

The existence of another equally probable explanation consistent with defendants' nonliability bars application of the doctrine of *res ipsa loquitur*, but the mere possibility of another agency not under the control of defendant having caused the injury, will not bar a proper instruction on the doctrine.

2. Negligence ⇨136(6)

In action for injuries to driver of truck which was being loaded by defendant's employees through the use of two mechanized fork-lifters, which were al-

* Subsequent opinion 272 P.2d 764.

legedly negligently operated, wherein there was no direct evidence as to exactly how injuries to truck driver occurred, but circumstances indicated that he might have been struck by one of the lifters, or that he might have fallen from truck, it was for jury to determine whether the two possibilities were equally probable, thus barring application of the *res ipsa loquitur* doctrine.

3. Negligence ⇨136(6)

In determining issue of whether two possible ways in which plaintiff's injuries occurred are equally probable, thereby precluding application of doctrine of *res ipsa loquitur*, the jury is entitled to take testimony and circumstantial evidence most favorable to plaintiff, and to disregard conflicting inferences.

4. Negligence ⇨121(2)

The mere fact of an accident happening on a defendant's premises did not give rise to or support an inference that defendant was negligent, unless it be shown, directly or indirectly by the evidence, that defendant was in control of the agency causing the injuries.

5. Negligence ⇨138(2)

A *res ipsa loquitur* instruction is permissible not only when the facts of the accident are in dispute, but even where it is disputed that any accident at all occurred, or when the accident is proved, but the causation is in doubt.

6. Evidence ⇨54

An inference may be predicated upon an inference if the first inference is reasonably probable and not itself predicated upon speculation.

7. Negligence ⇨138(2)

In action for injuries to driver of truck which was being loaded by defendant's employees on defendant's premises by use of mechanized fork-lifters, wherein there was no direct evidence showing exactly how injuries were sustained but circumstances indicated that they were result of either being struck by a fork-lifter or by falling off trailer of truck, giving of instruction on *res ipsa loquitur* doctrine, leaving it to jury to first determine which alternative

was the most probable, or whether they were equally probable, thus barring application of the doctrine, was proper.

8. Negligence ⇨121(3)

In action for injuries to driver of truck which was being loaded on defendant's premises by defendant's employees using mechanized fork-lifters, wherein there was no direct evidence as to whether the accident was caused by the fork-lifters or by fall of truck driver from trailer of truck, circumstantial evidence supported inference that accident was caused by the fork-lifter operated by one of defendant's employees, and that such inference was reasonable and not speculative, and that inference involved in *res ipsa loquitur* doctrine could be applied to first inference based on circumstantial evidence.

9. Negligence ⇨134(4)

In action for injuries to driver of truck being loaded on defendant's premises by employees using two mechanized fork-lifters, wherein there was no direct evidence as to whether driver was struck by a fork-lifter or suffered fall from truck, evidence was insufficient to warrant finding of negligence on part of night superintendent of defendant or to support a judgment against him.

10. Negligence ⇨134(4)

In action for injuries to driver of truck being loaded on defendant's premises by employees using two mechanized fork-lifters, wherein there was no direct evidence as to whether driver was struck by fork-lifter or suffered fall from truck, evidence did not sustain judgment against operator of fork-lifter working on opposite side of truck from that on which driver suffered injury.

11. Trial ⇨345

Although failure to object to the form of the verdict constitutes a waiver of certain defects, it does not constitute a waiver of a sound claim that the evidence is insufficient to support the verdict as to any one of the defendants.

James F. Boccardo, San Jose (Edward J. Niland, Santa Clara, of counsel), for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover damages for injuries suffered by him while on the premises of the Richmond Chase Company as an invitee. He claims that the injuries were caused as the result of the negligent operation of certain machinery by the employees of the corporation. He joined as defendants the corporation, and Castro, Silva and Rouyet, three employees of the company. The jury brought in an unanimous verdict against all defendants in the sum of \$8,281. From the judgment on this verdict all of the defendants appeal.

The major contention of the appellants is that the evidence is insufficient to support the judgment, a point inextricably interwoven with the contention that the trial court erroneously instructed on the doctrine of *res ipsa loquitur*. It is urged that such doctrine, as a matter of law, was not applicable to the facts involved. Appellants Silva and Rouyet, in addition, urge that there is no evidence at all to support the judgment against them. In their brief and on oral argument counsel for these appellants stipulated that if the judgment is reversed only as to Silva and Rouyet, these two appellants waive any right to costs on appeal.

The accident occurred in the early morning hours of August 17, 1949. The respondent was a truck driver, and had been so employed for seventeen years. In the late afternoon of August 16, 1949, on behalf of his employer, he had picked up a load of grapes at Delano in the San Joaquin valley. He was driving a tractor pulling two flat-bed trailers. He drove the load of grapes to the Richmond Chase cannery in San Jose, arriving at about 2 a. m. He slept until about 3:30 a. m. and then his truck was unloaded by cannery employees. He then picked up the cables and ties that had secured the load, placed them on the trailer beds, and drove to the box shed where it was his duty to pick up empty boxes to be returned to his employer. It was then about 4 a. m. The weather was

fairly clear with some fog. The cannery itself was not in operation, only the yard employees being in attendance.

The respondent parked his truck parallel to the empty boxes, and about twenty to thirty feet from them. The empty boxes were already piled on pallets in stacks. It was the duty of Silva and Castro, employees of the cannery, to load the empties onto the trailers. This was done by means of mechanized fork-lifters that picked up a pallet of nine boxes, drove to the trailer, and lifted the pallet onto the trailer. The beds of the trailers were $4\frac{1}{2}$ feet from the ground, and the 9 boxes and the pallet were 7 feet 3 inches in height, so that, when loaded, the top of the load was 11 feet 9 inches from the ground. Silva did all the loading on the left side of the trailers, and Castro all the loading on the right side. Silva picked up his boxes on his fork-lift, then drove forward around the back of the trailers and forward to where the boxes were to be loaded, raised the boxes on his mechanized equipment and loaded them onto the trailers. Castro, the right-side loader, picked up his pallet of boxes, and then backed up to the spot where he was to load his boxes on the right-hand side of the trailers. Each trailer could accommodate eight stacks of boxes, four stacks on each side. The front trailer was loaded first, from the front to the back. Castro and Silva had come to work at 6 p. m. the previous evening and were working a twelve-hour shift.

The evidence shows that the view of the operator of the fork-lifter was obstructed towards the front by the pallet of boxes. Castro testified that in the early morning hours he customarily backed up automatically without looking towards the rear. Silva corroborated this testimony, and further testified that on the morning of the accident neither he nor Castro looked backwards while backing their equipment. Castro conceded that he worked rapidly in order to load the trucks quickly so as to get them off the cannery premises.

Respondent testified that when he parked his truck for loading he removed the steel cables and ties which tie down the load, and laid them on the ground; that he then

had no further duties to perform in the loading process; that he walked to a position on the right side of the trailers and stopped, facing across the trailers, when he was in the open space between the two trailers, "just above even" with the outside edges of the trailers. The last thing he remembers is that the front trailer was fully loaded and one set of pallets had been loaded on the second trailer.

Respondent does not remember seeing or feeling anything hit him. Neither Castro nor Silva was aware that respondent was injured until they saw him lying on the ground. Both conceded, however, that no other people, machinery, or vehicles were in the area during the loading process, which consumed about twenty minutes. Castro testified that he was just about to load the last pallet of boxes onto the rear trailer when he glanced towards the front of the tractor-trailers unit and saw respondent lying upon the concrete floor. He stated that respondent was lying even with the cab of the tractor. Silva testified that respondent had his feet under the gas tank of the tractor, with his body at a right angle to the tractor.

After Castro observed respondent, he called to Silva, each loaded their last pallet, and then they both approached the injured respondent. Silva found respondent's wristwatch lying beside him. Respondent testified that he remembers nothing from the time he was standing between the two trailers until he woke up in the first-aid station.

The theory of appellants was that respondent must have climbed up on the tractor or the front trailer to tie down the boxes, and had fallen while doing so. Castro did not see respondent during the loading operations until he saw respondent on the ground. Silva remembers that once during the loading operations he saw respondent standing on the ground using a plank in an attempt to straighten the piles of loaded boxes. No one saw respondent trying to climb onto the loaded trailer or the tractor. Neither Castro nor Silva examined the fork-lifters or the boxes to see if they showed evidence of having hit the respondent.

Rouyet, the assistant night superintendent of the cannery, testified that he was not near the scene of the accident when it happened; that when informed of the accident he proceeded to the scene; that near the right side of the cab of the tractor he found an angle iron such as is used in tying on a load of boxes; that he observed a smudge on the gas tank on the right side of the tractor; and that he found blood where respondent had been lying. Rouyet did not observe the position of the other angle irons, or the cables or ropes used to tie down the load. Silva testified that the cables, angle irons and ropes were still on the ground when respondent was discovered.

Rouyet testified that, although in the past, he had observed some truck drivers hook in the angle irons from the ground, most truck drivers mounted the trailer to install them. He admitted, however, that this could not be done unassisted if the boxes were loaded flush with the edge of the trailer. He did not observe how the boxes were loaded on the front trailer here involved.

Respondent was positive that he had not climbed onto the equipment prior to blacking out, and testified that the tractor cannot be climbed upon from the ground. He also testified that angle irons and the cables can be and are installed from the ground, and that it would be extremely dangerous to try and climb onto a load of empties before it is tied down.

Respondent was severely injured. He had a facial burn with marked swelling on the left side of his face, a lacerated left eyelid, two parallel facial cuts, loose teeth, a fractured left elbow, and a fracture of the left jaw and cheek bone. He had a mild concussion and a sprained right knee. He had an operation on his jaw, had to have his teeth extracted, and could not work for ten months. He still was partially disabled at the time of trial, which was in March, 1952, some two and a half years after the accident. He urges that these injuries indicate that they were caused by being hit by a heavy object rather than from a mere fall.

The trial court denied motions for a nonsuit and directed verdict based on the

ground of insufficiency of the evidence, and submitted the case to the jury. In its instructions, at the request of respondent, an instruction was given, unchallenged as to form, on the doctrine of *res ipsa loquitur*. The jury, as already indicated, brought in its verdict against all the defendants.

The major contention of appellants is that the evidence was insufficient, and certainly was insufficient to warrant a *res ipsa* instruction when nobody saw, heard, or felt the accident, and where inferences arising from circumstantial evidence are needed to establish that the fork-lifter caused the injury. The appellants claim that before a *res ipsa* instruction can be given, the evidence must indicate that the most reasonable probability is that the accident happened as a result of the negligence of the defendant. Such authorities as *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 446, 247 P.2d 344, and *Prosser, Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 191, are cited to support the rule that before the doctrine is applicable the probabilities must preponderate in favor of negligence being the proximate cause and in favor of that negligence being that of defendant. Based upon this premise it is urged that a basic essential is here lacking, in that there is no evidence at all of the cause of the injury. *Res ipsa*, it is urged, cannot be used to first establish that the instrumentality causing the injury was under the control of appellants, and then that such instrumentality was negligently operated.

Basically, it is appellants' position that the jury should not be permitted first to infer that the fork-lifter was the agency causing the injury, and then utilize the inference based on *res ipsa* predicated on such inference, in a case where the inference that the fork-lifter was the offending agency is no more likely than the inference that respondent was injured by falling off the truck. They urge that where there are equally reasonable alternative explanations, one that would make appellants responsible and one that would not, the doctrine is not applicable. Cases are cited which support this general proposition. *La Porte v. Houston*, 33 Cal.2d 167, 199 P.2d 665; *Bennett v. Los Angeles Tumor Institute*,

102 Cal.App.2d 293, 227 P.2d 473; Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129.

[1-3] It is undoubtedly the law that *another equally probable* explanation consistent with defendants' non-liability bars application of the doctrine, but appellants erroneously assume that such question is one of law and not of fact. The mere *possibility* of another agency not under the control of defendant having caused the injury, will not bar a proper instruction on the doctrine. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522; Doe v. Pacific Crane & Rigging, Inc., 80 Cal. App.2d 601, 182 P.2d 284. It was for the jury to determine whether the two possibilities were equally probable. In determining that issue the jury was entitled to take the testimony and circumstantial evidence most favorable to respondent, and to disregard the conflicting inferences. In Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, at page 229, 252 P.2d 24, at page 28, the applicable principle is stated as follows: "How and to what extent plaintiff must account for his own conduct is explained by the same learned authority in his oft-cited article '*Res Ipsa Loquitur in California*', 37 Cal.L. Rev., 183, 201, as follows:

"(T)he plaintiff's mere possession of a chattel which injures him does not prevent a *res ipsa loquitur* case where it is made clear that he has done nothing abnormal and has used the thing only for the purpose for which it was intended.

"The plaintiff need only tell enough of what he did and how the accident happened to permit the conclusion that the fault was not his. Again he has the burden of proof by a mere preponderance of the evidence, and even though the question of his own contribution is left in doubt, *res ipsa loquitur* may still be applied under proper instructions to the jury'. (Emphasis added.)

"Therefore, unless it can be said that the evidence here, as a matter of law, does not exclude 'his (appellant's) conduct as a responsible cause', the fact that the accident occurred while he was engaged in the act of mounting and inflating the tire would

not deprive him of the benefit of *res ipsa loquitur*. Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* are present. Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P.2d 129."

What we are here dealing with is simply a case of circumstantial evidence. The only ways in which respondent could have been hurt were by the fork-lifter or by falling off the trailer. The evidence excludes other instrumentalities as the cause. No one saw respondent on the trailer. The evidence shows that he could not climb onto the tractor, that it was difficult if not impossible to climb onto the trailer, and that the angle irons and cables could be installed from the ground. Respondent's last recollection is of standing on the ground, and he has no recollection of removing the angle irons or cables from the ground. No one saw him doing so. The nature and extent of the injuries indicate the probability that he had been hit by the fork-lifter. Castro operated the fork-lifter backwards and forwards rapidly without looking or being able to see where he was going. The only unexplained fact is how respondent got to the position opposite the cab of the tractor where he was found. He last remembers standing between the two trailers. He could have been hit there and staggered to or could have been knocked to the spot where he was found. Under these facts it was for the jury to say whether it was most likely that he was hit by the fork-lifter or fell from the equipment.

[4] Of course, it is the law that, the mere fact an accident happened on appellants' premises does not give rise to or support an inference that appellants were negligent, unless it be shown, directly or indirectly by the evidence, that appellants were in control of the agency causing the injury. John v. B. B. McGinnis Co., Inc., 37 Cal.App.2d 176, 99 P.2d 323. But such causation can be shown by direct or circumstantial evidence.

[5] Certainly, the mere fact that the evidence and the inferences that arise there-

from are in conflict does not prevent the doctrine of *res ipsa* being applicable. Whatever doubt may have existed on this subject in the past, it is now well settled that a *res ipsa* instruction is permissible not only when the facts of the accident are in dispute, but even where it is disputed that any accident at all occurred. *Milius v. Wheeler Hospital*, 109 Cal.App.2d 759, 241 P.2d 684; *Roberts v. Bank of America*, 97 Cal.App.2d 133, 217 P.2d 129; *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344; *Black v. Partridge*, 115 Cal.App.2d 639, 252 P.2d 760, and the recent case of *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 260 P.2d 63. Certainly, if a properly conditioned *res ipsa* instruction can be given when it is disputed whether the accident happened at all, it can be given when the accident is proved but the causation is in doubt.

[6, 7] The parties discuss at some length the question as to whether in this state the inference involved in *res ipsa* can itself be predicated on an inference. It is settled law that an inference may be predicated upon an inference in this state. *Vaccarezza v. Sanguinetti*, 71 Cal.App.2d 687, 163 P.2d 470. Of course, the first inference must be reasonably probable and not be predicated upon speculation. *Reese v. Smith*, 9 Cal.2d 324, 70 P.2d 933. But, under the authorities already cited, in doubtful cases, such as the instant one, it is for the jury to determine whether the first inference is speculative or is reasonably probable. Certainly, the mere fact that respondent was knocked unconscious and is unable to recollect how the accident occurred, does not bar the application of the *res ipsa* doctrine. In *Raber v. Tumin*, 36 Cal.2d 654, 226 P.2d 574, the majority of the court applied the doctrine to an accident where a ladder fell upon the plaintiff, and where the plaintiff could not recollect how the accident occurred. It was possible that the plaintiff could have fallen negligently against the ladder and knocked it over, or the ladder could have fallen on plaintiff. The court held that it was up to the jury to reconcile these conflicting inferences and that, having done so, it could then apply *res ipsa*. Of course, in the *Raber* case, it was known that the in-

strumentality causing the injury was the ladder, while here such instrumentality is itself in doubt, but the same doubts as to alternative possibilities that caused the accident existed in the *Raber* case as exist in the instant case. In the *Raber* case the alternatives were, did plaintiff fall against the ladder or did the ladder fall on plaintiff? In this case they are, was respondent hit by the fork-lifter or did he fall? In both cases it was for the jury to determine which alternative was most probable.

It is interesting to note that in the *Raber* case the proprietor and his mere employee were required, under the *res ipsa* doctrine, to explain the accident because the proprietor had control of the ladder, and the employee was simply working about the premises, even though each could have been independently liable.

[8] On this phase of the case it is our conclusion that the circumstantial evidence supports the inference that the accident was caused by the fork-lifter operated by Castro, that such inference is reasonable and not speculative, and that the inference involved in *res ipsa* could be applied to the first inference which is based on circumstantial evidence.

[9] A different problem exists as to appellants Rouyet and Silva. Rouyet was the night superintendent of the cannery at the time of the accident. But there is no evidence at all of the scope of his duties, as to any notice to him of the negligent manner in which the fork-lifters were backed without the operator looking to the rear, as to any instructions relating to operation that he did or did not give, or as to what he was doing or where he was at the time of the accident. Admittedly, he was not present at any time during the loading operations. There is no evidence, or no reasonable inference from the evidence, that supports the judgment against him.

[10] The same can be said of Silva. The uncontradicted evidence places him at all times during the loading operation on the side of the equipment opposite to where respondent was standing and was hurt. There is no evidence, or no inference from the evidence, that places Silva in the area of the accident.

Respondent seeks to affirm the award against Silva under the rule of those cases which hold there can be multiple responsibility under the doctrine of *res ipsa* where any one or all of the defendants could have been reasonably responsible for the accident. *Raber v. Tumin*, 36 Cal.2d 654, 226 P.2d 574; *Cavero v. Franklin, etc., Benevolent Soc.*, 36 Cal.2d 301, 223 P.2d 471; *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. These cases are not here applicable. In all of them, under the evidence, any one or all of the defendants could have been responsible. In the instant case the uncontradicted evidence shows that the area limitation of Silva's work was such that he could not have been responsible for the accident.

[11] Respondent also seeks to support the awards against both Rouyet and Silva on a procedural argument. The record shows that but two forms of verdict were furnished the jury, one for and one against all defendants. No objection was made by any of the appellants to submitting the case to the jury in this fashion, nor did Silva or Rouyet ask for separate verdicts in reference to their liability. Respondent urges that since these two appellants made no objection in the trial court, they have waived their right to object on appeal. While failure to object to the form of the verdict constitutes a waiver of certain defects, *Hicks v. Coleman*, 25 Cal. 122, 146; *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 21, 276 P. 1017, it certainly cannot constitute a waiver of a sound claim that the evidence is insufficient to support the verdict as to any one of the defendants. See, generally, *Pisani v. Martini*, 132 Cal.App. 269, 22 P.2d 804; discussion 3 Cal.Jur.2d p. 649, § 164.

Although the judgment must be reversed as to Rouyet and Silva, counsel for these appellants have waived their right to any costs.

The judgment as to Rouyet and Silva is reversed, without costs; as to the Richmond Chase Company and Castro, the judgment is affirmed, with costs to respondent.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE v. ERNST.

Cr. 4980.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1953.

Rehearing Denied Nov. 30, 1953.

Hearing Denied Dec. 14, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, Lothrop E. Smith, J., of committing lewd and lascivious acts on a child under the age of 14 years, with intent to arouse child's sexual desires, and he appealed. The District Court of Appeal, Moore, P. J., held that child 8 years of age, and child 9 years of age, were properly permitted to testify when they correctly answered many questions on voir dire, by testimony responsive and coherent, demonstrating that each was intelligent enough to receive impressions and capable of intelligently relating them.

Judgment and order affirmed.

I. Criminal Law ⇨1158(4)

Witnesses ⇨79(2)

Provision of Code of Civil Procedure forbidding children under 10 years of age to be witnesses if they appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, imposes upon trial judge the duty of determining whether a child under 10 years is a competent witness, and when trial judge has heard the child testify, and has determined that child was a competent witness, in accordance with test of the statute, such determination is not a matter subject to review any more than judge's ruling upon the capacity of any other witness. Code Civ.Proc. § 1880.

2. Criminal Law ⇨1158(4)

Witnesses ⇨40(1), 45(2)

The competency of a child to testify is not determined entirely by its age, but rather by its intelligence and its understanding of the meaning and solemnity of an oath, and when it exhibits the ability to reasonably state the facts and thus qualifies as a witness, even though under the age of 10 years, trial court's finding will not be disturbed on appeal. Code Civ.Proc. § 1880.

3. Criminal Law ⇨1134(2)

On consideration of a court's finding of a child's competency to testify, though under the age of 10 years, the entire record will be reviewed on appeal. Code Civ.Proc. § 1880.

4. Witnesses ⇨40(1)

Girl 8 years of age, and girl 9, both of whom gave correct answers to many questions on voir dire, their testimony being responsive and coherent, and demonstrating that each was intelligent enough to receive impressions and to intelligibly relate them, were properly permitted to testify against defendant being prosecuted for commission of lewd and lascivious act against one of the girls. Code Civ.Proc. § 1880.

5. Infants ⇨20

Evidence sustained conviction of defendant for committing of lewd and lascivious acts upon a child under the age of 14 years, with intent to arouse the lust or passions or sexual desires of such child, even though evidence would have been, according to the rules of appellate procedure, sufficient to sustain a verdict favorable to defendant's alibi defense. Pen.Code, § 288.

6. Witnesses ⇨277(4)

In prosecution of defendant for committing lewd and lascivious acts on child under age of 14, with intent to arouse child's sexual desires, wherein defendant testified on direct examination that he was an investigator for state legislature of corrupt police departments, and on cross-examination that he had made a written report of an investigation of police department which made arrest, prosecution was properly permitted to forestall an unfair deduction by proof that no report had ever been made by defendant concerning such police department and that arresting officer's name had never been mentioned. Pen. Code, § 288.

7. Witnesses ⇨277(4)

A person accused of crime cannot limit his own cross-examination by testifying to a state of things inconsistent with, or contrary to, the evidence of the prosecution, and thereby avoid testifying expressly with relation to the precise facts, but he can be cross-examined with respect to facts or

denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states. Pen.Code, § 1323.

8. Criminal Law ⇨1039, 1044

Where no objection was made to juror's question to court in prosecution for committing lewd and lascivious acts on child under age of 14, as to why a psychiatrist hadn't been called in, and no motion was made to strike judge's answer and no instruction requested for purpose of advising jury as to limitations of judge's language, defendant was not entitled, on appeal, to challenge the acts of the trial court.

9. Criminal Law ⇨1174(5)

In prosecution for committing lewd and lascivious acts on child under age of 14, for purpose of arousing its sexual desires, wherein juror asked court why no psychiatrist had been called in, answer of court that in the action on trial, court did not think a doctor's testimony would do any good, was not prejudicial error, under all the circumstances. Pen.Code, § 288.

10. Criminal Law ⇨656(5)

In prosecution for committing lewd and lascivious acts on child under age of 14 years, with intent to arouse child's sexual desires, remarks by court to jury which in effect told jury that in final analysis it was going to have to determine who was telling the truth and that fact that a party could not remember small details surrounding a fact did not necessarily mean that he was not telling the truth, was not unfair, but was within bounds of judge's constitutional prerogative to comment on the evidence. Const. art. 6, § 19; Pen.Code, § 288.

11. Criminal Law ⇨823(2)

In prosecution for committing lewd and lascivious acts on child under age of 14 years, for purpose of arousing child's sexual desires, portion of cautionary instruction in which judge stated that fact that charge was difficult to disprove should not defer jury from rendering verdict of guilty, if jury was convinced beyond reasonable doubt that defendant was guilty as charged, was not erroneous, when preceded

by the customary cautionary instruction to jury to examine testimony of prosecutrix with great care and when jury was told that it was their duty to decide issue without regard to court's comment. Pen.Code, § 288.

12. Criminal Law ⇨656(5)

Where testimony of only two witnesses at trial of an action is in direct conflict on paramount issue of fact, common sense and legal logic compel such construction of constitutional provision permitting judge to comment on the evidence, as will permit trial court, by virtue of its intimate and peculiar knowledge of the witnesses, to advise jury that one of the witnesses has committed perjury. Const. art. 6, § 19.

13. Criminal Law ⇨1137(1)

A defendant who acquiesced in selection of municipal court building when presiding judge directed the trial to be held in such building in order to avoid unnecessary delay, could not complain that trial was outside the jurisdiction of the Superior Court, and a nullity, because place of holding trial did not meet the statutory requirements, especially when he failed to show how he was prejudiced by holding a trial in such building. Code Civ.Proc. §§ 73, 73b, 142.

14. Courts ⇨74

Provision of Code of Civil Procedure relating to holding of sessions of Superior Court at point more than 8 miles from nearest session point, is mandatory, but is not jurisdictional to point that a session of the court in an unauthorized site is null and void. Code Civ.Proc. § 73f.

15. Judges ⇨19

Where defendant made no objection to judge at time of his assignment, or at any time during trial, except an objection to judge on ground of asserted prejudice, proceedings were not rendered void on theory that judge was not authorized to conduct the trial in absence of stipulations of the

parties, when assignment was by judicial council as provided for by Constitution. Const. art. 6, §§ 1a, 5.

16. Judges ⇨16(1)

Constitutional provision for assignment of judge to the Superior Court by judicial council from municipal court, is in harmony with and a method in addition to, selection of a judge pro tempore by stipulation of the attorneys. Const. art. 6, §§ 1a, 5.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of violating section 288 of the Penal Code.¹ After his motions for a new trial and arrest of judgment had been denied, proceedings were suspended and he was placed on probation for five years on terms, one of which required that he serve six months in the county jail. His grounds of appeal are the incompetency of the two child witnesses, the insufficiency of the evidence, errors in the court's rulings and instructions, disqualification of the judge and lack of jurisdiction.

About noon on January 31, 1952, appellant called at the home of Mrs. T and told her that since her daughter, referred to herein as "X", was interested in taking dancing lessons, he desired to arrange for her to enroll in the school of Mrs. Todd who resided opposite to his home in Monterey Park, one block from Mrs. T's home. Such offer was politely rejected, X having already arranged for a visit to Mrs. Todd in the afternoon with her friend and schoolmate, Y. When X arrived at home from school, her mother had her accompany Y to the Todd home. On leaving Mrs.

1. "Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of

arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life."

Todd, the children found appellant seated in his truck in the street. He told X he was just going to call for her at her home and asked her to go into his house that he might comb her hair. Her mother had previously employed Mrs. Ernst to give X a permanent, at which time X first met appellant. After parking the truck in his driveway, the two children entered through the rear door of the home with appellant and were seated in the front room. After he had served them peppermint ice cream in a bowl, appellant directed X to go with him through the hallway into a small room and had Y remain where she was and look at a magazine. He had X sit on his lap and began to comb her hair. As he did so he placed his hand beneath her panties and rubbed her private parts for about a minute and asked her how she liked it. He then took X back to join Y and asked X whether she would like for him to comb Y's hair. After he had done so, the children departed. On the way home X told Y what had happened and immediately after arriving home she related her experience to her parents. Her father notified the police.

X was eight years old and Y was nine. The latter's testimony of the events outside the den was, in substance, the same as that of X. She added that (1) they were in appellant's home about twenty minutes, (2) as they were leaving, appellant called X back into the rear porch and talked to her out of Y's hearing, (3) while they were crossing the street, X was crying as she told about appellant's conduct.

The Children, Competent Witnesses.

[1-3] Section 1880 of the Code of Civil Procedure forbids children under ten years of age to be witnesses if they "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." That language imposes upon the trial judge in any case to determine whether a child under ten years is a competent witness. It means that if such child appears to the trial judge to have had the capacity to receive impressions and to relate them truthfully, he is a competent witness. Moreover, her testimony on the material issues indicates her competent in-

telligently to have received the impressions and intelligently to report them. And when the judge has heard the child testify in the matter, and "has determined that it was a competent witness, such determination is not a matter of review any more than his ruling upon the capacity of any other witness." *People v. Harrison*, 46 Cal.App.2d 779, 785, 117 P.2d 19, 22. The question as to the competency of a witness who has not reached his tenth year is addressed to the discretion of the trial court. *People v. Goff*, 100 Cal.App.2d 166, 170, 223 P.2d 27. In the *Goff* case, the prosecutrix was a child of five years. The court determined after her voir dire examination that she was qualified, and also after giving her testimony. It was held that there was no abuse of discretion. The competency of a child to testify is not determined entirely by its age but rather on its intelligence, its understanding of the meaning and solemnity of an oath. And when it exhibits the ability reasonably to state the facts and it thus qualifies, the trial court's finding will not be disturbed on appeal. *People v. Manuel*, 94 Cal.App.2d 20, 24, 209 P.2d 981. On a consideration of a court's finding of a child's competency, the entire record will be reviewed on appeal. *People v. Arcia*, 85 Cal. App.2d 127, 129, 192 P.2d 31; *People v. Harrison*, *supra*.

[4] While X and Y did not answer all questions on voir dire as philosophers might have done, yet they gave correct answers to many. The testimony of each of them was responsive and coherent. Because it demonstrates that each was intelligent enough to receive impressions and capable of intelligibly relating them, any deficiency shown in her voir dire examination will be overlooked. *People v. Harrison*, *supra*, 46 Cal.App.2d at page 785, 117 P.2d at pages 22, 23. The narrative of X that she first met appellant at his home; that he kissed her there on two prior occasions on a Saturday and a Tuesday; that he met her and Y as they left Mrs. Todd's and asked them into his home; that he served them with peppermint ice cream and took her into an adjoining room to comb her hair—her testimony of those and subsequent events all sound like the testimony of a witness of

understanding and are such proof as to justify the determination of the trial court.

The foregoing observations relative to X's qualification as a witness are equally applicable to Y.

Evidence Sufficient.

As corroboration of X's testimony, in addition to that of Y, her mother testified that on reaching home about 5 p. m. her daughter was crying, shaking and upset. She heard her "tell Y that he rubbed her." Her father reported the incident to Sergeant Hoiten who called and quizzed X for half an hour in the presence of the mother. The father testified that on her arrival home she was "more or less hysterical." When he called on the police, Sergeant Hoiten and a stenographer returned with him. After the interrogation, X directed the officer and her father to the residence of appellant. Sergeant Hoiten testified that in the evening he called at appellant's home and found a half carton of peppermint ice cream in the ice box. In response to the imputation of the interest of the parents in the political aspirations of appellant for the city council, both Mr. and Mrs. T testified that they had never heard his name mentioned during the councilmanic campaign in which Mr. T favored the election of one Marria.

[5] The foregoing is a summary of all the proof adopted by the court. Appellant himself testified to an alibi and was persuasively supported by a number of witnesses. He urges here the strength of that defense. But while a verdict favorable to him, by virtue of his alibi, would have been supportable according to the rules of appellate procedure, it was rejected by the jury and the trial court. In such event, this court is powerless to interfere on the ground of the insufficiency of the evidence. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Also, counsel argues that there was no substantial evidence that the defendant had touched the body of X "with intent to arouse her passions or his passions * * * she had no knowledge regarding it and there was no statement that the place rubbed was the sexual organs." But the testimony of the child was that he

rubbed her private parts. That she had "no knowledge regarding it" renders his act even more culpable. That he referred to the rubbing and not to the combing was answered by the verdict. That the prosecution was based upon X's report of the incident in appellant's home and not upon his political aspirations was the finding of the jury.

No Prejudicial Error in Rulings.

[6] Appellant contends that he was prejudiced by the court's ruling which permitted the prosecution to "bring out new matters not brought out on direct examination" and then impeaching appellant by proving the untruth of the new matters elicited by the cross examination. Of course appellant's thesis is fundamental and is sound. But it is not the complete story. On direct examination appellant told that he was an investigator for the State Legislature of corrupt police departments; that his home had been searched and his reports had been tampered with. It was clear to the prosecutor that from such proof it would be contended that the police department of Monterey Park abhorred such investigation and had framed appellant for the purpose of halting the investigation or of minimizing the effect of appellant's reports. Such fear or suspicion on the part of the prosecutor was reasonable and is proof of his alertness to the pitfalls of a criminal trial. It was therefore timely and appropriate that appellant be asked whether he had made a written report of his investigation of Monterey Park's Police Department and whether Sergeant Hoiten's name was mentioned. Over objection he answered that it was. Had the inquiry on this point ceased with appellant's testimony that his home had been searched and his reports "tampered with," the deduction that a cruel, corrupt and dishonest police force feared an investigation could have been drawn. Such deduction was to be prevented only by pursuing the inquiry until some concrete basis could be found whereby to repel any such unfair conclusion. Consequently, after appellant testified that he had made an investigation of the Police Department of Monterey Park, it was only fair to allow the People to

prove by the Secretary of the State Senate that no report had ever been made by appellant concerning such police department and that Sergeant Hoiten's name had never been mentioned. Such evidence was competent to forestall an unfair deduction: not to impeach appellant.

[7] A person accused of crime cannot limit his own cross examination by testifying to a state of things inconsistent with, or contrary to, the evidence of the prosecution, and thereby avoid testifying expressly with relation to the precise facts. "He can be cross examined with respect to facts or denials which are necessarily implied from the testimony in chief as well as with respect to facts which he expressly states." *People v. Mayen*, 188 Cal. 237, 257, 205 P. 435, 443, 24 A.L.R. 1383. Language to the contrary in *People v. Arrighini*, 122 Cal. 121, 127, 54 P. 591, must be deemed to have been impliedly overruled by later cases. *People v. Zerillo*, 36 Cal. 2d 222, 228, 223 P.2d 223. The Penal Code, section 1323, specifically authorizes the cross-examination "as to all matters about which he (accused) was examined in chief."

Assignment is made of the court's answering the question of a juror, to wit: "Why at no time, for either the People's side or the defendant's side a doctor or a psychiatrist wasn't called in?"

"The Court: Well, as a matter of fact I do not believe that the testimony of either an M.D. or of a psychiatrist would have been of any benefit in this lawsuit. In the final analysis you are either going to believe one group of witnesses or another group of witnesses, and although psychiatrists have a place in this world I do not believe that the testimony of one would have helped us any in this lawsuit.

"Mr. Lavine: May it please the Court I wish to differ with your Honor, because of the testimony of Mrs. Taylor, the testimony brought out on cross-examination, that they did not take the child to a doctor, and I will argue that in the lawsuit.

"The Court: Mr. Lavine will argue, he says, whether or not it was good judgment in not taking her to a doctor, but I do not

believe that it would have helped much in this lawsuit."

[8] Appellant argues that he was prejudiced by the court's answer in that it "was argumentative and invaded the province of the jury." In the first place, no objection was made to the juror's question, and no motion was made to strike the judge's answer and no instruction was requested for the purpose of advising the jury as to the limitations of the judge's language. A litigant cannot withhold his objections and motions with respect to the conduct of a trial and, on appeal, challenge the acts of the trial court. It should have the first opportunity to correct its rulings or instruct with reference to any inappropriate remark.

[9] But there was no prejudice caused appellant by the judge's answer. See *People v. Delgado*, 37 Cal.App. 807, 810, 175 P. 24. The total sum and substance thereof was that in the action on trial, the judge did not think a doctor's testimony would do any good. He was correct.

[10] Assignment as prejudicial is made of the following remarks by the court to the jury: "Ladies and gentlemen, before instructing you I want to refer to that homely illustration of not being able to see the forest for the trees. I hope you will be able to get to the real issues of this matter and be able to weed out the extraneous issues. A great deal has been said and a great deal of emphasis put upon impeachment of witnesses. I think it has been pretty well explained to you what that word means. In the final analysis you are going to have to determine who was telling the truth here, and it will be a deliberate situation. Either one side or the other is essentially and deliberately lying. There would be nothing that could reconcile the testimony of both sides. I just want to point that out to you.

"I might also point out, in view of the fact that so much has been said about impeachment, that I do not believe any person who attended the Rose Bowl game last year would forget, for instance, that they had attended that game, although by now they might have forgotten who was seated

on one side or the other of them or what clothing they wore or what other people they saw there. Maybe a week or two later they might have forgotten those facts, or even that they saw the Governor there; but the mere fact that they could not remember those details does not mean that they could not remember the important thing of being there. I just give you that as an illustration. Now what you are going to have to determine here is who was telling the truth. And it will be a deliberate situation."

Such comments were in no sense unfair. They were strictly in accord with the constitutional provision for a judge to comment on the evidence. Art. VI, § 19.² No mention was made of any particular witness as might legally and appropriately have been done. Section 19, *supra*. The comment was applicable to both groups of witnesses with no invidious contrasts. It was not a full and free exercise of the power conferred by section 19. The comment was designed merely to arouse the interest of the jury to the point of considering and estimating the significance of the testimony of all witnesses. When one group of witnesses say that the accused was at a designated house at a certain hour of a specified day and did the acts named in the pleading and the other group of witnesses say that he was at other places at and near the time specified, how could the comment of judge prejudice either side by saying to the jury that one of the two groups of witnesses was lying and the jury would "have to determine here who is telling the truth." Section 19 has been judicially approved and adopted as a rule for trial courts. *People v. Ottey*, 5 Cal.2d 714, 723, 56 P.2d 193. The comment criticized is not argumentative, neither did it deprive the jury of its freedom to weigh, consider and determine the merits of every witness.

[11,12] Criticism is made of the last portion of the cautionary instruction as

follows: "* * * and the fact that the charge here made is one difficult to disprove should not defer [sic] you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty as charged." The quoted portion did not weaken, modify or detract from the preceding customary instruction given to the jury as a caution to examine the testimony of the prosecutrix with great care. The two parts of the entire instruction are not antagonistic. Neither does the above-quoted portion indicate an opinion of the court as to the comment "in order to uphold the dignity of the court" since it left to the jury the function of determining what was the truth. *People v. Ahsbahr*, 77 Cal.App.2d 244, 251, 175 P.2d 33. Where the testimony of the only two witnesses at the trial of an action is in direct conflict on the paramount issue of fact common sense and legal logic continue to compel such construction of the section (19) "as will permit the trial court by virtue of its intimate and peculiar knowledge of the witnesses to advise the jury that one of the witnesses has committed perjury". *Pomerantz v. Bryan Motors, Inc.*, 92 Cal.App.2d 114, 119, 206 P.2d 440, 443. The trial judge having carefully reminded the jury that it devolved upon them to decide the question at issue without regard to the court's comment, it is difficult to conceive how a prejudice could have resulted to appellant. The very instruction given was approved in *People v. Arechiga*, 72 Cal.App.2d 238, 240, 164 P.2d 503, as an accurate statement of the law on the subject. See *People v. Westek*, 31 Cal.2d 469, 481, 190 P.2d 9; *People v. Todd*, 91 Cal.App.2d 669, 673, 205 P.2d 453.

Holding Court at Alhambra not Prejudicial.

Appellant contends that the Municipal Court building in Alhambra is not an authorized place for holding court and that therefore the trial of appellant in those

2. "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper de-

termination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

quarters was taking evidence out of court. Such contention is based upon the statutory provision that no sessions of the superior court shall be held in any city meeting the requirements of sections 73, 73b or 142 of the Code of Civil Procedure unless the city hall of that city is at least eight miles from the city hall of the nearest city in which sessions of the superior court are lawfully held. Also, the adequacy of any proposed quarter must be approved in advance by a majority of the judges of the superior court if such sessions are legally authorized to be held in such city for the first time. Therefore, argues appellant, since the trial was outside the jurisdiction of the court, it was a nullity, citing *In re Brady*, 65 Cal.App. 345, 224 P. 252; *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 43 A.L.R. 1509.

[13,14] Such contention comes in the face of the fact that appellant chose to be tried in the Alhambra Municipal Court Building in that he complacently acquiesced in the selection of that site when the Honorable Kurtz Kaufman, presiding judge at Pasadena, directed the trial to be held in such building in order to avoid unnecessary delay. By virtue of such acquiescence by appellant and by reason of his failure to show how he was prejudiced, he is in no position now to complain. *Union Oil Company v. Reconstruction Oil Company*, 20 Cal.App.2d 170, 181, 66 P.2d 1215; *People v. Pompa*, 192 Cal. 412, 421, 221 P. 198. The decision in *Hamblin v. Superior Court* cited by appellant is authority for the proposition that while section 73f of the Code of Civil Procedure is mandatory it is not jurisdictional to the point that a session of court in an unauthorized site is null and void. See also, *Union Oil Company v. Reconstruction Oil Company*, supra.

Judge Smith was Correctly Designated.

Appellant contends that although Judge Smith was an "assigned" judge, he was not authorized to conduct the trial in that ap-

pellant did not stipulate to the judge's presiding and therefore all proceedings are void.

Such contention is vain. Appellant made no objection to Judge Smith at the time of the assignment to Alhambra or at any time during the trial, except that he did object to the judge on the ground of the latter's asserted prejudice, not raised on appeal.

[15,16] The stipulation by appellant to Judge Smith's acting was not essential to his competency for service. He forgets that a judge may be assigned to try a particular cause or to sit for a specified period of time, while a judge pro tempore may be selected from the bar by stipulation of the parties as provided by section 5 of Article VI of the Constitution. Judge Smith was assigned by the Judicial Council from the Municipal Court as provided by section 1a of Article VI. Prior to the adoption of section 1a it had been the practice to select a judge pro tempore by stipulation of the attorneys in the case. After the Supreme Court had held that section 1a was the exclusive method of investing judicial authority, *Martello v. Superior Court*, 202 Cal. 400, 261 P. 476, section 5 of Article VI was reinstated so that the selection of a licensed lawyer as judge pro tempore by stipulation of the parties to an action was restored. But that method was in addition, and not contrary to section 1a. The two sections are in harmony: one method is through the machinery of the Judicial Council; the other by stipulation of the parties. Judge Smith having been assigned from the Municipal Court to the Superior Court was constitutionally and effectively qualified.

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

121 Cal.App.2d 124

PEOPLE v. DOMENICO.

Cr. 2909.

District Court of Appeal, First District,
Division 1, California.

Nov. 5, 1953.

Defendant was convicted of possessing firearm capable of being concealed upon the person, defendant having theretofore allegedly been convicted of a felony in New York. The Superior Court of the State of California in and for the city and County of San Francisco, Eustace Cullinan, Jr., J., entered judgment, and defendant appealed therefrom and from order denying his new trial motion. The District Court of Appeal, Fred B. Wood, J., held that defendant's prior New York conviction of a felony under New York law was properly certified and authenticated, even though New York judgment was not attested by the clerk and authenticated by the chief judge of the New York Court.

Judgment and order affirmed.

1. Criminal Law ⇨1202(3)

Prior conviction of felony was element or ingredient of charge against defendant of possessing firearms capable of being concealed upon person, defendant having theretofore allegedly been convicted of a felony in New York, and issue whether such prior conviction existed was joined under defendant's plea of not guilty, and, therefore, fact that defendant had admitted the prior conviction when arraigned upon the indictment in the subsequent California prosecution would not make offer and reception of proof of New York conviction constitute error. Gen.Laws, Act 1970, § 2; Pen.Code, §§ 1025, 12021.

2. Criminal Law ⇨1202(1)

Statute forbidding possession of firearms capable of being concealed upon the person by one having theretofore been convicted of a felony in another state does not require that the offense upon which prior conviction was based would be pun-

ishable as a felony if committed in California. Gen.Laws, Act 1970, § 2; Pen.Code, § 12021.

3. Criminal Law ⇨1202(1)

Defendant's conviction of grand larceny of second degree and his imprisonment therefore in New York state prison pursuant to New York laws characterized defendant as person who had been convicted of a felony under the laws of another state within statute forbidding such person to possess firearms capable of being concealed upon his person. Gen.Laws, Act 1970, § 2; Pen.Code, § 12021; Penal Law N.Y. §§ 1296, 1297, 2183.

4. Criminal Law ⇨1202(3)

In prosecution for possession of firearms capable of being concealed upon the person by defendant allegedly having theretofore been convicted of felony in New York, defendant's prior New York conviction of a felony under New York law was properly certified and authenticated, even though New York judgment was not attested by the clerk and authenticated by the chief judge of the New York court, in view of fact that prison warden's certificate, which set forth copy of judgment and sentence and defendant's photograph and fingerprints, was supported by certificates of deputy commissioner of New York Department of Correction and of the New York Secretary of State. Code Civ.Proc. §§ 1905, 1918, subd. 7; Pen.Code, § 969b.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Dep. Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant was tried upon an indictment¹ which charged, in Count I, burglary (violation of section 459 of the Penal Code) with intent to commit theft and armed with a deadly weapon at the time, and, in

1. He was at the same time tried and acquitted upon an information which

charged a violation of section 11500 of the Health and Safety Code.

Count II, violation of the dangerous weapons control law of 1923, Deering Act 1970, § 2, possession of a firearm capable of being concealed upon the person, defendant having theretofore been convicted of a felony (grand theft) by the Court of General Sessions, County of New York, State of New York.

Following these two counts, the indictment alleged, as a "prior conviction," said New York grand theft conviction and that he served a term of imprisonment therefor in the state prison in New York.

Defendant was convicted on Count II. The jury disagreed on Count I, which count was later dismissed without retrial. He has appealed from the judgment rendered on Count II and from the order denying his motion for new trial.

The evidence shows that defendant had previously been convicted of a felony under the laws of New York; grand larceny in the second degree, punishable by imprisonment in the state prison under the laws of that state.

But the evidence does not show that the offense which he committed in New York would be punishable as a felony if committed in California. The New York law defined grand larceny in the second degree as including the taking of property of the value of more than \$100 but not exceeding \$500, N.Y. Penal Code, § 1296, 39 McKinney's Consol. Laws of New York, punishable by imprisonment for a term not exceeding five years in the state prison of that state, N.Y. Penal Code, §§ 1297 and 2183.

The California Statute, insofar as the value of the property taken is concerned, characterizes the offense as a felony only when the property is of a value exceeding \$200, Pen. Code, § 487, and there is in the record before us no proof of the circumstances of the commission of the offense; e.g., whether the property was taken from the person of another or whether it was an

automobile, horse, bovine animal or other thing to which the \$200 limit does not apply under our statute.

[1] Defendant contends that there was a failure of proof (1) because it does not appear that the offense committed in New York would be a felony if committed in California, and (2) because the record of the New York conviction, admitted in evidence here, was not properly authenticated.²

[2] (1) *Does section 2 of Deering Act 1970 require, as to prior conviction of a felony in another state, that the offense be punishable as a felony if committed in this state? No.*

The statute declares that "* * * no person who has been convicted of a felony under the laws of the United States, of the state of California, or any other state or any other government or country * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person." Deering Act 1970, § 2; Stats. 1923, ch. 339, p. 696, as amended by Stats. 1931, ch. 1098, p. 2316; codified without substantial change, as section 12021 of the Penal Code, by Stats. 1953, ch. 36, p. 653, at p. 654.

Literally, the expression "convicted of a felony under the laws of * * * any other state" means "felony" as defined by the laws of that state; in this case the laws of the state of New York.

That the literal meaning of the language used in section 2 of Act 1970 is the intended meaning seems quite clear from a reading of the section in its original form and as amended in 1931, using italics to indicate words added and strike-out type to indicate words deleted by the 1931 amendment: "* * * no person who has been convicted of a felony ~~against the person or property of another or against under the government laws~~ of the United States ~~or, of the State of California or of any politi-~~

2. Defendant also suggests that error occurred in the offer and reception of proof of the New York conviction, he having admitted the prior conviction when arraigned upon the indictment in the instant case. (See the last sentence of section 1025 of the Penal Code.)

This point lacks merit because the prior conviction of a felony was also an element or ingredient of the offense charged in Count II, requiring proof by the state under the issue joined by defendant's plea of "Not guilty."

cal subdivision thereof, or any other state or any other government or country * * shall own or have in his possession or under his custody or control any * * * firearm capable of being concealed upon the person." Stats. 1923, p. 696; amended by Stats. 1931, ch. 1098, p. 2316.

In *People v. Camperlingo*, 1924, 69 Cal. App. 466, 469-470, 231 P. 601, 602, the court, construing the original statute, § 2 of Deering Act 1970, assumed that "felony against the person or property of another" meant "felony" under the laws of the state where committed and that section 17 of our Penal Code furnished the test or definition of felony elsewhere, imprisonment in a state prison. No holding or suggestion was made that the foreign offense must be such as would be punishable by imprisonment in a state prison if committed in this state. The 1931 amendment ("under the laws of * * * any other state") would seem emphatically to negative the possibility of any such holding or suggestion now.

In *People v. Voss*, 1934, 2 Cal.App.2d 188, 189-190, 37 P.2d 846, the substantive offense, violation of section 2 of Act 1970, occurred in 1934. The prior offense occurred in 1926, violation of section 37 of the Criminal Code of the United States, conspiracy to violate section 141 of that code. Defendant contended the prior was a misdemeanor. The court held it was a felony, because Congress had amended the statute in 1910, changing it from a misdemeanor to a felony. There was no discussion or mention of the question whether it would have been a felony under the laws of this state.

We see no basis for reading into the statute a requirement that the prior conviction of a felony in another state must be for an offense which would be punishable as a felony under the laws of this state if committed here.

Defendant, in support of his contention, cites a number of decisions³ which construe and applied our habitual criminal

statute, section 644 of the Penal Code as implemented by section 668 of that code. Section 644 requires augmentation of the penalty if the defendant was previously twice or thrice convicted of any of certain specified crimes and served a term therefor in any state prison or federal penitentiary "in this State or elsewhere". Section 668 expressly defines such a crime committed outside the jurisdiction of this state as "an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison." Section 668, obviously, bears no similarity to section 2 of Act 1970 in this respect. Decisions interpreting section 668 are not determinative of the meaning of section 2.

One of defendant's cases, *In re Rogers*, 20 Cal.App.2d 397, 66 P.2d 1237, did involve section 2 of Deering Act 1970, but the question now before us was not presented for consideration. The petitioner in the *Rogers* case had been convicted of violating said section 2. He was also found guilty of three prior convictions of felonies and, pursuant to section 644 of the Penal Code, was sentenced to state prison for life without benefit of parole. He contended that violation of section 2 was only a misdemeanor and that none of the prior convictions charged and proved as an element of that offense could also be used as a basis for augmenting his sentence under section 644. The court held against him as to both of these contentions. There was no discussion of the requirements of proof of an out of state conviction nor any indication that any of the prior convictions occurred outside of California. The *Rogers* case, obviously, bears no similarity to our case. In our case the prior New York conviction was not used as a basis for augmenting defendant's sentence and the state makes no claim that his New York conviction meets the requirements of our habitual criminal law.

[3] Accordingly, we conclude that defendant's conviction of grand larceny of

3. In *re* *McVickers*, 29 Cal.2d 264, 176 P. 2d 40; In *re* *Bramble*, 31 Cal.2d 43, 52, 187 P.2d 411; In *re* *Wolfson*, 30 Cal.2d 20, 180 P.2d 326; In *re* *Kingsbury*, 74 Cal.App.2d 959, 170 P.2d 82; In *re* *Tay-*

lor, 64 Cal.App.2d 47, 148 P.2d 143; *People v. Morrison*, 26 Cal.App.2d 616, 80 P. 2d 94; and *People v. Hayes*, 3 Cal.App. 2d 59, 39 P.2d 213.

the second degree and his imprisonment therefor in a state prison in New York pursuant to the laws of that state, characterized him as a "person who has been convicted of a felony under the laws of * * * any other state" as that expression is used in section 2 of Deering Act 1970.

[4] (2) *Was the New York record of defendant's conviction of a felony under the laws of that state properly certified and authenticated? Yes.*

Proof of defendant's New York conviction and imprisonment was made by means of a series of certificates: (1) a certificate by W. L. Denno, Warden of Sing Sing Prison, setting forth a copy of the New York judgment and sentence, and photographs and fingerprints of Silvio Domenico, and stating that they are true copies of the original commitment, photographs and fingerprints on file in his office as legal custodian thereof and that Domenico served a term of imprisonment in said prison; (2) attached to Domenico's certificate, a certificate with the departmental seal affixed, by William E. Leonard, deputy commissioner of the New York Department of Correction, that Wilfred L. Denno was warden of Sing Sing Prison, duly authorized to grant the certificate which Denno made, and that the signature attached to the Denno certificate is that of said Warden Denno; and (3) attached to Leonard's certificate, the certificate of the secretary of state of New York that Leonard held the office indicated and was duly authorized to grant the certificate Leonard made, that said certificate is in due form and executed by the proper officer, that the seal thereto affixed is the seal of the Department of Correction of the State of New York, that Leonard's signature is in his proper handwriting and is genuine, and that full faith and credit may and ought to be given to his official acts; affixed to the secretary of state's certificate is the great seal of the State of New York.

Defendant claims the New York judgment should have been attested by the clerk and authenticated by the chief judge of the New York Court as provided by

section 1905 of our Code of Civil Procedure for the proof of a judicial record of a sister state. That could have been done but it was not necessary.

Section 969b of our Penal Code sanctions certification by the official custodian of the New York prison records and subdivision 7 of section 1918 of our Code of Civil Procedure recognizes authentication by the secretary of state of New York. The certificates by Denno, Leonard and the secretary of state, in the instant case, meet the requirements of sections 969b and 1918.

People v. Foster, 3 Cal.App.2d 35, 41, 39 P.2d 271, is readily distinguished. There a Louisiana conviction was shown by certificates purportedly executed by the general manager and by the warden of the Louisiana state prison but there was "no authentication of the signatures or official standing of the general manager and warden". 3 Cal.App.2d at page 42, 39 P.2d at page 274.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



121 Cal.App.2d 247

GARWICK v. GORDON et al.

Civ. 19577.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1953.

As Modified on Denial of Rehearing

Dec. 4, 1953.

Suit by one partner against the other and against others for declaratory judgment, dissolution of partnership, and accounting. The Superior Court, Los Angeles County, William R. McKay, J., entered judgment from which the defendant partner and another appealed. The District Court of Appeal, Moore, P. J., held that since there were no findings of balance due or of damages or of value of partnership assets,

conclusion of law and judgment awarding assets to plaintiff to entire exclusion of defendant partner were erroneous.

Affirmed in part and reversed in part and remanded with directions.

1. Appeal and Error Ⓒ544(3), 907(3), 1071(6)

Where appeal is taken without reporter's transcript, reviewing court is limited to determination of questions as to whether complaint states cause of action, whether findings are within issues, whether judgment is supported by findings, or whether reversible error appears on face of record, and it is conclusively presumed that findings are supported by evidence, and omission to make finding on issue raised by pleadings is not ground for reversal.

2. Account Ⓒ22

In action for accounting, statement in findings of balance due, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of the action.

3. Partnership Ⓒ344

In suit for partnership accounting, where there were no findings of balance due or of damages or value of assets, conclusion of law and judgment awarding assets to one partner to entire exclusion of the other were erroneous. Corporations Code, § 15038(2)(b).

4. Account Ⓒ22

An award of property as complete settlement of accounting action cannot be considered as implied finding that total amount of damages suffered is exactly equal to value of property awarded.

Armond M. Jewell, Los Angeles, for Philip MacKay Gordon and Ginger Beer Bottlers, Ltd.

Stanley M. Arndt, Los Angeles, for Cock 'n Bull Products.

Laurence J. Rittenband, Los Angeles, for Floyd Garwick.

MOORE, Presiding Justice.

In December 1948 Messrs. Garwick and Gordon were granted a bottler's license by Cock 'n Bull Products, Incorporated, where-

by they became the exclusive licensees for the bottling and distribution of the beverages of the licensor in Southern California. For such franchise or license they paid \$500 cash and agreed to pay a balance of \$14,500 in installments. On January 5, 1949 they executed articles of copartnership to continue in force for a period of ten years. Also, their writing provided for the formation of a corporation with the name of "Ginger Beer Bottlers, Ltd.," hereinafter referred to as the "corporation", to market the products of the licensor. Following the incorporation, a contract was executed by the two men, their partnership and the corporation whereby the latter paid \$2,000 to apply on the cost of the license and agreed to operate the business of bottling and distributing the licensor's products in the manner as promised by Garwick and Gordon. Cock 'n Bull Products consented to such agreement under the express stipulation that its consent was not to be deemed a consent to an assignment of the license to the corporation. Pursuant to the covenants of such contract, the corporation executed its promissory note to the licensor in the sum of \$12,500. It was guaranteed by the two partners and was given to secure the balance of the purchase price of the franchise. The note was thereafter wholly paid by its maker.

While the corporation was operating the distribution franchise, Gordon was gradually excluding Garwick from the management of the partnership's enterprise and from the affairs of the corporation which in September 1950 Garwick notified that its rights under the sublicensing agreement were cancelled. This was done pursuant to the articles of copartnership.

The flow of affairs above recited resulted in the filing of this action by Garwick for a declaration of the rights of the partners and the corporation under the articles of copartnership. Also, he demanded a dissolution of the partnership, and an accounting.

Cock 'n Bull as a party defendant cross-complained against the partners and the corporation and asked for a declaration of its rights to revoke the franchise and for damages. Among its declared grievances it alleged the use by the partners and the cor-

poration of ginger beer bottles with paper labels instead of ceramicized bottles; failure to pay royalties promptly; failure to furnish an indemnity policy; distribution of ginger beer of brands other than those of licensor; failure vigorously to carry forward the sales of the latter's products in 1949 and 1950.

By their answer to the cross-complaint, both Gordon and the corporation alleged a counterclaim based upon the licensor's violation of the exclusive franchise by selling its products to other distributors. Also, they alleged (1) an inferior quality of concentrate was furnished to them and (2) the formula for ginger ale concentrate was so changed that they suffered a loss of good will and damages.

Upon the issues thus created, the action was tried, resulting in a holding for Garwick. While the court found numerous, surreptitious breaches of the franchise agreement by Gordon due to his "gross negligence and incompetency" and that he had not brought himself within the provisions of Civil Code section 3275¹ and "is not entitled to relief thereunder" and found Garwick "had not acted in a gross or incompetent manner and had brought himself within the benefit privileges and relief provided by section 3275 * * * and is entitled to relief thereunder," it made no separate findings of fact with respect to an accounting between the partners. It merely declared in its written opinion that the court's award operated as a finding that there was an accounting between the parties. Also, the conclusions of law declared there had been an accounting.

The court found that the franchise had never been assigned or transferred to the corporation, and that its rights as a distributor for the partnership ceased November 1, 1950. The court decreed the partnership dissolved; found no damages for or against Cock 'n Bull Products and awarded the franchise to Garwick "as the surviving partner," subject to his compliance with cer-

tain specified conditions. Garwick having complied therewith, the court with the licensor's approval made and entered its final judgment, October 19, 1951, from which comes this appeal by Gordon and the corporation.

Prior to the filing of its decision, the court's opinion was placed in the files. It was that document in which the court specified the conditions for Garwick to submit a plan to be approved by Cock 'n Bull Products, to buy out the corporation and to operate the franchise. Although such conditions were complied with, neither judgment or decision with respect thereto was entered.

Pursuant to their appeal, appellants filed a proposed settled statement. Respondents filed objections and oral arguments were heard, but the trial court refused to settle the statement. Appellants then moved to amend their proposed settled statement and asked for it to be settled as amended. Objections were again filed, and after argument, appellants' motion was denied. They took an appeal from this order on the judgment roll alone, contending that the trial court abused its discretion in denying their motion. In view of the conclusions impliedly reached below, it is assumed, though not decided, that the denial of the motion to amend the proposed settled statement and to settle it as amended was not an abuse of discretion.

[1] Where an appeal is taken without a reporter's transcript, the reviewing court is limited to a determination of the questions as to whether (1) the complaint states a cause of action; (2) the findings are within the issues; (3) the judgment is supported by the findings; or (4) reversible error appears on the face of the record. *Hunt v. Plavsá*, 103 Cal.App.2d 222, 224, 229 P.2d 482. Also, it is conclusively presumed that the findings are supported by the evidence. *Helvey v. Security-First National Bank*, 99 Cal.App.2d 149, 151, 221 P.2d 257. In such a situation, the omission to make a finding

1. Civil Code, § 3275, provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with

its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

on an issue raised by the pleadings is not a ground for reversal. *Stewart v. Hollingsworth*, 129 Cal. 177, 180, 61 P. 936; *D'Alessio v. D'Alessio*, 56 Cal.App.2d 118, 120, 132 P.2d 271.

Appellants' contention that the judgment in regard to the partnership accounting is not supported by the findings must be sustained. By the judgment, the franchise is awarded to Garwick as his share of the partnership assets; nothing is awarded to Gordon and his interest in the franchise is "terminated and forfeited." In the conclusions of law the court declares: "an account has been rendered of the partnership assets and that the franchise * * * is now the property of the plaintiff Garwick * * * and that * * * [Gordon's] right, title and interest in and to the same has been terminated and forfeited * * *." In the findings of fact there is no reference either to an accounting, to damages suffered by either partner due to the acts of the other or to any forfeiture. The reference to the accounting in the "memorandum of decision re interlocutory judgment" is no more extensive than that in the conclusions of law. For what reason was Gordon's interest in the franchise awarded to Garwick?

If he so desires, Garwick, as the partner who has not caused the dissolution wrongfully, may possess the partnership property and continue the business in the same name. But Gordon, the partner causing the dissolution wrongfully, must receive the value of his interest at the dissolution less any damages recoverable against him and he must be protected against all other present or future partnership liabilities. Corporations Code, § 15038(2) (a) (b) (c). For a discussion of the application of this statute to a similar dissolution see *Vangel v. Vangel*, 116 Cal.App.2d 615, 254 P.2d 919.

[2, 3] In an action for an accounting, a statement of the balance due in the findings,

without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of such an action. *Sears v. Rule*, 27 Cal.2d 131, 149, 163 P.2d 443; *Whann v. Doell*, 192 Cal. 680, 684, 221 P. 899. It follows that where, in a suit for an accounting, there are no findings of balance due or of damages or of the value of the assets, a conclusion of law and a judgment awarding the assets to one party to the entire exclusion of the other is also error.

[4] An award of property as a complete settlement of an action cannot be considered as an implied finding that the total amount of the damages suffered is exactly equal to the value of the property awarded. So to hold would be to permit the finding by implication of all facts necessary to support the legal conclusions of the trial court. *People v. Ocean Shore Railroad*, 22 Cal. App.2d 657, 660, 72 P.2d 167.

Those parts of the judgment adjudicating (1) the dissolution of the partnership, (2) denying damages to Cock 'n Bull Products, and (3) enjoining Gordon from interfering with Garwick's conduct of the business in connection with the exercise of the franchise, are affirmed. But with respect to the accounting, and the interests in the franchise, the judgment is reversed with instructions to cause an accounting of the partnership to be made; to determine the amount of damages suffered by either party prior to the dissolution or by any of the contractees of the partnership; to allow Garwick the opportunity to purchase the assets and to continue the business upon his compliance with the requirements of Corporations Code, section 15038 (2) (b); and to file such findings with appropriate conclusions and judgment.

McCOMB and FOX, JJ., concur.

2. Paragraph 12 of the License Agreement provided:

"In the event that the licensee does not comply with any one or more of the terms of this agreement, the company may give notice in writing to the licensee

of its default or breach and upon the licensee's failure to correct the same within thirty (30) days after receipt of such notice the company may forthwith declare this agreement ended and may revoke this license and contract."

121 Cal.App.2d 400

SWOFFORD
v.
**INDUSTRIAL ACCIDENT COM-
MISSION et al.**
Civ. 8294.

District Court of Appeal, Third District,
California.
Nov. 20, 1953.

Proceedings before Industrial Accident Commission to determine amount due truck driver for injuries. The Commission found that the claimant was employed by a father and son who were acting as copartners or as joint venturers. The father petitioned for review of the award contending that the employment was between his son and claimant. The District Court of Appeal, Peek, J., held that the evidence was not sufficient to show that a partnership relation existed between father and son.

Award as it related to petitioner annulled; otherwise affirmed.

1. Partnership ⇨5

The basic elements of partnership relation are a community of interest in the business and a sharing of profits. Corporations Code, § 15006.

2. Workmen's Compensation ⇨1434

In workmen's compensation proceeding, evidence was not sufficient to sustain Commission's finding that father and son, who hired claimant, were engaged in partnership.

Wadsworth & Souza, Tracy, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, John J. McFall, Manteca, for respondents.

PEEK, Justice.

Petitioner J. O. Swofford seeks a review of the award of the Commission finding that J. R. Meadows while employed as a truck driver by J. O. Swofford and Hal Swofford, individually and as copartners, sustained an injury arising out of said employment. It is the sole contention of petitioner that the evidence is not sufficient to

support the conclusion that the two Swoffords (who were father and son respectively) were acting as co-partners or as joint venturers and that the employment, if any, was between Hal Swofford and the respondent Meadows as an individual.

The Commission in its return sets forth the general rules relative to findings of the Commission when supported by substantial evidence and the general rules relative to the acts and intent of individuals which may be construed as establishing a partnership as distinguished from a formal agreement to so act. In support of such contention the Commission relies upon certain testimony that both of the Swoffords were engaged in the same kind of business in the same general location—the son for a period of several months and the father for several years. Reliance is also placed upon other testimony that when it was found that Hal's (the son) truck was not suitable for hauling beets he and the petitioner together went to the residence of the grower-employer to obtain the use of the latter's truck. According to the son he did not have sufficient finances to rebuild his truck for that purpose, and his father, as his "mouthpiece", was endeavoring to buy the truck from the grower. Upon the refusal of the grower to sell the truck the father succeeded in negotiating a rental of the same. After further discussion between the two Swoffords the son suggested to the grower that he rent the truck from him on a percentage basis. This was agreed to by all parties. Thereafter the son obtained the services of Meadows as a driver of the grower's truck and the hauling began. The petitioner was using his truck in the same operation at that time and subsequently the son used his own truck in the same work.

[1] A partnership is defined in Corporations Code, section 15006 as an association of two or more persons as co-owners to carry on a business for profit. In other words, two basic elements are necessary, a community of interest in the business and a sharing of profits. Auditorium Co. v. Barsotti, 40 Cal.App. 592, 181 P. 413; Fee v. McPhee Co., 31 Cal.App. 295, 160 P. 397.

[2] As noted the evidence relied upon by the Commission in support of its conclusion is wholly devoid of any showing of a formal, or any, agreement between the Swoffords to associate themselves in the trucking business or to share profits arising out of such association. Hence to find that a partnership did exist it would be necessary to rely upon the acts of the parties and the reasonable inferences to be drawn therefrom as evidence of their intent to so associate themselves. *Kersch v. Taber*, 67 Cal.App.2d 499, 154 P.2d 934. However, there is no evidence from which a reasonable inference could be drawn evidencing such an intent. The testimony of both of the Swoffords negatives such a conclusion since it showed that all of the arrangements for as well as the use of the truck were made with reference to Hal Swofford as an individual and not as a copartner with his father, the petitioner. Also the evidence of Meadows and the farmer Reece shows that the petitioner had no degree of control in the enterprise; that all control of the truck and its operation was with Hal Swofford and that all of Reece's dealings after the original negotiation were with the son Hal Swofford.

By reason of the foregoing, the award, as it relates to the petitioner, is annulled; in all other particulars it is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



ROWLAND v. BARTHEL et al.*

Civ. 8232.

District Court of Appeal, Third District,
California.

Nov. 9, 1953.

Hearing Granted Jan. 6, 1954.

Action by assignee of judgment debtors to compel redemption and to quiet title to realty sold by judicial sale. The

* Subsequent opinion 279 P.2d 544.

Superior Court, Yolo County, C. G. McDonald, J., entered judgment and order sustaining defendants' demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Peek, J., held that complaint, which alleged that judicial sale had been made after entry of judgment against plaintiff's assignors, that judgment created in assignors a right to redeem, that, prior to expiration of period provided by law for redemption of sales of realty upon execution, sheriff wrongfully delivered deed thereto to defendants, and that such deed constituted cloud upon plaintiff's title, was sufficient to state cause of action.

Judgment reversed.

1. Evidence ⇨43(3)

In action to compel redemption and to quiet title to realty, wherein plaintiff had pleaded legal effect of a prior judgment, which allegedly called for a judicial sale of the realty and created in plaintiff's assignor a right of redemption, and further alleged that, prior to time for redemption, sheriff had wrongfully delivered deed to the realty, trial court did not err in taking judicial notice of the prior proceeding.

2. Liens ⇨23

Generally, redemption is purely a statutory privilege, but, since redemption is remedial in character, statutes giving right of redemption should be construed liberally in favor of such right.

3. Vendor and Purchaser ⇨289

In an action brought by vendor who retains title, wherein judicial sale of the property is ordered, statutory right of redemption attaches since vendor's interest, being fundamentally one of security, must be treated the same as if such secured interest was represented by specific instrument of mortgage.

4. Judicial Sales ⇨59

Since right of redemption exists following a judicial sale, any attempt to bar such right is void, and, therefore, where sheriff's or commissioner's deed has been delivered before period of redemption had expired, such deed is void.

5. Quieting Title 34(5)

Complaint, which alleged that judicial sale had been made after entry of judgment against plaintiff's assignors, that judgment created in assignors a right to redeem, that, prior to expiration of period provided by law for redemption of sales of realty upon execution, sheriff wrongfully delivered deed thereto to defendants, and that such deed constituted cloud upon plaintiff's title, was sufficient to state cause of action.

James S. Eddy, Sacramento, for appellant.

Robert M. Cole, Davis, for respondents.

PEEK, Justice.

This is an appeal from a judgment and order sustaining defendants' demurrer to plaintiff's complaint without leave to amend.

By his action plaintiff sought to compel redemption and to quiet title to certain real property in Yolo County. Specifically he alleged the entry of a judgment in the Superior Court of that county against his assignors providing that the property in question be sold as the property of said assignors in the manner provided by law for sales of real property pursuant to execution; that said judgment created in said assignors an equitable interest in said property and the right to redeem the same; that the property was so sold by the sheriff of said county as the property of plaintiff's assignors; that prior to the expiration of the period provided by law for redemption of sales of real property upon execution, the sheriff of said county wrongfully made and delivered to the defendants a deed thereto; that said deed now constitutes a cloud upon plaintiff's title; that the property is improved; that defendants have spent unknown sums in the maintenance, upkeep and repair thereof; that plaintiff has demanded a verified statement of the amounts of rents and profits thereof but that defendants have refused to give any such statement. It was further alleged that the defendant Bank of Davis claims an interest in said property adverse

to plaintiff by virtue of a deed of trust. In his prayer plaintiff sought an order declaring his right to redeem the property; for an accounting from the defendants of the rents and profits as well as the expenses, and for an order directing the defendants to convey title to plaintiff. Defendants demurred, both generally and specifically to said complaint. As shown by its memorandum opinion the trial court, in sustaining defendants' demurrer, took judicial notice of the prior action and based its order on that portion of the decree in that action wherein it was held that the vendees [the assignors of plaintiff herein] "or any person acting by or through them * * * are hereby enjoined and debarred from asserting any such claim or demand which arose prior to date of Judgment herein, and all equity of redemption of any of the aforesaid persons is hereby foreclosed." In conclusion, the trial court stated that plaintiff herein, "has no equity of redemption, and that it is impossible for him to state a cause of action which will enable him to redeem the real property."

Appellant now makes two main contentions: (1) That the trial court improperly took judicial notice of the former action, and (2) that even though it may have properly taken such judicial notice the court was in error in concluding that the plaintiff redemptioner herein has no right to redeem.

[1] The Supreme Court held in *Wolfson v. Hathaway*, 32 Cal.2d 632, 638, 198 P.2d 1, 5, that "It is the general rule that 'the court will not take judicial notice of other actions, not even those pending or concluded in the same court.'" But the court said in *City of Los Angeles v. Abbott*, 217 Cal. 184, 193, 17 P.2d 993, 995: "The rule precluding the court from taking judicial notice of its judgment in another case is not an inflexible one, and has several exceptions." And, in referring to an exception noted in a case cited therein, said: "The fact that such an exception exists indicates that the rule is not based on lack of power but is a rule of expediency, to be applied or refused application as the equities and justice of the cases re-

quire." Again, the same court said in *Willson v. Security-First National Bank*, 21 Cal.2d 705, at page 711, 134 P.2d 800, 804, "judicial notice will be taken of proceedings in other cases in the same court in the interests of justice." Examining the allegations of plaintiff's complaint in light of the rule and exceptions thereto as enunciated in the cases cited we cannot say that the trial court erred in taking judicial notice of the prior proceeding. Here plaintiff pleaded the legal effect of prior judgment; that it involved title to certain real property; that it called for a judicial sale of that property and created in his assignor an equitable interest, that is, a right of redemption. He further alleged his attempts to redeem and set out verbatim the assignment given to him by the original vendees. He alleged the fact of the sale which resulted from that judgment, and that prior to the time for redemption the sheriff wrongfully made and delivered a deed to the property.

If the right of redemption may be so foreclosed and a deed issued forthwith, then the order sustaining the demurrer was proper. However, if the right continues during the redemption period and if the acts of the sheriff were without sanction in law, then the sustaining of the demurrer was improper and the judgment entered pursuant thereto must be reversed. Therefore it would appear that the fundamental question is not whether the court could take judicial notice of the prior case but whether or not plaintiff or his assignors could be deprived of their right of redemption under the allegations of the complaint.

The parties are in agreement that the sale herein was a judicial sale and not a sale under execution. Appellant contends that California statutes have established the policy that all judicial sales of real property are conditioned by a right of redemption and confirmation by the court. Respondent to the contrary argues that a judicial sale gives no such right.

[2] As a general rule redemption is purely a statutory privilege but being remedial in character, statutes giving such right should be construed liberally in favor of the right. Or, as stated in *Lobingier*

v. Skinner, 93 Cal.App. 695, 270 P. 394, 396, "rights of redemption are favored in law." There is substance in the argument of plaintiff that the policy of this state is that all judicial sales of real property contain the right of redemption. In the early case of *Sparks v. Hess*, 15 Cal. 186, where the contract of sale was executed and title remained in the vendor, the decree of foreclosure provided for judicial sale, and the court, noting that a mortgage was a form of conveyance of title though intended only as security for a debt, observed that in a vendors' lien "the title is retained by the vendors for a similar purpose of security." Again, in the later case of *Gessner v. Palmateer*, 89 Cal. 89, 24 P. 608, 26 P. 789, 790, 13 L.R.A. 187, in discussing the difference between a vendor who has parted with the title but taken no security for the purchase price and the vendor who retains title under an unexecuted contract of sale, the court said: "Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt * * *." See also *Tilley v. Bonney*, 123 Cal. 118, 55 P. 798, and *Brown v. Kahn*, 176 Cal. 159, 167 P. 869.

[3-5] It would therefore appear that in an action brought by the vendor who retains title and where judicial sale of the property is ordered, the statutory right of redemption would attach, since the vendor's interest being fundamentally one of security must be treated the same as if that secured interest was represented by a specific instrument of mortgage. It necessarily follows that since the right of redemption exists any attempt to bar that right is void. Thus, where a sheriff's or Commissioner's deed has been delivered before the period of redemption has expired, it is void. *Bessinger v. Grotz*, 66 Cal.App.2d 947, 153 P.2d 369. Likewise any attempt to bar redemption by decree providing for immediate delivery of the deed following sale has also been held to be void. In considering this question the Supreme Court in *Anthony v. Janssen*, 183 Cal. 329, 191

P. 538, 541, said that "With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property, or to do anything in consummation of the sale, except to execute to the purchaser a certificate of sale as provided in the Code. Code Civ.Proc., § 700a. The property was real estate and the sale was made subject to redemption. Code Civ.Proc. §§ 700a-702. The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. Code Civ.Proc. § 703. The direction in the decree that the deed should be made immediately after the sale was contrary to the Code, and beyond the power of the court. It was therefore void." To the same effect see also *Vasquez v. Vasquez*, 109 Cal. App.2d 280, 240 P.2d 319.

Even though the Anthony case involved a suit to foreclose a materialmen's lien, the code sections dealing with sales after execution were applied and we see no valid reason for a different application thereby effecting a contrary result in the present case.

In view of what has heretofore been said it appears unnecessary to consider the additional matters discussed by the parties.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



121 Cal.App.2d 371

CAVANAH v. MERCUSH.

Civ. 15748.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1953.

Action for personal injuries and damage to plaintiff's automobile as the results

of a collision with an automobile driven by defendant. From a judgment of the Superior Court, Santa Cruz County, Stanley Murray, J., on a jury's verdict for plaintiff, defendant appealed. The District Court of Appeal, Nourse, P. J., held that the verdict, awarding \$14,500 general damages to plaintiff, who was a 64 year old widow, with no earnings except \$100 in one month of each year as a cashier, for fractures of the tibia and fibula of her left leg and her right knee patella, necessitating hospitalization for 4½ months and two operations on such leg, the wearing of a brace on her left foot, and her use of a cane in walking, was not so excessive as to indicate passion, prejudice or corruption of the jurors.

Judgment affirmed.

I. Damages ⇐130(2)

A jury's verdict awarding \$14,500 general damages to 64 year old widow, earning only \$100 as cashier in one month of each year, for fractures of tibia and fibula of left leg and right knee patella, necessitating hospitalization for 4½ months, two operations on left leg, wearing of brace on left foot, and use of cane in walking, was not so excessive as to indicate passion, prejudice or corruption of jurors.

2. Appeal and Error ⇐1004(3)

The amount of damages fixed by jury and approved by trial court for personal injuries will not be disturbed on appeal, unless evidence show that award is so disproportionate to any reasonable limit of compensation as to indicate that it was result of passion, prejudice, or corruption of jurors.

Belcher & Koller, Schofield & Hannegan, Oakland, Stanford G. Smith, Raymond H. Goodrich, Santa Cruz, for appellant.

McCarthy & Franich, Watsonville, for respondent.

NOURSE, Presiding Justice.

This is an action for personal injuries and damage to plaintiff's automobile suffered in a collision. Defendant's liability

was admitted at the trial and it was stipulated that damage to the automobile in the sum of \$300 and special personal damages (hospitalization, medical services, etc.) in the sum of \$3,413.16 were correct and reasonable. The jury returned a verdict in the total sum of \$18,313.16 on which judgment was entered. A motion for a new trial on the ground of excessive damages was denied.

[1] Defendant's only grievance on appeal is against the alleged excessiveness of the general damages in the amount of \$14,500. There was supporting the verdict substantial evidence that respondent suffered a fracture of the tibia of the left leg extending into the knee joint, fracture of the fibula of the left leg with injury to the peroneal nerve affecting her movement, compound fracture of the right knee patella and minor injuries to chest and left elbow. She was hospitalized for four and one-half months and had to undergo two operations on her left leg. She suffered very much pain during the first three months and at the time of the trial, one year and nine months after the accident, still suffered pain when moving around. At that time the motion of her left foot and knee was limited; she had to wear a brace on her left foot and use a cane, whereas prior to the accident she moved normally. The necessity of wearing a brace could be obviated by an operation which, however, would result in a stiff left foot. The patella of her right knee was subject to slipping which condition could be corrected by an operation which would cost approximately \$500 for surgical and hospital costs. Walking outside was restricted to one or two blocks on level ground with brace and cane although in her home she sometimes moved

without them. It was stipulated that plaintiff had a life expectancy of 11.67 years.

According to appellant she was a 64 year old widow. Since her marriage she had no earnings from employment except occasional work as cashier in the month of December for some five years, in which she earned \$100 each December. She had agreed to do the same work in December, 1950, but was prevented from doing so by the accident.

[2] The alleged excessiveness of a similar verdict was rejected by the Supreme Court in *Erickson v. Southern Pacific Co.*, 39 Cal.2d 374, 382, 246 P.2d 642, 647. The plaintiff in that case was a 64 year old man with a life expectancy of approximately fourteen years. He suffered leg injuries comparable to those in the case before us, requiring hospitalization and operations and causing pain and permanent limitation of the motion of one foot. The verdict upheld was for \$18,000, comprising \$3,000 for loss of wages during an estimated period of disability. The following language of the Supreme Court found at the page cited above is equally applicable to our case: "The claim that the verdict was excessive was passed upon and rejected by the trial court on the motion for a new trial. The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts. [Citation.] There is no such showing."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

121 Cal.App.2d 442

ORANGE COUNTY v. GOLDRING et al.
Civ. 4734.District Court of Appeal, Fourth District,
California.

Nov. 23, 1953.

Hearing Denied Jan. 20, 1954.

Suit to enjoin defendants from conducting cattle feeding operation, on a certain parcel of land. The Superior Court, Orange County, Raymond Thompson, J., entered restraining order and defendants appealed. The District Court of Appeal, Griffin, J., held that defendant's use of disputed area was contrary to zoning ordinance and not a non-conforming use, where permanent cattle feeding pens and troughs were constructed and number of cattle was greatly increased after passage of ordinance.

Order affirmed.

1. Counties ⇨211½

Where disputed area was open field which, on occasions, had been used for feeding of 35 to 50 cattle, but after passage of county zoning ordinance defendant constructed permanent feed pens throughout area and fed 200 to 300 cattle, such use, except quartering 35 to 50 cattle, constituted departure from established use and violated ordinance.

2. Municipal Corporations ⇨601(3)

It is the purpose of zoning to crystallize present uses and conditions and eliminate nonconforming uses as rapidly as is consistent with proper safeguards for those affected.

3. Municipal Corporations ⇨601(18, 23)

Provisions for continuation of a non-conforming use are inserted in zoning ordinances because of the injustice and doubtful constitutionality of compelling immediate discontinuance of the nonconforming use and courts have always strictly construed such provisions.

Joel E. Ogle, County Counsel, George F. Holden, Robert J. Switzer, and Stephen K. Tamura, Deputies County Counsel, Santa Ana, for respondent.

GRIFFIN, Justice.

In 1946, defendants Max Goldring and wife purchased about 18 acres of land in Orange County in the Southwest Garden Grove area, and subsequently transferred title to it to defendant Garden Grove Farms, a corporation, of which Mr. Goldring was president and general manager. The area in dispute is the easterly 660 feet of the property, and constitutes slightly less than one-half of the 18-acre parcel. The westerly portion had been used for livestock feeding purposes prior to 1946, and pens, sheds, feed-mill, house, barn and other structures had been constructed thereon. A school is located immediately to the north of the property and to the northwest and beyond are a number of residences. Before 1950, the easterly portion, being the acreage in question, was an open field with a fence around the perimeter, the fence having been constructed by a former owner in 1939. In 1946, a crop of barley was grown upon that area. Prior thereto tomatoes and barley had been seen growing there. Up until December 24, 1949, the disputed area was still an open field with scattered weed growth. After defendants acquired the property there had been no feeding of livestock on this 8 acres except that in the early part of 1946, approximately 35, 40, or 50 head of cattle were permitted in the area, for a week or ten days, during which time they were fed hay. On several occasions one or two cows or calves were allowed to graze in this part of the range, and at times two or three horses were pastured there. There is some evidence that the cattle which were permitted to graze there were there only a few days at a time until they recovered from illness or fatigue following shipment, during which time they were fed whole hay.

In 1947, defendants Goldring, on behalf of the corporation, applied to the Orange County Planning Commission for a use variance permit, under a former county ordi-

Utt & Hubbard, Delbert L. Larsh, Santa Ana, for appellants.

nance, to construct feeding pens in the disputed area. The application was reported on adversely by the Planning Commission and denied by the Board of Supervisors. Early in October, 1949, defendants constructed pens (1) and (2) on the western end of the disputed area and immediately placed and fed cattle in them. A resident in that area complained of the construction of pens (1) and (2) and a "stop work order" was posted on the premises by a deputy county building inspector in the latter part of October, 1949. On December 9, 1949, Ordinance No. 561 became effective, which included, in the R-4 suburban residential district, the disputed area, as well as other lands. This ordinance provided in part:

"The lawful use of land existing at the time this ordinance or amendments thereto take effect, although such use does not conform to the provisions hereof, may be continued, but if such non-conforming use is discontinued for a period of one (1) year any future use of said land shall be in conformity with the provisions of this ordinance.

"The lawful use of a building existing at the time this ordinance or amendments thereto take effect may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building provided no structural alterations, except those required by law or ordinance or permitted under section 19 of this ordinance are made therein. If no structural alterations are made, a nonconforming use of a building may be changed to another conforming use of the same or more restricted classification."

No further feeding pens were constructed in the area until May of 1950, when construction was resumed. Thereafter, despite the direction of the County Building Inspector to cease construction, defendants, on advice of their counsel, continued and completed the construction of feeding pens throughout the entire area. Each pen is equipped with a feeding trough and a watering trough built on permanent foundations, each pen having a capacity for feed-

ing 75 to 100 cattle. After the effective date of the ordinance, 200 to 300 cattle and varying numbers in excess thereof, were placed and fed in the area in question. Cattle belonging to some 12 to 15 cattle buyers and brokers, including the defendant corporation, are kept and fattened on the ranch. The feed consists of a formula of ground hay, grain, and roughages mixed with concentrates and molasses for the purpose of fattening the cattle for the livestock market. The feeding capacity of the ranch was 1200 cattle in 1947, and in 1952 was 3600 cattle.

The trial court found generally in accordance with this statement of facts and concluded that the use of the real property involved, except as to the areas embraced in pens (1) and (2), for the operation or maintenance of a livestock feeding ranch for the feeding of cattle, constituted a public nuisance under the provisions of the county ordinance; that the defendants have a valid, nonconforming use to use the areas embraced in pens (1) and (2) for the maintenance and operation of a livestock feeding ranch for the feeding of cattle, and a nonconforming use to use the real property here involved, except as to pens (1) and (2), as a single unit, as a resting place for cattle, not to exceed 50 head at any one time and only for such period of time as shall be necessary for them to recover from travel fatigue or sickness following shipment, and rendered judgment accordingly permanently enjoining defendants from operating or maintaining upon or using the real property involved, with the exceptions indicated.

On this appeal, defendants do not challenge the sufficiency of the evidence to support the findings. The claim is that the findings do not support the conclusions of law and judgment that followed.

Their contentions are that since the trial court determined that defendants had a valid nonconforming use to feed livestock in the disputed area, and since the 20 acres owned by defendants, including both the disputed and undisputed areas, had for many years prior to the effective date of the ordinance been operated and maintained as a single unit, the trial court was not

authorized to limit the manner, method, or extent of defendants' exercise of its use, and that therefore defendants have a valid, nonconforming use to use the disputed property for the feeding of livestock without limitation, citing such cases as *De Felice v. Zoning Board of Appeals of Town of East Haven*, 130 Conn. 156, 32 A.2d 635, 147 A.L.R. 161; *Building Commissioner of Medford v. McGrath*, 1942, 312 Mass. 461, 45 N.E.2d 265; and *Appeal of Haller Baking Co.*, 295 Pa. 257, 145 A. 77.

Plaintiff relies principally upon the late cases of *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972; and *Edmonds v. County of Los Angeles*, 40 Cal.2d 642, 255 P.2d 772, as disposing of the issues here involved.

[1-3] Photographs are in evidence indicating the nature of the 8 acres in question prior to the passage of the ordinance and its present condition as found by the trial court. It is quite apparent that there was a material change in the condition of the use by the construction of the feeding pens described, by the building of permanent foundations for watering troughs, and no doubt the number of cattle now confined in the limited quarters where cattle are being fattened for market by feeding the new formula, caused added noises, stench, and disagreeable odors, which disturb the near-by residents and school children. The facts found clearly demonstrate that the present use is such a formidable change and departure from the established use, both in magnitude and character, that it constitutes a wholly new and different use, and an unlawful enlargement or extension of a nonconforming use, and comes well within the principles established in the cases relied upon by plaintiff. It was stated in those cases that it is the purpose of zoning to crystallize present uses and conditions and eliminate nonconforming uses as rapidly as is consistent with proper safeguards for those affected; that provisions for continuation of a nonconforming use are inserted in zoning ordinances because of the injustice and doubtful constitutionality of compelling immediate discontinuance of the nonconforming use; and that our courts and courts throughout the country gener-

ally, have always strictly construed such provisions, citing *Rehfeld v. City & County of San Francisco*, 218 Cal. 83, 84, 21 P.2d 419; *City of Yuba City v. Cherniavsky*, 117 Cal.App. 568, 4 P.2d 299; *In re Botz*, 1942, 236 Mo.App. 566, 159 S.W.2d 367, 372.

In the *Botz* case, cited with approval in the *McClurken* case, an underlying distinction is noted. It is there stated that a building frequently represents a considerable investment, and if regard were not had for the reasonable protection of such investment, the ordinance might be held to be confiscatory with respect to its application to particular structures. The court there said:

"Not so, however, in the case of land, where the owner has made no investment in its improvement, and where, in most instances, he would be expected to suffer no hardship if compelled to conform to the strict letter of the zoning plan with respect to the use to which his land might be subjected.

"The underlying spirit of a comprehensive zoning plan necessarily implies the restriction, rather than the extension, of a nonconforming use of land, and therefore to whatever extent the particular act fails to make express provision to the contrary, a condition that the lawful nonconforming use of land existing at the time of the adoption of the ordinance may continue must be held to contemplate only a continuation of substantially the same use which existed at the time of the adoption of the ordinance, and not some other and different kind of nonconforming use which the owner of the land might subsequently find to be profitable or advantageous. * * *

Here we are concerned with the use of land as distinguished from buildings, and in a district where school houses and residences are gradually engulfing the surrounding territory.

In the *McClurken* case, *supra*, the trial court found that defendants had a nonconforming use to use a parcel of land for in-

dustrial purposes. In that nonconforming use the defendants utilized three fuel tanks having a capacity of 1200 gallons, 2300 gallons, and 6000 gallons respectively. Subsequent to the adoption of the zoning ordinance, defendants in that action constructed four tanks with a capacity of 12,000 gallons each, permanently located upon concrete bases. It was there contended by them that the subsequent use was merely a continuation of the former nonconforming "industrial use" and that defendants made use of all the land owned by them as a unit for industrial purposes and it was therefore lawful. This court made an unsuccessful attempt to sustain the finding and judgment of the trial court in holding for defendants in that action. 222 P.2d 688. The Supreme Court held otherwise and said:

"* * * Such a formidable expansion can hardly be viewed as a mere continuance of the nonconforming use consisting of the intermittent storage of lumber and scrap metal, preliminary grading, steel beam storage, or even the use of movable tanks 'all over the property, first one spot and then another' that may have occurred in the area in question. Even if the new tanks were used to supply power for the original industrial use, they would constitute an unwarranted enlargement of that nonconforming use." (Citing cases.) [37 Cal.2d 683, 234 P.2d 975.]

The Edmonds case involved enlargement of plaintiff's trailer court to accommodate 30 more trailers. In disposing of the contentions there made the Supreme Court said [40 Cal.2d 642, 255 P.2d 778]:

"There is little difference in principle between enlarging a grocery business through relocation on a different part of the same property, as was the situation in the cited Yuba City case, and enlarging a trailer court business through the addition of trailer units for the housing of more people. In either situation the enlargement of the nonconforming business would involve a detrimental effect on surrounding property values in a residential area,

as well as conflict with the purpose of zoning to restrict rather than extend the 'existing' nonconforming use.

* * * See, also, *Pisicchio v. Board of Appeals of Village of Freeport*, 165 Misc. 156, 300 N.Y.S. 368.

The out-of-state authorities relied upon by defendants are distinguished in the Edmonds case, *supra*, or are inconsistent with the holding in that case.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



KINGSBURY et al. }
v.

ARCADIA UNIFIED SCHOOL DIST. *
Civ. 19718.

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1953.

Hearing Granted Jan. 20, 1954.

Action was brought against school district to recover balance due as architect's fee for erection of school buildings. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered judgment adverse to school district, and school district appealed. The District Court of Appeal, McComb, J., held that on abandonment of construction contracts by school district, architect was entitled to compensation in addition to progress payments made to him under contracts.

Judgment affirmed.

See also 263 P.2d 330.

1. Schools and School Districts ☞85

Provisions of contract between architect and school district for architectural services in connection with erection of school building that if district abandons construction there shall be due money

* Subsequent opinion 271 P.2d 40.

sufficient to increase total amount paid architect to amount bearing same proportion to fee as amount of services performed by architect prior to abandonment shall bear to entire services architect is required to perform entitled architect to compensation in addition to progress payments made to him under contract, where district abandoned contract.

2. Schools and School Districts ☞122

Where paragraph of complaint in action to recover from school district for architectural services alleged that in certain year school district abandoned construction of building and notified architect of such abandonment, and answer stated that school district admitted all allegations of such paragraph of the complaint, court properly found that school district abandoned construction of building in such year and notified architect of such abandonment.

3. Limitation of Actions ☞59(2)

Where contract between architect and school district for architectural services for the construction of school building was entered into in 1943, and in 1948 school district abandoned construction of building, action brought in 1951 to recover for architectural services was not barred by four-year limitations. Code Civ.Proc. § 337, subd. 1.

4. Schools and School Districts ☞121

In action to recover from school district balance due under contract for architect's fee for erection of school building, construction of which was abandoned by school district, evidence sustained finding that there should be recovery of \$72,000 for architectural services, less \$33,000 paid on account.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for appellant.

Harold B. Pool, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for the

failure of defendant to comply with the terms of two contracts whereby plaintiff's decedent was to render architectural services to defendant's predecessors in interest, defendant appeals.

Facts: December 1, 1943, defendant's predecessor in interest entered into a contract to pay plaintiff's decedent for architectural services rendered in connection with the proposed construction of an intermediate school. The architect was paid a total of \$33,000 for his services and judgment was entered in the present action in favor of his estate for an additional \$39,000. This contract will hereinafter be referred to as the 1943 contract.

Under a separate contract for the construction of classroom additions to the Santa Anita school entered into on August 25, 1948, the district paid decedent \$1,400 for preliminary plans, and judgment was entered in favor of his estate for an additional \$875. This contract will hereinafter be referred to as the 1948 contract.

The 1943 contract called for the payment of "an amount equal to eight percent (8%) of the construction cost * * * when services as hereinafter stipulated have been rendered." This contract did not contain any estimate of the cost of construction. Article 3 provided as follows:

"Article 3. Payments. Payments to the Architect on account of his fee shall be made as follows:

"a) Upon completion of the preliminary drawings and specifications, together with a quantitative survey and a preliminary cost estimate, if possible, an amount of Four Thousand Dollars (\$4,000.00).

"b) Upon completion of a formal application to the proper governmental authorities in such form as may be required, on the basis of preliminary sketches and specifications, an additional amount of One Thousand Dollars (\$1,000.00).

"Note:—Above payment shall not be due and payable in case that the above application is executed under paragraph 'd' of Article 1.

"c) Upon completion of the working drawings and specifications, and their ac-

ceptance by the District and readiness for presentation to the State Division of Architecture, an amount sufficient to increase the payments to a total of Nineteen Thousand Six Hundred Dollars (\$19,600.00).

"d) Upon the completion of a formal application to the proper governmental authorities in such form as may be required, an amount sufficient to increase the payments to a total of Twenty-One Thousand Dollars (\$21,000.00).

"Note:—Above payment shall not be due and payable in case that the payment under paragraph 'b' of Article 1 has already been made.

"e) Upon the acceptance of the working drawings and specifications by the State Division of Architecture, an amount sufficient to increase the payments to a total of Twenty-Two Thousand Four Hundred Dollars (\$22,400.00).

"f) Upon completion of fifty per cent (50%) of the construction work, an amount sufficient to increase the payments to ninety per cent (90%) of the fee based upon the contract cost of the work.

"g) Upon completion of the construction work and its acceptance by the District and the State Division of Architecture, an amount sufficient to increase the payments to one hundred per cent (100%) of the fee based upon the total completed construction cost of the work.

"h) Should the work, as agreed upon, terminate with the services as stipulated under paragraph 'a' of Article 1, then the payments as provided for under paragraph 'a' of Article 3 shall constitute the complete reimbursement to the Architect except as provided for under Article 2 of this Agreement.

"If, at any future time, the District desires to resume the work as stipulated under paragraphs 'b', 'c', 'd', 'e', 'f' and 'g' of Article 1 of this agreement, then the amount of the payments made under paragraph 'a' of Article 3 shall be applied against the payments becoming due for the above services as stipulated in paragraphs 'b', 'c', 'd', 'e', 'f' and 'g' of Article 3."

Article 9 provided:

"Article 9. Abandonment of Project and Cancellation of Agreement. If the District determines at any time, not to proceed with the construction of the 'building', or after the beginning of the construction work, to suspend indefinitely and/or abandon the construction work and shall require the Architect to suspend the performance of his services, or for reasons stipulated in Article 8 decides to cancel or terminate this Agreement, there shall be due and payable within thirty (30) days after notice has been given in writing to the Architect of said suspension and/or abandonment or decision upon the part of the District to terminate or cancel this Agreement, a sum of money sufficient to increase the total amount paid to the said Architect on the fee to an amount which shall bear the same proportion to the fee as the amount of services performed and/or provided by the architect prior to the time of such suspension and/or abandonment or termination of this Agreement shall bear to the entire services the Architect is required to perform and/or provide, plus the amounts, if any, still due the Architect under the provisions of Articles 2 and 4. Upon payment to the Architect of the amount or amounts provided under this Article the District may terminate and cancel this Agreement."

In February, 1944, the Board accepted the preliminary drawings and specifications prepared by the architect and paid him the sum of \$4,000 specified in subparagraph (a) of Article 3.

February 6, 1946, decedent appeared in a meeting of the Board of Trustees of the district and requested an amendment to the contract "to allow for and increase of payment since the original contract was estimated on a very low building cost basis." Pursuant to this request the agreement was amended on that date by which amendment the amount set forth in subparagraph (c) was increased from \$19,600 to \$33,000, and that set forth in subparagraph (e) was increased from \$22,400 to \$35,750.

June 5, 1946, the final plans and specifications were presented to and accepted by the

Board and on June 19, 1946, the school district's warrant in the sum of \$29,000 was delivered to decedent. Nothing further was done by the architect under the contract.

On January 14, 1949, the architect, Mr. Paul Kingsbury died.

In its answer defendant pleaded the statute of limitations, Code of Civil Procedure, § 337, subdivision 1, as a bar to the cause of action based on the 1943 contract. In response to this defense the court found that subsequent to the year 1947, the exact date not having been proved at the trial, the defendant abandoned or suspended indefinitely the construction of the building but that the defendant did not notify plaintiff in writing of such action; that plaintiff's complaint was filed on the 29th day of May, 1951, and each of the causes of action therein was based on a contract in writing signed by the parties thereto and that the money found due thereunder became due and payable within four years prior to the 29th day of May, 1951; that the third cause of action was not barred by the statute of limitations.

Relative to the 1948 contract which provided for a fee of 6½% of the construction cost, this contract fixed an agreed estimated construction cost of \$140,000 for the project and provided a payment in the amount equal to 1% of the estimate cost when preliminary plans were completed and accepted. The "abandonment" clause was identical with that in the contract of December 1, 1943, set forth above.

The architect completed the preliminary plans and upon acceptance by the Board of Trustees of the district was paid \$1,400. The court found the district thereafter "abandoned said construction and work and notified the said Paul Kingsbury of such abandonment." The court further found: "The court finds that \$2,275.00 is the amount which would bear the same proportion to the full fee as the amount of services performed by the said Paul Kingsbury prior to such abandonment would bear to the entire services to be performed under said contract as computed in accordance with the preceding para-

graph, and said sum is the reasonable value of the services as rendered."

Questions: First: *Do the provisions of Article 9, supra, in the contract of 1943 and Article 10 (which is identical with the provisions of Article 9, supra) in the contract of 1948, entitle the plaintiff to any compensation in addition to the compensation paid the architect at the time he ceased performance under the contracts?*

Yes. Defendant contends that under the contract of 1943, since it did not contain an estimate of the total cost of construction of the building, the architect was not entitled to any fee based upon such amount until a contract to construct the building had been entered into. This was never done.

Defendant further contends that each payment made to the architect as he rendered services pursuant to the contract constituted a payment for services to date; that the services were thus severable, and that the architect having been paid as the work progressed was thus fully compensated and paid for all of the services which he rendered under the terms of the contract.

With reference to the contract of 1948, defendant concedes that the contract contained an estimate of the cost of construction of the building, but urges that he was fully compensated for the services rendered since he was paid by instalments on the contract as it progressed, and therefore there is nothing further due plaintiff.

[1] Defendant's interpretation of the contract is erroneous and the correct interpretation is the one adopted by the trial court, which was that the progress payments were only payments on account and upon the abandonment of the projects the provisions of the two contracts under the heading "abandonment," in Article 9 of the contract of 1943 and Article 10 of the contract of 1948, are applicable.

In Article 3 of the contract of 1943, the parties set forth progress payment to be made and started the paragraph with the use of the following words: "*Payments to the architect on account of his fee shall*

be made as follows:" following which the parties set forth the progress payments. In Article 4 of the contract of 1948, which related to the progress payments in such contract, the parties open the paragraph with the same words as those just set forth. In each instance the words "on account" were used. Each contract contains a clause determining the fee in case of the abandonment of the contract. This clause is the same in both contracts and is set forth supra in detail as Article 9 of the contract of 1943. It is thus seen that if defendant's contention that the progress payments constituted full payment when the work had progressed to a certain point were true, there would be no reason for the parties to use the words, "on account" in each contract when referring to the progress payments.

The contract of 1943 in Article 3, paragraph (h) contained this provision: "Should the work, as agreed upon, terminate with the services as stipulated under paragraph (a) of article 1, then the payments as provided for under the provisions of paragraph (a) of article 3 shall constitute the complete reimbursement to the architect except as provided for under article 2 of this agreement."

This is the only instance in which the parties expressly agreed that the progress payments constituted full payment, and *that* progress payments only related to the services under the provisions of paragraph (a); that is, the preparation of the preliminary drawings and specifications, preliminary quantity survey and cost estimates, if possible, to serve as a basis for the preparation of final working drawings and specifications.

In the instant case the services rendered by the architect went far beyond the work set forth in paragraph (a). It is thus evident that the parties did not intend that the other progress payments constituted full payment. Had they so intended they would not have added the provisions of paragraph (h) of Article 3. In this case the trial court gave judgment in accordance with the provisions of the contracts as found under the "abandonment" clauses.

The court followed the formula as set forth by the respective contracts by first finding what the cost of construction of the entire project would have been and then finding the percentage of work that had been done under the contract, thus determining the earned fee according to the agreement of the parties.

Second: *Were the following findings of the trial court sustained by the evidence?*

"XV The Court finds that thereafter, but subsequent to the year 1947, the exact date of which was not proved at the trial, the defendant abandoned or suspended indefinitely the construction of said building. The Court further finds that the defendants did not notify plaintiff in writing of such action.

"XX The Court further finds that plaintiff's complaint herein was filed in the above entitled court on the 29th day of May, 1951, and that each of the causes of action therein was based on a contract in writing signed by the parties thereto and that the money found due herein became due and payable within four years prior to the said 29th day of May, 1951.

"XXI The Court finds that the third cause of action in plaintiff's complaint herein is not barred by the statute of limitations of the State of California."

Yes. Plaintiff alleged in her complaint that the contract was entered into on the first day of December, 1943. This fact is conceded by defendant. The record discloses the complaint was filed on May 29, 1951. It was further alleged in the complaint, paragraph V of the third cause of action (pertaining to the contract of 1943): "That at a date thereafter, late in the year 1948, the exact date of which is not known to plaintiff herein, but is known to the defendant, the defendant abandoned the construction of said building and notified the said Paul Kingsbury of such abandonment."

The foregoing allegation was admitted in the answer of defendant, wherein defendant alleges: "Answering paragraphs * * * V * * * of said third cause of action, said defendant admits all the allegations therein contained."

[2,3] Clearly the above evidence and admissions of defendant sustain the foregoing findings of fact.

Third: *Did the trial court err in excluding certain minutes of the school district for the purpose of clearing up claimed ambiguities in the contracts between the parties?*

No. A reading of the contracts sustains the comment of Judge Jeffery during the trial as follows, "I don't think there is any ambiguity."

Therefore the ruling on this point was correct.

[4] Fourth: *Are the following findings of the trial court sustained by the evidence?*

(A) "XVII The Court finds that \$72,000.00 is the amount which would bear the same proportion of the full fee as the amount of services performed by the said Paul Kingsbury prior to such abandonment would bear to the entire services to be performed under said last-mentioned contract as computed in accordance with the preceding paragraph and said sum is the reasonable value of the services rendered by Paul Kingsbury."

Yes. It was stipulated by the parties that the cost of the building under the contract of 1943 would have been \$1,200,000. There is no merit in defendant's contention that this stipulation was not received in evidence, for the record discloses that the court said with reference to the stipulation, "This stipulation is in the record." Therefore the foregoing finding is sustained.

(B) "XVIII It is true that the defendant has paid on account thereof the sum of \$33,000.00 and the balance of said fee in the sum of \$39,000.00 is past due, owing and unpaid. The said sum of \$33,000.00 was not paid by the defendant nor accepted by Paul Kingsbury in full settlement of all services performed under said last-mentioned contract."

Yes. John James Landon, a qualified architect, after testifying that he had examined the plans prepared by Mr. Paul Kingsbury pursuant to the contract of 1943, testified as follows:

"Q. (Mr. Pool) All right. An architect, proceeding under a contract to draw the preliminary drawings and the final drawings and specifications, and including supervision of the construction of the building, what percentage of the architect's services are completed when he has completed the drawings, when he has completed the final drawings such as I have offered in evidence, here?

"Mr. Lamoreaux: I object to the question on the ground it is incompetent, irrelevant and immaterial.

"The Court: You may answer.

"The Witness: Customarily 75% of the fee.

"Mr. Pool: In your opinion is that a close estimate as to the percentage of the work completed up to that point? A. I would say so."

This testimony showed that Mr. Kingsbury had completed 75% of his work under the contract. In addition Mr. Landon testified with reference to the contract of 1948 as follows:

"Q. Now, Mr. Landon, let's assume that we had another architectural contract in which the architect had completed the preparation of the preliminary sketches, drawings and specifications, just the preliminary, what percentage, in your opinion, of the architect's services would have been completed up to that point. A. (The Witness): Well, it could be 20 or 25%. I mean, it varies that much. I would say, generally, 25%."

Pursuant to the foregoing testimony and stipulation set forth above it is evident that the total cost of the building to be erected under the contract of 1943 would be \$1,200,000. The contract provided that Mr. Kingsbury should receive as his compensation 8% of the construction cost which would be \$96,000. Having completed 75% of his work, under the provisions of Article 9 of the contract, he was entitled to 75% of \$96,000, or \$72,000, and having been paid \$33,000 on account there was a balance due his estate of \$39,000.

With reference to the contract of 1948, such contract provided for a fee to Mr.

Kingsbury of 6½% of \$140,000 or \$9,100, but having completed only 25% of the work he was entitled to only 25% of \$9,100 or \$2,275. Having been paid \$1,400 on account, his estate was entitled on this contract to the sum of \$875.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



KINGSBURY

v.

ARCADIA UNIFIED SCHOOL DIST.*

Civ. 19718.

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1953.

Hearing Granted Jan. 20, 1954.

Action was brought against school district to recover balance due as architect's fee in connection with erection of school buildings. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered judgment for plaintiff but refused to award interest on amount found to be due from date of filing of complaint, and plaintiff appealed. The District Court of Appeal, McComb, J., held that in view of fact that until there was a trial, there was no way of determining percentage of work which architect had performed before abandonment of construction of school buildings by school district, plaintiff was not entitled to interest from date of filing of complaint.

Affirmed.

See also 263 P.2d 324.

1. Interest ⇐19(1)

Interest is not allowable when damages cannot be computed except on conflicting evidence, because of absence of established or reasonably ascertainable market prices or values. Civ.Code, § 3287.

* Subsequent opinion 271 P.2d 40.

2. Interest ⇐47(2)

Where, until there was a trial of action to recover from school district for architectural services rendered by architect in connection with construction of school buildings, there was no way of determining percentage of work which architect had performed before abandonment of construction by school district, plaintiff was not entitled to interest on amount found to be due from school district from date of filing of complaint. Civ.Code, § 3287.

Harold B. Pool, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment after trial before the court without a jury in an action to recover the balance due as an architect's fee for the erection of school buildings, plaintiff appeals from the portion thereof denying interest prior to the time of entry of the judgment upon the amount found due.

Facts: Paul Kingsbury, an architect, entered into two contracts with defendant's predecessors in interest. The contracts were entered into December 1, 1943, and August 25, 1948. Each contract contained a provision reading as follows:

"Abandonment of Project and Cancellation of Agreement. If the District determines at any time, not to proceed with the construction of the building, or after the beginning of the construction work, to suspend indefinitely and/or abandon the construction work and shall require the Architect to suspend the performance of his services, or for reasons stipulated in Article 10 decides to cancel or terminate this Agreement, there shall be due and payable, within thirty (30) days after notice has been given in writing to the Architect of said suspension and/or abandonment or decision upon the part of the District to terminate or cancel this Agreement, a sum of money sufficient to increase the total amount paid to the said Architect on the fee to an amount

which shall bear the same proportion to the fee as the amount of services performed and/or provided by the Architect prior to the time of such suspension and/or abandonment or termination of this Agreement shall bear to the entire services the Architect is required to perform and/or provide, plus the amounts, if any, still due the Architect under the provisions of Articles 2 and 4. Upon payment to the Architect of the amount or amounts provided under this Article, the District may terminate and cancel this Agreement."

Defendant abandoned the contracts and the trial court gave judgment for plaintiff in the sum of \$875 on the contract of 1948, and \$39,000 on the contract of 1943, with interest to run from the date of judgment.

Question: Was plaintiff entitled to interest on the amount found to be due from the date of the filing of the complaint instead of from the date of judgment?

No. Section 3287 of the Civil Code reads as follows: "Person entitled to recover damages may recover interest thereon. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *."

[1] Mr. Justice Shenk, speaking for the Supreme Court in *Lineman v. Schmid*, 32 Cal.2d 204, at page 212, 195 P.2d 408, at page 413, 4 A.L.R.2d 1380, thus accurately states the rule: "The rule appears to be uniform, whether the case involved contract price or reasonable value, that interest is not allowable when damages cannot be computed except on conflicting evidence, such as in the present case, because of the absence of established or reasonably ascertainable market prices or values. In such cases, since the amount of the damages cannot be resolved except by accord, verdict or judgment, interest prior to judgment, is not allowable."

[2] This rule is here applicable for the reason that in the present case until there had been a trial there was no way of determining the percentage of work which the architect had performed, and in the ab-

sence of this element it was not possible to apply the formula set forth in the contracts for the determining of his fee upon the abandonment of the projects. Therefore the court's ruling was correct.

Lasky v. American Indemnity Co., 102 Cal.App. 192, 282 P. 974, relied on by plaintiff, is not applicable to the facts of the present case for the reason that in such case it was unnecessary to receive evidence in order to apply the formula for determining the amount of damages, the parties there having treated the cost as certain, which in such case was an essential element for applying the formula of the contract.

In the present case the parties did not treat the actual bases for the application of the formula as certain, defendant at all times having objected to evidence which was received tending to prove such bases. Therefore the situation is different from that in the cited case where there was no contest as to the costs.

Affirmed.

MOORE, P. J., and FOX, J., concur.



121 Cal.App.2d 502

WOODLIN METAL PRODUCTS CO.

v.

FUTERNICK et al.

Civ. 19623.

District Court of Appeal, Second District,
Division 3, California.

Nov. 24, 1953.

Action for unpaid balance of purchase price of aluminum stamping blanks. Buyer filed cross-complaint alleging that seller failed to deliver materials. The Superior Court, Los Angeles County, Stanley N. Barnes, J., entered judgment for seller and buyer appealed. The District Court of Appeal, Shinn, P. J., held that contentions of

opposing parties were irreconcilable, and that seller's evidence supported the findings of trial court.

Judgment affirmed.

Sales ⇨ 359(3)

In action for unpaid balance of purchase price of aluminum stamping blanks, in which buyer filed cross-complaint alleging that seller failed to deliver materials, the evidence of opposing parties was irreconcilable, and seller's evidence supported finding that buyer had failed to pay the agreed price for the material.

J. George Bragin, Hollywood, for appellant.

Stone & Moran, Hugh A. Moran III and Willard J. Stone, Pasadena, for respondent.

SHINN, Presiding Justice.

Plaintiff sued for \$40,123.79, the unpaid balance of the purchase price of certain blanks from metal stampings sold to defendant at an agreed price of \$55,123.79. Judgment was for plaintiff in the amount claimed, and defendant appeals.

The court made findings as follows: " * * * it is true that plaintiff sold and delivered and defendant bought, accepted and received 185,290 pounds of aluminum blanks from metal stampings. * * * it is true that the defendant agreed to pay to plaintiff as the purchase price of said aluminum blanks from metal stampings the sum of Twenty-nine and three-fourths Cents (\$.2975) per pound or a total purchase price of Fifty-five Thousand One Hundred Twenty-three Dollars and Seventy-nine Cents (\$55,123.79), which sum was at said time the reasonable and actual value thereof." It was admitted by the pleadings that defendant had paid on account \$15,000. By its cross complaint defendant alleged that plaintiff had agreed to sell him all its metal scrap at dealers prices prevailing on the American metal market at the time, which was 17 cents per pound; that plaintiff had available 285,000 pounds of metal scrap but delivered only 172,370 pounds.

It was also alleged that plaintiff agreed to sell defendant 75,000 pounds of prime aluminum sheets at a price of \$.2975 per pound and refused to deliver any part of it. Damages were sought for the alleged breach of the agreement. The allegations of the cross complaint were found to be untrue. The able trial judge filed a memorandum of his decision in which he gave a comprehensive analysis of the evidence and answered fully all the contentions of defendant now urged on the appeal.

The blanks in question are small metal sheets, stamped out in the process of fabricating aluminum window frames from aluminum sheets at plaintiff's plant in Marshall, Michigan. The blanks were in three sizes.

Plaintiff's plant manager, Serr, wired defendant: "Morris please get in touch with me at once." He testified that defendant called him by telephone and he, Serr, told defendant that plaintiff had a quantity of aluminum blanks he wished to dispose of; defendant at that time mentioned a price which the witness could not remember; defendant called him again and was told by Serr that the company had not at that time decided what it would do with the metal; defendant called Serr later and was referred to Bachman, plaintiff's purchasing agent; Bachman testified that defendant offered to pay one-fourth of a cent a pound above the best offer plaintiff received for the blanks; that he, Bachman, refused to deal on that basis and defendant said he would go to .2975; this offer was accepted by plaintiff; defendant personally went to plaintiff's plant and supervised the loading of 185,290 pounds of aluminum blanks. Several days after the loading was completed, defendant went to plaintiff's office and gave Mr. Woodham, president of plaintiff, a check for \$15,000 and promised the balance on the following Monday. Defendant said nothing with respect to the nature or character of the metal he had received. In a few days defendant sent plaintiff another check for \$15,000 with an endorsement on the back that it was payment in full. This endorsement was blocked out, the check was deposited by plaintiff, but

was dishonored for the reason that defendant had stopped payment. Bachman then called defendant requesting payment of the balance and defendant then stated that he had not received the metal he had expected; the telephone call was transferred to Mr. Woodham; defendant said he could not use some of the small metal blanks and Woodham told him that he might return them, to which defendant replied that they had been sold; defendant stated that the transaction might be ruled illegal, evidently referring to some expected price control, to which Woodham replied that the company would take full responsibility.

Defendant testified that in the initial conversation with Serr over the telephone, he was offered aluminum sheets and agreed to pay for them \$.2975 per pound for 50 to 75 thousand pounds. Admittedly defendant received a telegram from plaintiff: "Accept your offer of .2975 for 50 to 75 thousand pounds." Plaintiff's witnesses denied having had any conversation whatever with defendant respecting the sale of aluminum sheets. One of defendant's expert witnesses testified that in the trade blanks are considered to be scrap. There was also evidence that blanks are used in the manufacture of small articles, while scrap is not.

There was an irreconcilable conflict in the evidence upon all the points in issue, namely, whether plaintiff agreed to sell defendant aluminum sheets, as well as blanks, and whether plaintiff agreed to pay for the blanks the price of .2975 per pound or only the prevailing market price for scrap aluminum. The conflicts, as we have seen, were resolved in favor of plaintiff.

In defendant's brief we find a profession of knowledge that it is not the function of this court to reweigh the evidence or to decide questions of fact, and yet the entire argument is to the effect that the trial court should have believed defendant and disbelieved the testimony of plaintiff's witnesses. The evidence of plaintiff, which we have summarized, fully supports the findings on the material issues. We may add that the memorandum of decision of the trial court was exceptionally comprehensive and ex-

plicit. The court not only stated that it disbelieved the testimony of defendant, but gave its reasons for such disbelief.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



ABLETT et ux.

v.

CLAUSON et al. (two cases), *

CLAUSON et ux.

v.

GLENDALE ESCROW CO.

CLAUSON et ux.

v.

SPOT DRIVE IN, Inc., et al.

CLAUSON et ux.

v.

ABLETT et ux.

Civ. 19668, 19669.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1953.

Rehearing Denied Dec. 16, 1953.

Hearing Granted Jan. 20, 1954.

Action in unlawful detainer brought against assignees of a lease by owners of a lot, consolidated with action by defendants for declaratory relief. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered judgments adverse to plaintiff owners and they appealed. The District Court of Appeal, Moore, P. J., held that where assignment of five-year lease of part of a lot rented to original tenants for six per cent of gross sales of drive-in restaurant being operated thereon, with minimum of \$150 monthly, gave assignees ownership of first right and prior option to secure a lease upon such premises before offered to any other person, firm or corporation for lease or rental, and option contemplated a lease for five year

* Subsequent opinion 272 P.2d 753.

period upon terms to be then agreed upon, assignees were entitled to specific performance of agreement for lease renewal, at rental in consonance with spirit and language of agreement for renewal, even though such agreement did not make certain amount of rental to be paid for term as renewed.

Affirmed.

1. Landlord and Tenant ⇨79(1)

Title given to a transaction, whether assignment or sublease, is not determinative of character of transfer, and actual terms and conditions of transaction must be considered in making such determination.

2. Landlord and Tenant ⇨79(1)

A transfer of a lease is an "assignment" when transferor alienates his entire interest in premises for remaining period of lease.

See publication Words and Phrases, for other judicial constructions and definitions of "Assignment".

3. Landlord and Tenant ⇨79(1)

Where corporate lessee of part of lot on which a drive-in restaurant was being operated transferred lease and its entire interest in business to respondents, such transfer was an "assignment", and fact that original copy of lease was held by escrow agent as something in nature of security for amount owed on purchase price was not a reservation of any interest in lease which would preclude transfer from being an assignment.

4. Landlord and Tenant ⇨76(4)

Evidence sustained finding that when lease of part of premises was transferred to respondents by instrument which constituted an assignment, plaintiff owners consented to assignment of lease to respondents as was required under lease to make assignment valid, notwithstanding that in letter consenting to transfer plaintiffs referred to respondents as sublessees and to transfer as a subletting.

5. Landlord and Tenant ⇨79(2)

Assignees of part of lot on which a drive-in restaurant business was being conducted were entitled to all rights original lessees had in respect to a renewal of lease.

6. Contracts ⇨143

Interpretation of a contract should be achieved with an eye to doing justice between parties to controversy.

7. Landlord and Tenant ⇨86(1)

Omission of details from option for renewal of a lease does not destroy or defeat power of equity to establish such details nor does it nullify force of clause giving right of renewal, and if lease provides for absolute right to extension or renewal and details are such as court may determine, it should not be held that contract is incomplete and court should establish right and settle details.

8. Landlord and Tenant ⇨83(1)

Where party to lease has right to extension of term of original lease or to a new term, such right will not be defeated by absence of some essential provisions of a new lease, and if parties do not agree on rental or other provisions for new lease, court will fix them in consonance with spirit and language of agreement for renewal despite plea that court is making a contract in contravention of its powers.

9. Specific Performance ⇨30

Where assignment of five-year lease of part of a lot rented to original tenants for six per cent of gross sales of drive-in restaurant being operated thereon, with minimum of \$150 monthly, gave assignees ownership of first right and prior option to secure a lease upon such premises before offered to any other person, firm or corporation for lease or rental, and option contemplated lease for five-year period upon terms to be then agreed upon, assignees were entitled to specific performance of agreement for lease renewal, at rental in consonance with spirit and language of agreement for renewal, even though agreement did not make certain amount of rental to be paid.

Hiram T. Kellogg, Los Angeles, for appellants.

Fizzolio & Fizzolio, Los Angeles, Carl B. Sturzenacker, Hollywood, and Walter Monarch, Los Angeles, for respondents Cyril L. and Kathleen M. Ablett.

MOORE, Presiding Justice.

One Clauson and his wife, appellants herein, were owners of lot 25, tract 1259, in the City of Burbank. They leased a portion thereof to M. A. Johnson and others in September 1946. The lessees established and operated a drive-in restaurant on the leased premises. They transferred their lease to a corporation, with the consent of appellants. The lease was for five years at a rental of six per cent of gross sales with a minimum of \$150 monthly and contained a clause giving the lessees a "first right and prior option" to a renewal for a like period upon terms to be agreed upon. With two years and ten months of the original term remaining, the corporation transferred the lease and its entire interest in the business to Mr. and Mrs. Ablett, respondents, for \$22,000—\$12,000 in cash, the remainder to be paid at the rate of \$300 per month on principal and interest.

The court found that appellants knew on the day of the sale—December 7, 1948—of the purchase of the lease for \$22,000 and that respondents had made the purchase in reliance upon a right to renew the existing lease for an additional five years at a monthly rental of six per cent of the gross income, with a minimum rental of \$150, and that respondents intended to operate a drive-in restaurant thereon. After gaining such knowledge, appellants did not advise respondents that (1) the use of the premises for a drive-in restaurant would be opposed; (2) there was no provision in the original lease for a renewal on the same terms or (3) they would consent to a sublease only. At the same time appellants informed respondents that they would not only consent to the transfer but would reduce the rental from six per cent to five per cent of the gross sales. Appellants not only knew of the payment by respondents of \$12,000 on December 7, 1948, but consented to the assignment of the lease and accepted respondents as assignees of the rights and obligations of the lessees and knew of the payments by respondents of \$300 monthly until August 15, 1950 and of \$200 per month thereafter until the end of the term designated by the original lease.

Notwithstanding the facts that appellants (1) in divers ways had approved respondents as tenants and (2) had advised counsel for the corporation in possession that they had approved respondents as tenants, at the end of the lease's five-year period appellants refused to negotiate with respondents for a new lease. Thereupon, the latter commenced their action for declaratory relief according to the terms of the original lease. Appellants then filed their complaint in unlawful detainer to obtain possession. The two actions were consolidated for trial and the court adjudged that respondents were "entitled to a renewal of their lease for an additional five-year term" and "to such parking facilities adjoining the demised premises as shall be practicable for the operation of a drive-in restaurant business * * * substantially the same as that enjoyed by plaintiffs and their predecessors."

On appeal, appellants contend (1) that the evidence does not support the findings that the transfer to respondents was an assignment and that appellants consented to such assignment as required by the lease, and (2) that the judgment was contrary to law in granting specific performance of an agreement for the renewal of the lease, the terms of which were not certain.

[1,2] The title given to a transaction, whether assignment or sub-lease, is not determinative of the character of the transfer. On the contrary, the actual terms and conditions of the transaction must be considered in making such determination. *Jordan v. Scott*, 38 Cal.App. 739, 745, 177 P. 504. *A transfer of a lease is an assignment* when the transferor alienates his entire interest in the premises for the remaining period of the lease. *Jeffers v. Easton, Eldridge and Co.*, 113 Cal. 345, 352, 45 P. 680.

[3] In the situation presented by this appeal, the transferor retained no interest in the lease. The original copy of the lease was held by the escrow agent as something in the nature of security for payment of the amount owed on the purchase price; but this does not constitute a reservation of any interest in the lease by the as-

signor. The transfer of the lease to respondents was an assignment.

[4] In the letter consenting to the transfer appellants referred to respondents as sub-lessees and to the transfer as a sub-letting. Appellant now argues that this usage is conclusive on the question of lack of consent to the assignment. But there is substantial evidence to support the finding that appellants were actually consenting to the assignment of the entire interest of the lessees to respondents. The conversations between the parties relating to maintenance and improvement of the property; letters by appellants' attorney concerning a renewal of the lease in which he referred to respondents as "assignee"; the answer to the complaint for declaratory relief referring to the transfer as an assignment; that the notice to quit was sent to respondents and not to the original lessees; also, that the action in unlawful detainer was against respondents and not the original lessees—all these facts are evidence in support of the finding that appellant consented to the assignment. The indiscriminate use of the words "sub-lease" and "assignment" serves to indicate a disregard for, or a lack of knowledge of, their technical meanings and therefore the actual intent of the lessor should be determined from all his actions, not merely by one of them.

[5] Since respondents are assignees of the lease, they are entitled to all the rights that the original lessees had in respect to a renewal of the lease. The assignment conveyed to them full ownership of "the first right and a prior option to secure a lease upon said premises before the same are offered to any other person, firm or corporation for lease or rental and that said option shall contemplate a lease for a period of five (5) years upon terms to be then agreed upon." The evidence discloses that at the termination of the original five-year term, appellants intended to use the premises under lease as part of the parking facilities for a super-market which they had erected on adjacent property and leased to others. This avowed intent to lease to another was contrary to the "first right

and prior option" that the present lessee had under the renewal clause.

[6] Appellants contend that the language of the option is so uncertain as effectually to convey no right at all. Merely because a new lease, or an extension of the existing lease is not set out in *haec verba* as an exhibit to the original lease is no reason for depriving a lessee or his assigns of a right which by the original writing was clearly granted to the lessee. The interpretation of a contract like all other facts to be found should be achieved with an eye to doing justice between the parties to the controversy. Such was the concept of Mr. Justice Drapeau in *Chaney v. Schneider*, 92 Cal.App.2d 88, 206 P.2d 669. There the lease was for five years and the lessor agreed "to give Lessee first refusal for an additional term of lease, at rentals and terms to be mutually agreed upon at that time * * *." In affirming judgment that the lessee should have "an additional five years upon the same terms and conditions as the original lease but at an increased rental", the court said, 92 Cal. App.2d at page 89, 206 P.2d at page 669:

"Leases which left anything for future agreement of the parties were for a long time generally held to be void for uncertainty. The modern trend of decisions would seem to be in relaxation of the strictness of the rule, particularly when the amount of rental is left to future agreement. If there is in the writing a sufficient definite standard or method for the determination of the rental, and if the amount thereof is the only thing to be determined, courts of equity will hold that the parties agreed upon a reasonable rental for the extension, and will declare it if they do not agree."

[7, 8] If the court may fix a "reasonable rental" where the covenant is for a renewal of the lease for a rental to be determined by arbitration, after the arbitrators failed to agree *Streicher v. Heimburge*, 205 Cal. 675, 272 P. 290, the court may fix rentals or determine any other fact required by the option clause to do justice. The omission of details from an option for renewal of a lease does not destroy or defeat the power

MORTON et al.

v.

TRAVELERS INDEMNITY CO.

No. 182645.

Appellate Department, Superior Court,
San Diego County, California.

Signed and Filed Oct. 22, 1953.

of equity to establish such details nor does it nullify the force of the clause giving the right of renewal. If a lease provides for the absolute right to its extension or renewal and the details are such as a court may determine, it should not be held that the contract is incomplete but should establish the right and settle the details. *Joy v. City of St. Louis*, 138 U.S. 1, 43, 11 S.Ct. 243, 34 L.Ed. 843, 856; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 8 Cir., 29 F. 546, 557; see *Kauffmann v. Liggett*, 209 Pa. 87, 58 A. 129, 67 L.R.A. 353. Appellants forget that the genius of the law does not encourage stagnation. On the contrary, it demands expansion; in every field of endeavor it provides new rules and new remedies to meet new situations. The lone and forlorn cry that "it's never been done before" is not sufficient to reverse a new, wholesome trend. The thesis of the Chaney decision is that where a party to a lease has a right to an extension of the term of the original lease or to a new term, such right will not be defeated by the absence of some of the essential provisions of a new lease. If, perchance, the parties do not agree on the rental or other provisions for the new lease, the court itself will fix them in consonance with the spirit and language of the agreement for a renewal despite the plea that the court is making a contract in contravention of its powers.¹

[9] The application of the doctrine declared in *Chaney v. Schneider*, supra, to the lease here involved was not error. The fact that the rent was not changed although the value of the property has increased during the period of the first lease does not defeat this conclusion, since the rent is a percentage of the gross income from the lessee's business. The value of the property increases because the amount of potentially available business on the location increases, and the rent under this lease (6 per cent of gross sales) increases when the amount of business increases.

The judgments are affirmed.

McCOMB and FOX, JJ., concur.

Action by insured against insurer to recover, on automobile liability policy covering insured's automobile, for personal medical payments resulting from an accident occurring while insured was operating automobile belonging to his wife. The Municipal Court, San Diego Judicial District, Ronald Abernethy, J., entered judgment for insurer, after a general demurrer was sustained to insured's complaint, and insured appealed. The Superior Court, Burch, J., held that under policy provisions respecting use of other automobiles, coverage was afforded for medical payments resulting from an accident while occupying or operating an automobile other than the insured automobile, if such other automobile was not owned by insured or a member of his household, and hence insured's medical payments were not covered, since automobile which insured was operating at time of accident belonged to his wife.

Judgment affirmed.

1. Insurance ⇨146(1)

In absence of any charge of mistake or fraud, intention of parties in executing particular form of written insurance contract would be ascertained from writing itself.

2. Insurance ⇨146(2)

Terms of insurance contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them.

3. Insurance ⇨146(1)

In construing insurance contract, each clause is to be considered with reference

1. See also Note, 24 Southern California
263 P.2d—22

to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached.

4. Insurance ⇨146(3)

While uncertainties and ambiguities in policies are to be resolved against insurer, courts must avoid putting a strained and unnatural construction on terms of policy and thereby creating an uncertainty or ambiguity.

5. Insurance ⇨146(1)

No term of an insurance contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof.

6. Insurance ⇨452

Under provisions of automobile liability policy respecting use of other automobiles, coverage was afforded for medical payments resulting from an accident while occupying or operating an automobile other than the insured automobile, if such other automobile was not owned by insured or a member of his household, and hence insured's personal medical payments resulting from an accident occurring while insured was operating his wife's automobile were not covered.

7. Insurance ⇨452

Generally, only those vehicles with reference to which insurance is obtained are within protection of policy, and no liability attaches to insurer for harm done by any others.

William M. Hawkes, Escondido, for appellants.

Luce, Forward, Kunzel & Scripps, by R. Sherman Platt, San Diego, for respondent.

BURCH, Judge.

Plaintiff Hugh B. Morton appeals from a judgment entered after a general demurrer was sustained to his complaint.

Defendant insurance company issued an automobile liability policy to plaintiff, which included also bodily injury, property

damage, and medical payments resulting from an accident involving plaintiff's Chevrolet car.

As regards "excess" medical payments up to \$1,000 limit, resulting from an accident, coverage was afforded assured while operating or occupying another automobile provided the other automobile was not in a class excluded by conditions expressed in the insuring agreement.

Plaintiff received injuries involving medical payments of \$3,104, while operating his wife's Studebaker. The wife's insurer paid \$2,000 of these, and plaintiff seeks to recover on his Chevrolet policy the \$1,000 limit.

The court below entered judgment for defendant after a general demurrer was sustained to the complaint. As regards the use of other automobiles, the insuring agreement with its conditions is set out in the complaint as follows:

"V. Use of Other Automobiles:

"If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

"(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

"(b) This insuring agreement does not apply:

"(1) to any automobile owned by, hired as part of a frequent use of hired

automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

"(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

"(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

"(4) under Coverage B, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse."

Coverage B of the policy reads as follows:

"I. Coverage B—Medical Payments.

"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission."

The question for decision is whether under these provisions of the policy the insured, who incurred the medical expenses following upon an accident while operating his wife's car, is entitled to insurance coverage.

These insurance agreements will be found to have been adopted for use in the Standard Automobile Liability Policy as of 1947. (See August, 1950, Supplement to Vol. 1, Insurance Annotations, published by the Committee on Insurance of The American Bar Association.)

[1-5] The wording of these insurance agreements was determined upon by rep-

resentatives of insurers for use in automobile liability policies generally and was not so much formulated as selected for inclusion in plaintiff's insurance contract. There being here no charge of mistake or fraud, the intention of the parties in executing this particular form of written contract must be ascertained from the writing itself as the same is brought before us on this appeal.

"The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them." *Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 575, 296 P. 273, 276.

"* * * each clause is to be considered with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached, * * *." *Jones v. Van Nuys*, 161 Cal. 158, 165, 118 P. 541, 544.

"* * * each clause of the contract is to be looked to for light in interpreting the others; * * *." *In re Estate of Winslow*, 121 Cal. 92, 94, 53 P. 362, 363.

"While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof." *Burr v. Western States Life Ins. Co.*, supra, 211 Cal. 576, 296 P. 276.

Plaintiff argues that there is ambiguity between V (b) (1) and V (b) (4), which by way of construction vitiates V (b) (1) for the purposes of this case. However, it will be noted V (b) (1) has to do specifically with insurance like that afforded covering the principal automobile—the

Chevrolet—when some other automobile is involved. Since assured paid but one premium for coverage on his Chevrolet, it is not unreasonable to expect that similar coverage on other cars would be conditioned to such other cars as were not owned by insured or his household. Such appears to be the clear and unequivocal meaning of V (b) (1). When V (b) (4) is examined in relation to V (b) (1) its clear meaning is that operation or occupancy by the assured or his wife is within the insuring agreement provided that the other automobile occupied or operated (1) be not one owned by assured or member of his household (V (b) (1)); (2) be not in use in business or occupation of the named insured or spouse (V (b) (2)); (3) be not involved in an accident arising out of its operation in connection with repairs or storage of it (V (b) (3)). There is the further condition expressed in V (b) (4) that it pertains only to Coverage B—Medical Payments.

[6,7] As we construe these provisions so far as material here, coverage is afforded for medical payments resulting from an accident while occupying or operating a car other than the insured car which is not owned by the insured or a member of his household. Since the car plaintiff was operating at the time of the accident belonged to his wife, who was a member of his household, no coverage is afforded by the policy.

Coverage B dealing with medical payments is in its nature an accident policy in favor of those persons who incur medical payments for injuries "caused by accident, while in or upon, entering or alighting from the automobile (Chevrolet) if the automobile (Chevrolet) is being used by the named insured or with his permission". It has of itself nothing to do with the use of other automobiles. The reference to it in V (b) (4) affords coverage of like extent and like limitation to other automobiles besides the Chevrolet, but subject to the conditions of Coverage V—Use of Other Automobiles. These conditions we have found to exclude another automo-

bile owned by assured or member of his household.

The decisions of other jurisdictions which have been brought to our attention that have considered the language contained in Coverage B, Medical Payments, in the present policy, have involved injuries from accidents in which the principal automobile was involved. The Louisiana court in *Sims v. National Casualty Co.*, La.App., 43 So.2d 26, considered the insurance in the nature of an accident policy and suggests in the opinion that the assured was not covered for his personal medical payments. An Ohio court in *Madden v. Farm Bureau Mutual Auto Ins. Co.*, 82 Ohio App. 111, 79 N.E.2d 586, granted judgment to the assured without mention of whether he was in the class insured by the clause. In neither case were the insurance agreements for the use of other automobiles involved. Hence there was no consideration of the relation of the two insuring agreements to each other. The general rule is stated in *Appleman's Insurance Law and Practice*, Vol. 8, Section 3961, as follows:

"Only those vehicles with reference to which insurance is obtained are within the protection of the policy and no liability attaches to the insurer for harm done by any others."

The language used here under the insuring agreement V, Use of Other Vehicles, appropriately distinguishes this policy from the general rule but without the latter insurance agreement, that is the use of other automobiles, no doubt the general rule would have applied here. It appears that the application of the general rule to Coverage B gives clarity and certainty to the provisions of the insurance agreement V, Use of Other Automobiles, and that insured's personal medical payments resulting from an accident while insured was operating his wife's Studebaker are not covered in the policy.

On these considerations the judgment is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

PALMQUIST v. MERCER et al.*

Civ. 19438.

District Court of Appeal, Second District,
Division 2, California.

Nov. 10, 1953.

Rehearing Denied Nov. 30, 1953.

Hearing Granted Jan. 6, 1954.

Action by equestrian against riding academy, oil company which maintained trestle across flood control channel, and second oil company which maintained pipe on such trestle, for breach of warranty and for personal injuries sustained when horse ran under trestle and equestrian struck stationary object extending beneath trestle. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment of nonsuit in favor of defendants, and equestrian appealed. The District Court of Appeal, McComb, J., held, *inter alia*, that where equestrian upon hiring horse signed release providing that equestrian discharged riding academy and operators thereof from any and all claims, and that equestrian rented horse at own risk, and there were no unfair tactics used to get equestrian to sign release, such release was valid and binding and would preclude liability of riding academy whether equestrian had read release or not.

Judgment and order affirmed.

1. Highways ☞79(1)

In action against oil company and others by equestrian who was injured when horse ran under trestle belonging to oil company and equestrian hit stationary object extending beneath trestle, where there was evidence that portion of road running under trestle had been abandoned and placed under control of Flood Control District which had given oil company permission to build trestle, evidence was insufficient to establish that there was a public road beneath the trestle.

2. Adverse Possession ☞8(1)

When realty is held by the state or a subdivision thereof, such as the Flood Control District, and has been dedicated to a public use, no adverse holding thereof will give title to the adverse claimant.

* Subsequent opinion 272 P.2d 26.

3. Easements ☞38**Negligence ☞54**

Where Flood Control District having complete control of flood control channel granted permission to oil company to construct pipeline trestle across such channel, oil company could acquire no rights in property owned by Flood Control District and could not prohibit passage upon flood control right of way and therefore was not liable to equestrian whose horse ran along road under trestle, causing equestrian to strike stationary object extending beneath trestle.

4. Nuisance ☞3(1)

Where oil company maintained pipeline trestle across flood control channel by express permission of Flood Control District, such trestle was not on any public street or highway and equestrian received injuries when horse ran under trestle, causing equestrian to hit stationary object extending beneath trestle, pipeline company would not be liable to equestrian on ground that maintenance of trestle was a nuisance.

5. Negligence ☞54

Where Flood Control District granted oil company permission to build pipeline trestle across flood control channel, any changes in construction from requirements of permit were subsequently ratified and approved by district, and district accepted trestle as maintained and equestrian received injuries when horse ran under trestle and equestrian hit stationary object extending beneath trestle, oil company would not be liable to equestrian on ground that trestle did not conform to permit granted by flood control district, since equestrian at most was licensee and obliged to take premises as he found them.

6. Negligence ☞32(2.2)

Where oil company maintained trestle across flood control channel with permission of Flood Control District and equestrian went onto property of district and was injured when horse ran under trestle, equestrian was at most licensee to whom oil company owed only duty of refraining from wilful or wanton injury.

7. Negligence ☞105

Where inexperienced equestrian rented horse from stable, by virtue of actions of horse equestrian knew or should have known that horse was unmanageable, equestrian knew that trestle extending across path or road extending from stable made passing under structure hazardous and that equestrian would have to bend down to pass under it and that he could return to stable by various ways, and equestrian received injuries when horse ran under trestle and equestrian hit stationary object extending beneath trestle, equestrian had assumed the risk thus precluding liability on part of oil company maintaining trestle.

8. Negligence ☞54

Where Flood Control District granted first oil company permission to construct trestle across flood control channel, thereafter such oil company entered into agreement with second oil company whereby second oil company was permitted to place and maintain one pipeline upon trestle but first oil company retained sole direction and control of trestle and second company was given no right, power or privilege in connection with maintenance, repair or removal of trestle, second company could not be liable on ground of negligence to equestrian whose horse ran under trestle, causing equestrian to hit stationary object extending beneath trestle.

9. Livery stable keepers ☞11

Where equestrian upon hiring horse signed release providing that equestrian discharged riding academy and operators thereof from any and all claims and that equestrian rented horse at own risk, and no unfair tactics were used in procuring equestrian's signature, release was valid and binding and would preclude liability of riding academy for injuries sustained by equestrian while riding horse whether equestrian had read release or not.

10. Contracts ☞114**Livery stable keepers ☞11**

Where equestrian upon renting horse from riding academy executed release providing that equestrian fully and forever discharged riding academy and operators thereof from all claims, etc., which might

result from or during rental time and that equestrian rented horse at own risk, such release was not void either as against public policy or because by its terms it was broad enough to include release for gross negligence and willful acts of riding academy.

Fred N. Howser, Arcadia, and Russell H. Pray, Long Beach, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondent Tidewater Associated Oil Co.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent H. W. Mercer.

Ball, Hunt & Hart, Long Beach, for respondent Union Oil Co. of California.

McCOMB, Justice.

From a judgment of nonsuit entered in favor of defendants after trial before a jury for damages for personal injuries and breach of warranty, plaintiff appeals.

Facts: On October 10, 1950, plaintiff with Loretta M. Palmquist, now his wife, visited defendant Mercer's riding academy located at 223rd Street and Golden Avenue in Long Beach, California, for the purpose of renting two riding horses. Plaintiff's wife had never ridden a horse before and plaintiff had not ridden for a period of approximately six or seven years. When plaintiff entered the premises of the riding academy he asked the attendant for "a couple of old nags," and further told him that he would like tame and gentle horses. The attendant stated "All right, come into the office."

Plaintiff entered the office and walked to a desk in the center of the room where the attendant pushed over a register pad and asked him to sign it. Plaintiff signed it by writing his name and address, and then followed the attendant out of the room. He was in the office approximately 15 seconds. He did not read the printed form which he signed nor was he requested to read it. He testified that the name and address on defendant Mercer's exhibit D was in his handwriting, and that any other writing on that exhibit was not his; that he does not recognize defendant Mercer's ex-

hibit D. but remembers that he signed his name on a square piece of white paper.

Defendant's exhibit D contained the following release clause: "* * * fully and forever discharge the Equestrotel Riding Academy and the operators thereof from any and all claims, demands and damages, rights of action or causes of action, on account of whether known or unknown, concealed or hidden, external or internal, personal physical injuries, damages or causes or otherwise, or damages or injuries of every kind or character resulting from or which may result from or during the rental time therein provided, either directly or indirectly. * * * I expressly rent the horse at my own risk and assume full responsibility for all matters resulting from or that may occur by reason thereof, and agree to pay the rental charges on demand."

After leaving the office plaintiff parked his car and again talked to the attendant who picked a horse named "Doc" for plaintiff and another horse for plaintiff's wife. The attendant led the horse away from the trough in which it was feeding and told plaintiff he should go north on Golden Avenue, west on 223rd Street, and then under a pipe trestle in a northerly direction. The horses then proceeded out of the driveway onto Golden Avenue, walked north on Golden to 223rd Street and then turned east for approximately 30 feet. Plaintiff and his companion then turned the horses around and went west on 223rd, turned north up an embankment and into a stable where the horses walked to a water trough and began drinking. While the horses were drinking, plaintiff pulled the left rein of his horse, but the horse refused to leave the trough. Eventually the horses left the trough and returned to 223rd Street, went south on Golden Avenue and returned to the Equestrotel riding academy. The horses stopped inside the premises of the riding academy where plaintiff again talked to the attendant. Plaintiff told the attendant that he was having trouble managing his horse and that his companion said she thought her horse was squeamish. The attendant answered that there was nothing wrong with the horses. He then gave plaintiff and

his companion a demonstration on how to direct a horse. After the demonstration plaintiff mounted his horse again. The attendant then led plaintiff and his companion onto Golden to the intersection of 223rd, proceeding west on 223rd until they were standing opposite a pipe trestle which is located on the north side of 223rd Street.

The trestle traverses the Los Angeles River in an east and west direction and carries oil pipe lines for defendants Union Oil Company of California and Tidewater Associated Oil Company. Up to the time plaintiff and his companion stopped south of the trestle with the attendant, the surface on 223rd Street appeared to be hard, consisting of sand, dirt, gravel and oil all mixed together. When asked, "Did you see any path or trail or roadway under the trestle?" plaintiff answered "Yes," indicating an area under the pipe trestle. As they were stopped south of the trestle, the attendant told plaintiff that he would have to bend over to go under this trestle, and then to ride as far as they liked.

Plaintiff and his companion proceeded under the trestle and followed the road, indicated by car tracks, around the bend in a northerly direction. After plaintiff passed the trestle he proceeded north on the road for about 400 feet, then he turned to the left and called to his companion. As he turned his head to the left his horse reeled about to the left and began running back on the road towards the trestle. The horse picked up speed and plaintiff tried to stop it by pulling on the reins with both hands. At first he did not pull hard; then he tried to stop the horse by pulling the reins back with both hands as hard as he could, but the horse was going all the faster. The horse passed the other rider and ran around the bend in the road towards the trestle.

Immediately before the accident herein-after described, plaintiff remembers seeing underhanging beams of the trestle in front of him. At that time he was eight to ten feet north of the beams which form the understructure of the pipe trestle and which are located immediately above the traveled area under the trestle at a height of six feet. At that time he was flat in the saddle and bent over to the right and around the

saddle, his head held down as far as he could get it. His left shoulder was pointing upward and his right arm and head were down to the right. His left shoulder and neck hit a stationary object such as the vertical beams of the understructure of the pipe trestle located above the traveled area under the trestle, and he blacked out.

When he regained consciousness he was

lying immediately to the south of the pipe trestle, approximately five feet from the nearest substructure of the trestle and immediately south of the traveled area under the trestle. As a result of the accident he is permanently paralyzed from the waist down.

The following is a photograph of the area where the accident occurred.



I

*Questions presented on the appeal
against the defendant Union Oil
Company of California.*

[1] First: *Was there a public road beneath the Union Oil Company's trestle?*

No. Plaintiff conceded that the accident occurred on the property controlled by the Los Angeles Flood Control District to the north of Long Beach in a general easterly and westerly direction. In 1919, that portion of this road, 720 feet long, extending across the flood control channel, was abandoned by appropriate action and was placed under the control of the Flood Control District. From that time until the happening of the accident, October 10, 1950, by ordinance the Flood Control District had been vested with complete control over the channel and nothing by way of impeding flow of water or changing of the property was allowed except by permission of the Flood Control District.

On August 23, 1922, defendant Union Oil applied to the Flood Control District for permission to construct a pipeline trestle across the flood control channel at Wilmington Street. September 12, 1922, the chief engineer of the Flood Control District by letter submitted his recommendations to the Board of Supervisors, the letter containing a provision that the lower members of the deck stresses must not extend more than two feet below the official top of the west levee. The Board of Supervisors acted upon the matter and by resolution authorized the construction of the trestle in accordance with the recommendation of the chief engineer.

Union Oil proceeded to and did erect the trestle in accordance with the plans submitted to the Flood Control District. The bottom chord of the inverted queen post trusses extended four feet four and one-half inches below the top of the trestle. The area underneath the trestle probably changed due to the action of flood waters from time to time in the ensuing years. At the time of the accident the clearance of the supporting trestle was approximately six feet.

At the time the trestle was completed, access to the property of the Flood Control District from the east was unimpeded, both to the north and to the south of the trestle. It was not until approximately 10 years later that certain changes were made to the north and east of the easterly terminus of the trestle that impeded access to the area of the flood control channel to the north of the trestle from its east end. During the period from 1931 to 1941 there appeared to be marks, as foot prints or hoof prints, growing into pathways under the trestle at various locations. The locations of these changed from time to time. Also during part of such time there was a wooden barrier erected across what would be an extension of 223rd Street at a point some distance west of the easterly end of the trestle, and just south of it. This was placed there by the Flood Control District.

For the last several years prior to the accident there had developed a well defined area of travel underneath the trestle at certain bents to the west of the east boundary line of the flood control channel.

During the years which had followed the construction of the pipe line trestle, and prior to October 10, 1950, Union Oil from time to time notified the Flood Control District of the necessity of repairing the trestle and received permission from the District to do so. From 1945 until the date of the accident people indiscriminately entered the area of the flood control channel, riding about on horse back, crossing underneath the pipe line trestle at many points, even under that portion traversing the river bed itself, where there had been eroded a deeper channel affording greater clearance.

On the date of the accident there had become worn a well defined area, path or trail which divided and passed to either side of the polings constituting the bent at the western end of the two most easterly spans of the trestle. This is the area where the accident occurred.

For five years prior to the accident the black top of 223rd Street east of the flood control channel ended at the gate to the yard of the property of the Oil Operators,

Inc., at the southwest corner of Golden Avenue and 223rd Street. Beyond that point the dirt was sprayed with oil and dragged about once a year by employees of Oil Operators, Inc. This operation included the area south of the trestle and perhaps under the trestle to some extent.

There was no action on the part of defendant Union Oil Company to excavate, fill, level, surface or treat the ground area within the flood control channel at any time other than the sinking of pilings, etc.

Various accidents had occurred at the point where the instant tragedy took place, and defendant Union Oil had knowledge thereof. The record is entirely devoid of any proof to show that the road where the accident occurred was at any time since 1922 maintained by any road district, road commission or other public agency. It was occupied solely by the Flood Control District for flood control purposes.

[2] It is clear that when land is held by the state or a subdivision thereof, such as the Flood Control District, and has been dedicated to a public use, no adverse holding thereof will give title to the adverse claimant. (*Ortiz v. Pacific States Properties*, 96 Cal.App.2d 34, 37, 215 P.2d 514.)

[3] Union Oil Company had no power to acquire any rights in the property owned by the Flood Control District. It had no right to forbid the trespassing under its trestle, and the fact that it had on occasion installed signs indicating the height of the trestle and warning to people who passed under it did not increase its power. It could not have prohibited the passage of persons or animals or vehicles upon any part of the flood control right of way. Its sole power was to maintain the trestle and to prevent trespassing thereon.

[4] Second: *Was the maintenance of the pipe trestle a nuisance?*

No. The trestle was maintained by express permission of the Flood Control District and not on any public street or highway. Therefore it could not be characterized as a nuisance. (*Barrett v. Southern Pac. Co.*, 207 Cal. 154, 160, 277 P. 481;

Gerberich v. Southern California Edison Co., 5 Cal.2d 46, 51, 53 P.2d 948.)

[5,6] Third: *Since plaintiff contends that in certain particulars the trestle was not built in conformity with the permit granted by the Flood Control District, was defendant Union Oil Company liable?*

No. For the reason that an examination of the record discloses that any changes in the construction of the trestle from the requirements of a permit issued by the Flood Control District were subsequently ratified and approved by the District, and that it accepted the trestle as maintained. Therefore plaintiff is not in a position to complain of the manner in which the trestle was maintained. At most he was a licensee to whom defendant owed only the duty of refraining from wanton or willful injury. (*Oettinger v. Stewart*, 24 Cal.2d 133, 137 [5], 148 P.2d 19, 156 A.L.R. 1221; *Demon v. Smith*, 58 Cal.App.2d 425, 432[2], 136 P.2d 660.) Therefore plaintiff was obliged to take the premises as he found them.

Plaintiff relies upon numerous cases in support of the proposition that since defendant Union Oil Company had knowledge of prior accidents it owed a duty to correct a dangerous or defective condition. The cases cited by plaintiff are not here applicable for the reason that such authorities in the main had to do with dangerous conditions in structures over or on public streets or highways. In the present case defendant Union Oil Company had no right to make any changes in the path where the accident occurred.

As was heretofore stated the only one that had any authority over such property was the Flood Control District. In addition plaintiff conceded that he knew the condition of the trestle where the accident occurred prior to the time of the accident.

Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536 and *Davis v. Pacific Power Co.*, 107 Cal. 563, 40 P. 950, are clearly distinguishable on their facts from the instant case. In the *Davoust* case defendant was a trespasser and was dealing with a highly dangerous element, to

wit, a live electric wire. Likewise the plaintiff in the case was a licensee and the case does not deal with defendant's liability where it owned or was licensed to be on the property.

In the Davis case the trial court submitted to the jury the question of whether or not defendant, erector of a revolving shaft causing the injury, had permission from the lessee, the admitted possessor of the premises, to erect and operate the shaft. The evidence was in conflict and the jury found defendant had no such permission. Clearly here under the finding of the jury defendant was a trespasser and the case is not applicable to our situation.

[7] Fourth: *Did plaintiff assume the risk?*

Yes. The uncontradicted evidence discloses that plaintiff knew or should have known that his horse was unmanageable. He knew the structure made passing under the trestle hazardous, and that he must bend down to pass under it. He knew that he was not an experienced horseman, and also knew that he could return to the riding academy through various ways. Therefore in riding as he did he assumed the risk of the unfortunate injury which occurred. (See *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 384 et seq., 240 P.2d 580; *Powers v. Raymond*, 197 Cal. 126, 131, 239 P. 1069.)

It is clear that the directed verdict as to defendant Union Oil Company was correct.

II

Question presented on the appeal against the defendant Tidewater Associated Oil Company.

[8] *Was there any showing of negligence on the part of Tidewater Associated Oil Company?*

No. The uncontradicted evidence disclosed that in November of 1936, defendant Union Oil Company had granted written permission to Tidewater Associated to place and maintain one pipe line upon the trestle which Union Oil had constructed. Under this agreement Union Oil had retained the sole direction and control of the pipe trestle and, for the permission of maintaining the one pipe line on the trestle, Cal.Rep. 263-264 P.2d—11

Tidewater Associated agreed to pay Union Oil one half of Union Oil's cost and expense of construction, maintenance, operation, repair, renewal or removal of the trestle.

Tidewater Associated had no right, power or privilege to in any way do anything in connection with the construction, maintenance, operation, repair, renewal or removal of the trestle. Its sole privilege was to place and maintain one pipe line upon the trestle with the obligation to reimburse defendant Union Oil for a percentage of Union Oil's cost and expense in regard to the trestle. (See *MacLeod v. Fox West Coast Theatres Corp.*, 10 Cal.2d 383, 387, 74 P.2d 276.) The trestle was neither planned nor constructed by defendant Tidewater Associated, who therefore could not have been negligent in its construction or maintenance. (*Denman v. City of Pasadena*, 101 Cal.App. 769, 772 et seq., 282 P. 820; *Bernard v. Vorlander*, 87 Cal.App.2d 436, 440, 197 P.2d 42; *Whalen v. Ruiz*, 40 Cal. 2d 294, 303, 304, 253 P.2d 457.)

In view of our conclusion on this point it is unnecessary to discuss other points urged by plaintiff against this defendant. The trial court's judgment was correct.

III

Question of the liability of defendant Mercer, doing business under the fictitious name and style of Equestrotel Riding Academy.

[9] *Did plaintiff release defendant Mercer from any liability for damage resulting from the hiring of the horse by plaintiff from such defendant?*

Yes. At the time the horse was hired plaintiff signed a release reading in part as follows: "fully and forever discharge the Equestrotel Riding Academy and the operators thereof from any and all claims, demands and damages, rights of action or causes of action, on account of whether known or unknown, concealed or hidden, external or internal, personal physical injuries, damages or causes or otherwise, or damages or injuries of every kind or character resulting from or which may result from or during the rental time therein provided, either directly or indirectly * * *

I expressly rent the horse at my own risk and assume full responsibility for all matters resulting from or that may occur by reason thereof, and agree to pay the rental charges on demand."

The general release voluntarily executed by plaintiff was valid and binding. Plaintiff admits that he signed it and that no unfair tactics were used to get him to sign it. There is no claim of fraud or misrepresentation, or that he was prevented from reading it if he so desired. Therefore it was binding upon him and it is immaterial whether he read it or not.

The rule is thus accurately stated in *Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462, 470 et seq., 34 P. 84, 86: "The general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding." (See also *Nichols v. Hitchcock Motor Co.*, 22 Cal.App.2d 151, 153 [1] et seq., 70 P.2d 654; *Knox v. Modern Garage, etc., Shop*, 68 Cal.App. 583, 587 [2], [3], 229 P. 880.)

[10] There is likewise no merit in plaintiff's contention that the release is void as against public policy. A similar contention was made in *Werner v. Knoll*, 89 Cal.App. 2d 474, where at page 475 [1], 201 P.2d 45, at page 46, the court says:

"Clearly said section 1668 does not declare unlawful all contracts, the object of which is to exempt individuals from the consequence of their own acts, but only those contracts which would exempt one from the consequences of his own fraud, willful injury or violation of law whether willful or negligent. It is noteworthy that the only use of the word negligent in said section is in a restrictive sense and only in connection with violations of law. Therefore it necessarily follows, that by the obvious omission from the provisions of said section 1668 of the Civil Code, contracts seeking to relieve individuals from the results of their own negligence are not

invalid as against the policy of the law as therein provided, and hence are neither contrary to public policy nor expressed provision of the law as set forth in said section 1667." (See also *Inglis v. Garland*, 19 Cal.App.2d Supp. 767, 771 [3], 64 P.2d 501.)

Nor is plaintiff's proposition sound that the release is void because by its terms it is broad enough to include a release for gross negligence and possibly for willful acts of such defendant. This contention was answered adversely to plaintiff's claim in *Werner v. Knoll*, supra, 89 Cal.App.2d at page 476, 201 P.2d at pages 46, 47.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.



121 Cal.App.2d 537

RECLAMATION DIST. NO. 1500

v.

SUTTER BASIN CORP., Limited, et al.

Civ. 8252.

District Court of Appeal, Third District,
California.

Nov. 25, 1953.

Hearing Denied Jan. 20, 1954.

Proceeding to enjoin defendant from using reclamation district's levee for grazing and for vehicular traffic. The Superior Court, Sutter County, Lowell L. Sparks, J., granted injunction, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that, grazing and vehicular travel on levee in violation of regulations of army engineers was a use of levee inconsistent with flood control plans of State of California.

Judgment affirmed.

I. States 4.19

Where by both state and federal legislation, flood control agreement between state and federal governments had acquired force of law, state was obligated to maintain levees and flood control projects in ac-

cordance with regulations of army engineers.

2. Levees and Flood Control ⇨13½

Where defendant granted easement to reclamation district to build levee, reserving right to use levee for vehicular traffic and for grazing not inconsistent with flood control plan of state, and levee became part of system in which state and federal governments had interest, use of levee by defendant which was in conflict with regulations of army engineers was inconsistent with flood control plans of state, and in excess of defendant's reserved interest.

3. Levees and Flood Control ⇨35

Decree which enjoined defendant from making unlimited use of levee, which was built on defendant's property by reclamation district in accordance with easement granted by defendant, was not too broad in restricting all acts damaging levee, since it was assumed that trial court in any future contempt action would act reasonably in determining what constitutes damage.

4. Levees and Flood Control ⇨13½

Where defendant granted to reclamation district an easement to build levee on defendant's property, reserving right to use levee in manner not inconsistent with flood control plan of state, and levee became part of water control system in which both state and federal governments had interest, regulations of army engineers restricting use of levees were part of flood control plan of state, and defined extent of defendant's reservation.

5. Appeal and Error ⇨1121

Where defendant was enjoined from use of levee for vehicular traffic and grazing without permission of state engineer, and state engineer denied such permission, District Court of Appeal would not define conditions under which defendant could use levee, but defendant could apply to trial court to test reasonableness of state engineer's ruling. Code Civ.Proc. § 956a.

Downey, Brand, Seymour & Rohwer, Sacramento, Edmund G. Brown, Atty. Gen., by Walter S. Rountree, Raymond H. Williamson, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by Sutter Basin Corporation, Ltd., a corporation, from a judgment rendered against it, whereby it was enjoined from using the east levee of respondent Reclamation District No. 1500, which levee is a part of the west levee of the Sutter By-pass, for vehicular traffic and for the grazing of livestock.

After the commencement of the action intervention was permitted by the People of the State of California and the Sacramento and San Joaquin Drainage District, acting by and through the State Reclamation Board.

The cause was tried and briefed to the trial court, which thereupon rendered a written opinion which so clearly, adequately and fully discusses the legal and factual issues presented by the pleadings and the evidence, and the decision of the court with respect thereto, that we will adopt the parts of that opinion hereinafter quoted as the opinion of this Court on appeal. That portion of the trial court's opinion so adopted reads as follows:

"This is an action brought by the above-named Reclamation District seeking perpetually to enjoin defendant from pasturing stock, particularly sheep, upon plaintiff's levee, and from using said levee for vehicular travel. * * *

"Defendant resists the action on the principal ground that as owner of the land upon which the levee in question was constructed, it had specifically reserved a right of way upon said levee for road purposes, and also for pasturage, and that it had exercised said rights without question for some thirty years.

"Following the filing of the complaint, and on permission of the Court first had and obtained, a complaint in intervention was filed in the name of the People of the State of California, the Sacramento and San Joaquin Drainage District, Acting by

Rich, Carlin & Fuidge, Marysville, for appellant.

and Through the Reclamation Board of the State of California. The interest of the intervenor is predicated upon the fact that the levee in question serves a dual purpose, namely, as the east levee of plaintiff Reclamation District, and at the same time, the west levee of the Sutter By-pass, which in turn is located within the boundaries of, and comprises a portion of the Sacramento and San Joaquin Drainage District, and further is a part of the Sacramento River Flood Control Project, as approved by the United States and the State of California; that the intervenor is charged by the Sacramento River Flood Control Project and by law to operate, protect and maintain said west levee of the Sutter By-pass, together with all rights, easements and appurtenances thereto.

"At the outset, and because plaintiffs in intervention have been admitted as parties to the case, it is apparent that the problems here involved can not be narrowed to a controversy between plaintiff Reclamation District and defendant company, but that they are inextricably woven into the whole history of a vast flood control project of the Sacramento River, and involve the rights and interests of the people of this State, and through contract and by law, the Federal Government itself.

"No attempt will be made unnecessarily to narrate that history here. It is plainly written in the acts of the Legislature of this State, of Congress, and in the several decisions of our Supreme and Appellate Courts, as they were called upon to adjudicate legal questions presented in the growth and development of the project.

"See *Sacramento and San Joaquin Drainage District v. Superior Court*, 196 Cal. 414, 417, [238 P. 687]; *Reclamation Board [of State of California] v. Riley*, 208 Cal. 661, [284 P. 668]; *Argyle Dredging Co. v. Chambers*, 40 Cal.App. 332, [181 P. 84]; *Reclamation Board v. Chambers*, 46 Cal.App. 476, [189 P. 479]; *In re Sutter-Butte By-Pass Assessment No. 6 [of Sacramento & San Joaquin Drainage Dist.]*, 191 Cal. 650, [218 P. 27]; *Sacramento and San Joaquin Drainage District v. Johnson*, 192 Cal. 211, [219 P. 442];

Sacramento and San Joaquin Drainage District v. Riley, 194 Cal. 624, [229 P. 957]; *Sacramento and San Joaquin Drainage District v. Riley*, 199 Cal. 668, [251 P. 207].

"The public interest in the entire project, however, is well described in the case of *Sacramento, etc., Drainage District v. Riley*, 199 Cal. 668, on page 685, 251 P. 207, on page 214, where our Supreme Court, in considering a problem relative to the appropriation of \$300,000 by the State Legislature in connection with 'Sutter-Butte By-Pass Project No. 6', said as follows:

"The work of reclamation and flood control in that important and extensive region which is embraced within the boundaries of the Sacramento and San Joaquin Drainage District is, and from its earliest inception has been, considered to be essentially a public project undertaken by the state of California in its interest and in the interest of its people at large. It was so regarded by the state in its action approving the report of the California debris commission in the year 1911, and by the act of its Legislature of that year. Stats. 1911, Ex.Sess., p. 117. It was expressly declared to be such by the enactment of the Legislature of the following year amending said former act (stats. 1913, § 7, pp. 252-266), wherein it was stated that, "The state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams, and confining the waters of said rivers, tributaries, by-passes and overflow channels within their respective channels, and it shall be the duty of the reclamation board at all times to enforce on behalf of the state of California and the people thereof the erection, maintenance and protection of such levees, embankments

and channel rectification as will, in their judgment, best serve the interests of the state of California.”

“The particular facts out of which the present litigation arises may be summarized as follows:

“In the year 1919 Sutter Basin Company, a corporation, granted to Reclamation District Number 1500 a perpetual easement and right of way over its lands for the construction, maintenance, operation and repair of levees and other works of reclamation. In said grant certain rights were reserved by Sutter Basin Company, it being stipulated therein that all such rights and privileges so reserved should be subject to the jurisdiction, use and enjoyment of the said Reclamation District, for reclamation purposes. It was further stipulated therein that Sutter Basin Company reserved the right to use said levee or right of way or land for any other purpose not inconsistent with the use of the same for reclamation purposes.

“Thereafter, Reclamation District Number 1500 completed the construction of the levee here involved and dedicated it to the use for which it was constructed, namely, of reclaiming swamp lands of that portion of the Sacramento River valley.

“By instrument dated May 29, 1926, Reclamation District Number 1500 granted to Sacramento and San Joaquin Drainage District, a public agency or mandatary, a perpetual easement ‘to use, operate, repair and enlarge those certain levees and other works of reclamation * * *’, being the levee in this litigation involved. The consideration for said grant, as expressed therein, was the issuance through Reclamation District Number 1500 ‘of warrants aggregating \$3,702,980.99 drawn against Sutter-Butte By-Pass Assessment Number 6 for the Sacramento and San Joaquin Drainage District, receipt of which is hereby acknowledged’.

“In said grant of easement it was further provided: ‘It is the intention hereof to grant to said party of the second part a perpetual easement in and to said property hereinafter described for all purposes consistent with the flood control project of the

State of California, or any changes, additions or modifications that may hereafter be made therein * * *.’

“As a part of the same transaction, Sutter Basin Company executed a quitclaim deed under date of June 30, 1926, to the Sacramento and San Joaquin Drainage District, * * *, whereby it did remise, release and forever quitclaim all its rights, title and interest in and to a perpetual easement to use, operate, repair and enlarge its certain levees and other works of reclamation or flood control. Said quitclaim deed further provided:

“‘It is the intention hereof to quitclaim to said party of the second part a perpetual easement in and to said property hereinafter described, for all purposes consistent with the flood control project of the State of California, or any changes, additions or modifications that may hereafter be made therein, and also the perpetual right to take and use materials, as well as all other right incident to such flood control project, or any changes, additions or modifications thereof, over, upon and across said property hereinafter described. There is hereby expressly reserved by the party of the first part in the property hereinabove mentioned, including the levees and embankments thereon, a right of way and easement for all highway and road purposes for which a road or right of way may sufficiently or lawfully be used, and also a right of pasturage for any and all animals and for all pasturage purposes.

“‘The party of the first part does also reserve, in addition to said reservations specially mentioned, in all the said property, all other uses and the right to use the said property for any purpose *not inconsistent with the flood control plans of the State of California, now or hereafter adopted, it being understood and provided, however, that the exercise of said right of way and easement for highway and road purposes, and said right to right of pasturage shall at all times be subject to and*

consistent with the flood control plans of the State of California now or hereafter adopted." (Emphasis added.)

"Implementing said grant of easement, a second quitclaim deed was executed under date of June 30, 1926, by Sutter Basin Improvement Company, predecessor of defendant Sutter Basin Company, to Sacramento and San Joaquin Drainage District, * * *, said deed containing like provisions to that of the quitclaim deed hereinabove quoted.

"Inasmuch as defendant's claim of right to use the levee in question for pasturage and for vehicular travel is derived principally from the reservations expressed in these instruments, it is necessary that said provisions be examined with care. In this connection, it must be noted, first, that the grant in said deeds contained specifically contemplated that the said levee of Reclamation District Number 1500 would thenceforth become part and parcel of a larger project, and that instead of serving solely as a levee for the purpose of reclaiming and making tillable swamp lands within the boundaries of the District, it became the westerly levee of a project which had for its primary purpose the control of floods in a vast area. The language used in the two quitclaim deeds, therefore, was apparently selected with some precision. First, it must be noted that the grant of the perpetual easement specifically included 'all purposes *consistent with the flood control project of the State of California, or any changes, additions, or modifications that may hereafter be made therein.*' Then the reservations of rights and uses to the grantors were limited to 'any purpose *not inconsistent with the flood control plans of the State of California now or hereafter adopted.*' And, finally, 'that the exercise of said right of way and easement for highway and road purposes, and said right to right of pasturage shall at all times *be subject to and consistent with the flood control plan of the State of California now or hereafter adopted.*'" (Emphasis added.)

"It is patent from the plain and specific language used in said deeds that the rights

reserved by the defendant here were not intended to be absolute or static, but at all times subordinate and correlative to the flood control project and to its future development.

"Having thus by its own instrument in writing made the reservation of its rights correlative to the flood control project and subordinate thereto, the question then arises as to whether or not the present exercise by defendant of the right of pasturage and of vehicular travel on said levee is inconsistent with the said flood control plans of the State of California as presently adopted.

"Without attempting to relate the history of the flood control project, it can be said in general that the State of California in the development of this vast project, enlisted aid from the Federal Government, and in doing so entered into contractual relations with the Federal Government which was confirmed by Public Laws enacted both by Congress and by legislation passed by the California State Legislature. The magnitude of the entire project can also be appreciated by a consideration of its cost. According to Col. A. M. Barton, Chief Engineer and General Manager of the Reclamation Board of the State of California, the total cost of the project has been \$117,670,000, in which the State of California's share has been \$40,175,000, and that of the Federal Government, \$40,695,000. Also, on this particular levee here involved, as a part of the Sacramento River Flood Control Project, there was expended as recently as 1942 the sum of \$1,300,000, appropriated by the United States, and spent in bringing the levee up to standard grade and cross-section by the War Department Engineers. It has already been noted that the Sacramento and San Joaquin Drainage District, in consideration of the transfer of said levee, agreed to issue its warrants in the sum of \$3,702,-980.99, so that the financial interest of both the State and Federal Governments in the project can be readily seen.

[1] "The evidence showed that the flood control plans of this State were modified and that by said modification the

State of California agreed with the Federal Government, in consideration of the appropriation by said Federal Government of said large sums of money, that the State of California would maintain all of the project works in the Sacramento River Flood Control Project in accordance with the regulations of the United States Army Engineers. This agreement, by enactment of both Federal and State statutes, has acquired the force of law, and the State of California is now bound and obligated by law to maintain the levee here in question in accordance with the regulations of the said Army Engineers.

"In view of this modification of said flood control plans, the ultimate question for decision here is whether or not defendant's reserved rights of the use of said levee are now inconsistent with said modifications, and specifically whether said uses are in conflict with the regulations for maintenance promulgated by said United States Army Engineers. These regulations provide:

"4.02 Pertinent Requirements of Section 208.10, Title 33, of Code of Federal Regulations.

"a. Levees.

"1. Maintenance. The Superintendent shall provide at all times such maintenance as may be required to insure serviceability of the structures in time of flood. * * * Periodic inspections shall be made by the Superintendent to insure that the above maintenance measures are being effectively carried out and further, to be certain that:

"(XI) There is no unauthorized grazing or vehicular traffic on the levees."

"Defendant contends that the rights reserved by it under its said grant deeds can not be restricted by any regulations of the Army Engineers, and asserts its right to use the levee for the grazing of sheep and for vehicular travel in connection therewith without authority from anyone. It specifically disputes the authority of officials, either local, State or Federal, to interfere with said grazing and vehicular

travel, and in particular to debar defendant from using the roadway on the crown of the levee for the moving of sheep and trucks.

"The evidence showed that a conflict occurred in the exercise of the rights claimed by defendant, and of those sought to be asserted by plaintiff and plaintiffs in intervention during the rainy season of the year 1950. This was a year of exceptionally heavy rainfall in the autumn and winter months, and one which brought both a threat of and actual floods themselves in the region here involved. The evidence further showed that the crown of the levee in question was in places rutted and cut up by vehicular travel to [such] an extent as to make it practically impassable for equipment, and particularly for the proper patrol of the levee, or in case of emergency, for moving men and materials to protect the levee. Nevertheless, defendant disputed the right of Reclamation District officials, local, State or Federal, to debar defendant from the use of the levee for grazing of sheep and for the moving of equipment in connection therewith. As pointed out above, the defendant then, and at the trial of the action, contested any regulation of the Army Engineers which would prevent defendant's use of said levee.

[2] "From the foregoing, the Court can not help but conclude that the said assertion of rights by defendant to pasture said levee and to use the same for vehicular travel in a manner contrary to and in conflict with the regulations of the Army Engineers, constitutes a purpose now inconsistent with the flood control plans of the State of California, as they existed at the time of filing this action. The Court does not believe that such a conclusion has the effect of depriving defendant of any property without due process of law or without paying just compensation therefor. To the contrary, it considers such a conclusion to be a direct and proximate result of defendant's own contract, namely the quitclaim deeds of June 30, 1926."

We think the reasoning by which the trial court arrived at its stated conclusions

with respect to the nature of the reservations contained in the pertinent title deeds and the effect of the changes in the overall flood control plan are sound. The interrelationships of the State agencies and the Federal Government are so many and so mutually interdependent as to make the several undertakings of the public agencies part and parcel of that plan and specifically this reasonably includes the rules and regulations for maintenance and care of the subject levee as a part of the whole integrated levee system. It follows, therefore, that the rules and regulations of the Army Engineers promulgated for the purpose of making uniform the requirements for maintenance and care of the levees rightfully and finally control and fix the reserved rights of defendant; and this, as the trial court has said, by force of the very reservations themselves which are contained in the deeds it and its predecessors have executed. It is obvious that this holding may presently and in practical effect so restrict those rights as to render them of little value, but that is a situation foreshadowed in the reservations themselves.

The decree entered by the trial court and from which this appeal is taken reads as follows:

"It is hereby ordered, adjudged and decreed * * *:

"1. That any use of the east levee of plaintiff or the right of way described in Exhibits 'A' and 'B' attached to the complaint herein, which is inconsistent with the Sacramento River Flood Control Project as now or hereafter adopted, or any damaging of said levee or right of way is illegal, is a violation of the Sacramento River Flood Control Project and is not authorized by the reservations contained in Exhibits 'C' and 'D' attached to the complaint herein or otherwise.

"2. That defendant, Sutter Basin Corporation, Ltd., a corporation, its agents, servants, employees and all persons acting by, through or under it, are hereby jointly and separately enjoined and restrained from any and all acts

which injure or damage said east levee of plaintiff and the right of way located thereon by any means or in any particular, or which are inconsistent with the Sacramento River Flood Control Project as now or hereafter adopted, and, without limiting the generality of the foregoing, from pasturing or grazing livestock or otherwise using said right of way and levee for vehicular traffic except upon compliance with the regulations of the United States Army Engineers governing the maintenance of the Sacramento River Flood Control Project."

Appellant specifically argues against the propriety of the foregoing decree, as follows: "(a) The injunction is too broad in prohibiting any and all acts which injure or damage said east levee. (b) The trial court erred in enjoining the use of the levee for pasture purposes. (c) The use for pasture purposes was not unauthorized and is not inconsistent with the use of the levee for reclamation purposes."

[3] In support of its first contention, appellant argues that the decree is too broad in that it restricts any and all acts which injure or damage the levee and appellant says: "The first hoof marks on the levee, the first blade of grass bent down, the first swirl of dust from a passing car, constitute an act of contempt." The language of the decree is simple and clear and we do not know how better words could be found to express the clear right of respondents to have their levee protected against injury or damage by any act of appellant. We cannot suppose that acts such as appellant states would be acts of contempt, would, in a hearing charging contempt, be held to be such. We must assume reasonable action of the trial court in the future in determining whether its decree has in fact been violated.

[4] The second contention of appellant, that the trial court erred in enjoining the use of the levee for pasture purposes, is, of course, an objection to any decree at all and is answered by what has heretofore been quoted from the opinion of the trial court. While it is true, as appellant argues,

that a right of pasturage carries with it a right of entry to the land to be pastured and constitutes an estate in the land itself, yet these considerations can be freely admitted without in any wise impugning the decree appealed from. That decree, as has been said, is based upon the proposition that the limiting of the reserve rights to such exercise as from time to time may be authorized by the Army Engineers is part and parcel of the existing flood control plans of the State of California and, therefore, expressly permitted by the language of the reservations. In support of its third contention that the use of the levees for pasture purposes was not unauthorized and was not inconsistent with the use of the levee for reclamation purposes, appellant's argument may be summarized as follows: That the reservations having been made when the title deeds were executed, cannot be affected by regulations of the Army Engineers. Says appellant: "We think there has been confusion in this case between the rules and between flood control plans of the State of California as referred to in the reservation of the deeds." What has heretofore been said obviously answers this contention. Any use of the levee for pasturage except as permitted by the regulations of the engineers is an unauthorized use.

[5] Appellant has in its brief requested that this Court take additional evidence and make such further orders as may be deemed proper under Section 956a of the Code of Civil Procedure. As we read the brief, this request is predicated upon things which happened after the making of the decree appealed from including application to the State Engineer, as the responsible agent under the regulations of the Army Engineers, for leave to make use of the levee for vehicular and pasturage use and the denial of the request by that officer. Appellant says the trial court found that it was entitled to these uses under permission of the State Engineer and that he has arbitrarily denied such use. It asks us to appoint a master to take testimony and, having done so, that this Court "lay down the conditions under which the defendant is to use its acknowledged right."

Since we have held herein that authority to permit the use of the levee for the desired purposes lies with the Army Engineers we obviously cannot accede to the request to take evidence and the same is denied. If, as claimed, the denial of use was arbitrary, then proof thereof must be made in the trial court in a proceeding to ascertain if respondents are abusing the court's decree. They sought and obtained a decree in equity. They have not appealed but have accepted it. That decree they may use for the lawful purpose for which it was handed down—but it may not be abused.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



121 Cal.App.2d 432

BROWN et al. v. FAIRBANKS et al.

Civ. 4713.

District Court of Appeal, Fourth District,
California.

Nov. 23, 1953.

Rehearing Denied Dec. 16, 1953.

Action by husband and wife for declaratory relief wherein a defendant whose work brought into production a mine owned by plaintiff filed a cross-complaint. The Superior Court of San Bernardino County, Edward P. Fogg, Judge Assigned, rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to show that a joint venture or partnership rather than employee and employer relationship existed between plaintiffs and cross-complainant, and that trial court was justified under evidence in distributing assets of partnership accordingly.

Judgment affirmed.

I. Mines and Minerals §§97, 99(2), 101

Parties may orally agree upon a joint partnership or joint venture pertaining to

business of engaging in mining ventures and partnership, as such, may own mines or lease or sell them, and property of partnership, although held in name of one partner, may be partitioned in partnership accounting.

2. Mines and Minerals ⚡97

Where defendant did not own an interest in mine at time defendant agreed to do work upon mine owned by plaintiffs, a special or qualified partnership under statute was not formed. Public Resources Code, § 2351 et seq.

3. Joint Adventures ⚡1.7

Partnership ⚡13

A provision to share losses may be implied in a partnership or joint venture agreement. Corporations Code, § 15006.

4. Partnership ⚡15

A partnership may be formed for one or two ventures as well as for conduct of a general and continuous business. Corporations Code, § 15006.

5. Partnership ⚡52

Receipt by a person of a share of profits of a business is prima facie evidence that he is a partner in the business. Corporations Code, § 15007

6. Partnership ⚡3

To constitute a partnership it is not necessary that there should be property forming its capital jointly owned by partners. Corporations Code, § 15006.

7. Frauds, Statute of ⚡144

Where plaintiff owners of mine agreed that if efforts to bring mine into production succeeded defendant was to receive one-half interest in it, and defendant assisted in bringing mine into production and performed everything required under agreement, and plaintiffs refused to turn mine over to partnership as agreed, plaintiffs were estopped from raising statute of frauds as defense to defendant's cross-complaint claiming one-half interest in mine, mining claim, and proceeds thereof. Civ.Code, § 1624, subd. 4.

8. Mines and Minerals ⚡101

Evidence was sufficient to show that a joint venture or partnership, rather than

employee and employer relationship, existed between plaintiff owners of mine and defendant whose work assisted in bringing mine into production, and trial court was justified under evidence in distributing assets of partnership accordingly. Corporations Code, §§ 15006, 15007.

Hector J. Rosso, San Bernardino, for appellants.

Curtis, Knauf, Henry & Farrell, San Bernardino, for respondent.

GRIFFIN, Justice.

Plaintiff Harvey C. Brown and his wife brought this action for declaratory relief against defendants Dave Fairbanks and Walter K. Skeoch, doing business as Southern California Minerals Co., in which plaintiffs allege that they were the owners since January 21, 1940, of the Pongo Mining claim; that they commenced working upon it and believed it to be valuable and worthy of further exploration; that they contacted defendant Fairbanks and asked him to join them in developing the mine and suggested that he put up \$1,000, in return for which they offered to give him a one-half interest in the mining claim and that they would work the mine together for their joint benefit; that Fairbanks agreed to accept the proposition but was unable to raise the \$1,000 and that the offer was withdrawn; that a new proposition was made that if he worked for them in developing the mine, plaintiffs would, whenever the same began producing, "see that he was well paid" for his labor; that Fairbanks agreed to this and began working with plaintiffs on the mine in February, 1947, and after digging a shaft 75 feet in length it was discovered about April, 1947, that the mine was ready to begin producing; that due to lack of funds they were unable to commence production and the mine remained idle until November, 1948, when it was leased to defendant Southern California Minerals Co. by plaintiffs; that the mineral company paid plaintiffs \$200 per month for ore extracted from the mine; that plaintiffs paid Fairbanks on account of his past work one-half of the monthly

payments, totaling in excess of \$3,000; that subsequently the Welfare Department informed plaintiffs that Fairbanks had been drawing old age benefits concurrently with these payments, to which he was not entitled; that plaintiffs agreed to make further payments to Fairbanks on condition that he repay the Welfare Department the full amount of his wrongful withdrawals; that upon the discontinuance of these payments by plaintiffs Fairbanks claimed some interest in the mine and mining claims; that such claim was made in bad faith and without right. Plaintiffs sought a declaration of the rights of the respective parties, asked that the agreement between plaintiffs and Fairbanks be declared merely a contract of employment, and that all wages due him have been paid; that Fairbanks had no interest in the mine or proceeds from the sale of its products, and that defendant mining company pay plaintiffs the payments due, which were withheld by it pending the determination of the respective claims.

Defendant Fairbanks' answer denied generally the allegations of the complaint and by way of cross-complaint he claimed a one-half interest in the mine, mining claim, and proceeds thereof, and alleged that he and plaintiffs, by oral agreement on February 1, 1946, associated themselves together as joint venturers for the purpose of working and developing said claim for production and for sale or lease; that as a result of his contribution he was to receive the one-half interest above mentioned. He asked for a declaration of the rights of the respective parties; that he be declared the owner of an undivided one-half interest in the mining claim, lease, and one-half of all future royalty payments made under the lease, and that plaintiffs should account to him and to the court for all money received by them.

In an amended cross-complaint similar allegations were made claiming in addition that plaintiffs agreed to contribute to the joint venture or partnership venture, the mining claim in dispute; that Fairbanks was to perform services and contribute time, labor and skill, and share the costs and expenses of development, and that they agreed

that each should own a one-half interest in all the assets of the joint venture, including the mine and mining claim; that the joint venture or partnership was to engage in the business of developing said claim for production, sale or lease; that he bestowed his work and skill and furnished his share of the money, and plaintiffs refused to recognize his interest therein. It was prayed that there be a declaration that a joint venture or partnership existed in the ownership of the claim and in the business of its development for production, lease or sale for profit; that Fairbanks' title to a one-half interest therein be quieted, for an accounting and distribution in kind of all its assets, and for a dissolution of the joint venture or partnership.

The answer to the cross-complaint denied generally the allegations thereof and as a separate defense pleaded the statute of frauds under the provisions of section 1624, subdivision 4 of the Civil Code.

At the time of trial, a motion to dismiss the amended cross-complaint on the ground that the cause of action was barred by section 1624, subdivision 4 of the Civil Code, was denied. After trial, the court found generally that the record title of the mining claim stood in the name of plaintiffs; that Fairbanks worked on the claim jointly with Brown until April, 1946, and that it was at that time open for production; that plaintiffs paid Fairbanks \$3,280; that Fairbanks and plaintiffs entered into an oral agreement of venture or partnership under which they agreed to engage in the business of developing the claim for production, sale or lease; that Fairbanks performed all conditions of his agreement with them; that he became the owner of a one-half undivided interest in all the assets of the joint venture or partnership; that the assets include the mining claim, the lease, and all money accrued or to accrue thereunder; that the lessee paid plaintiffs \$6,561.17, as royalty up to July 31, 1951; that there is due lessors additional payments of \$3,125.13, up to May 15, 1952; that there is due Fairbanks \$500.58 from plaintiffs; that the agreement and cause of action are not barred by section 1624, sub-

division 4 of the Civil Code; that the partnership be dissolved and the assets distributed one-half to plaintiffs and one-half to Fairbanks, and Fairbanks is to recover one-half of all accrued and future royalty payments under the lease.

On this appeal, plaintiffs claim, in effect: (1) that the evidence is insufficient to sustain the finding that plaintiffs and Fairbanks were mining partners or joint adventurers; (2) that any claimed transfer of interest in the mining claim must be in writing under section 1624, subdivision 4 of the Civil Code and under section 2606 of the Public Resources Code, providing that grubstake contracts and prospective agreements affecting the title to mining locations are void and of no effect unless recorded; (3) that it would be inequitable to allot Fairbanks a one-half interest in a mine worth \$20,000, in exchange for his labor in assisting plaintiffs in sinking a tunnel 75 feet in length.

The evidence of what was said between the parties as to the arrangements constituting the claimed oral agreement of partnership or joint venture is not only in sharp conflict but is quite difficult of interpretation as to the true intent of the parties.

Harvey C. Brown testified that he and his wife did all assessment work on the claim, ran a tunnel for about 50 feet, and that the claim had been formerly owned by others; that they owned the claim on January 21, 1940; that in October, 1945, it needed additional work; that he told Fairbanks he had this mine but needed someone with money to help him with it; that the two looked it over and agreed if Fairbanks would put up \$1,000 he would give him a one-half interest in it by quitclaim deed; that later Fairbanks had some tax difficulty and stated he could not raise the \$1,000, so he and his wife and Fairbanks called the deal off; that in February, 1946, he told Fairbanks if he would go out and help him get the mine developed a little more so it could be leased or sold he would see that he would "be well taken care of"; that Fairbanks agreed; that they worked on it until April, 1946, and stopped work and the mine was closed down for the rest of the

year except for about 10 days work taking samples; that he endeavored to sell it or lease it and finally, in the latter part of 1948, he interested defendant company in leasing it at a minimum monthly royalty of \$200 per month; that he showed Fairbanks the lease he executed and started paying him about \$100 per month "because he helped me develop the mine so I could get it in shape to make the lease"; that he paid for all the "grub" and supplies, and later furnished Fairbanks with a \$50 automobile for transportation; that he determined that about \$2,000 would constitute "well paid" as indicated in their agreement; that due to Fairbanks' misrepresentation to the Welfare Department that he had no other income during this period, and since Fairbanks drew \$75 per month, totaling \$575 from it, he agreed to continue paying Fairbanks \$100 per month out of which he was to repay the Welfare Department \$25 per month, and that after he repaid the Welfare Department he ceased making further payments to Fairbanks. Mrs. Brown corroborated her husband's testimony to some extent.

Fairbanks testified that in October, 1945, at the first conversation had with him about the mine, Mr. Brown said to him: "I have got that mine and I can't do nothing with it myself, and if you want to go, come up and help me, we will share and share alike on it. You help work, do the work, and if we find anything, we will split it, it will be ours"; that there never was a conversation about him putting up \$1,000 but that prior to October, 1945, they may have talked about it, but no mention was made about leasing it or going into partners with him; that about March, 1946, he went with Mr. Brown to the mine and lived with plaintiffs and together they decided where to dig the shaft, and they "puttered" around over a period of two months time and sank a shaft about 75 feet in depth and they then considered it in a condition for production; that they both bought food and supplies and split the cost; that he did go upon the claim later and did take out some samples for a prospective lessee (not the defendant company); that subsequently Brown brought

the lease from defendant company and discussed its terms with him and wanted to know if he wanted to sign it with him but he did not and Brown stated he could put his signature to it any time he wanted to; that he never considered himself an employee of plaintiffs.

Defendant Fairbanks produced a witness who claimed he heard Brown say in the presence of Fairbanks while they were working on the mine that "he and defendant Fairbanks owned one of the best mines in Death Valley and that they were going to make a lot of money out of it". Another witness, the son of Fairbanks, testified that at a Bar in Baker Brown said: "We finally decided" to go out and work the mine; "it was going to go 50-50 work on the mine"; that they were talking about "being together around the thing there"; that later they said "each" was going to get a hundred dollars a month royalty out of it and that he gave his father \$100 to buy supplies on one occasion.

Fairbanks' sister testified that Fairbanks originally said to Brown that he was willing to go out to the mine and "make a mine out of it", and share the expenses and work alike; that "we will share it if it turns out to be a good mine and we will share the profits of it, and if it does not turn out to be anything, we will both lose"; that Brown and Fairbanks discussed the advisability of entering into the lease with defendant company and that they agreed it should be signed by Brown and his wife alone because he trusted Brown. The sister testified that she had had difficulty in hearing for a period of ten years. Brown denied any such conversation. It is upon this testimony that the court found as indicated.

We must conclude, in the face of the findings, that the offer plaintiff Brown claimed he first made to Fairbanks in reference to the \$1,000 and one-half interest in the mine was not made; and that plaintiffs' claim of an employment contract with Fairbanks was not established.

[1] It has been held that parties may orally agree upon a joint partnership or

joint venture pertaining to the business of engaging in mining ventures and the partnership, as such, may own mines or lease or sell them, and property of the partnership, although held in the name of one partner, may be partitioned in a partnership accounting. *Coward v. Clanton*, 79 Cal. 23, 26, 21 P. 359; *McNichols v. Nelson Valley Building Co.*, 116 Cal.App.2d 266, 271, 253 P.2d 744; *Musick Consolidated Oil Co. v. Chandler*, 158 Cal. 7, 109 P. 613; *Koyer v. Willmon*, 150 Cal. 785, 787, 90 P. 135; *Scott v. Jungquist*, 179 Cal. 7, 175 P. 412; *Swarthout v. Gentry*, 62 Cal.App.2d 68, 144 P.2d 38; *Bastjan v. Bastjan*, 215 Cal. 662, 12 P.2d 627; *Perelli-Minetti v. Lawson*, 205 Cal. 642, 272 P. 573; 12 Cal.Jur. p. 861, sec. 12.

In *Settembre v. Putnam*, 30 Cal. 490, it was held that where a person claiming an undeveloped mine, agrees with another that if he will devote his labor and skill in its development, the former will furnish him with tools and provisions, and give him an equal interest in the mine in case it shall prove valuable, the latter is entitled to an equal interest in the mine when it becomes valuable, if he devotes his labor and skill until that time; that if two or more persons, as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owners for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them; that where a party institutes an action against a portion of his associates in a mining partnership to establish a disputed right to an interest in a mine, and a conveyance of the interest claimed is a part of the relief sought, a court of equity may give judgment establishing the right and directing a conveyance to be made, without dissolving the partnership.

It therefore appears that if the evidence is sufficient to sustain the finding that plaintiffs agreed to form a partnership or joint venture and contribute the mining claim to it, then the transaction is not necessarily barred by the Statute of Frauds.

In *Dutton v. Interstate Investment Corp.*, 19 Cal.2d 65, 119 P.2d 138, it was held that an agreement assigning a fractional interest in the oil and hydrocarbons produced under an oil and gas lease operates to transfer an interest in real property and is required by the statutes to be in writing, but a contract whereby a party is to have a fractional interest in the net profits from a transaction involving the procurement of an oil lease is not required to be in writing. In that case, however, a partnership agreement such as here presented, was not involved.

The question then presents itself whether the evidence is sufficient to sustain this finding of the trial court, and whether it would sustain the finding of a copartnership or joint venture or whether, in effect, the agreement was that no joint partnership was intended but that Fairbanks would help plaintiff and if they found anything they would divide the profits. Under this latter interpretation, the statute of frauds would not apply. *Coward v. Clanton*, 79 Cal. 23, 27, 21 P. 359.

While a finding as to the latter interpretation might be supported by the evidence and the agreement involved, such is not the finding of the court. We therefore must consider the elements necessary to the formation of a partnership or joint venture and the evidence here produced indicating the letter of the contract, the conduct of the parties, and their intent to form such a copartnership or joint venture. *Westcott v. Gilman*, 170 Cal. 562, 150 P. 777.

[2-6] A special or qualified partnership under sec. 2351 et seq. of the Public Resources Code was not formed for the reason that Fairbanks did not own any interest in the mine at the time of the making of the agreement to do work upon it. *Prince v. Lamb*, 128 Cal. 120, 60 P. 689; 17 Cal.Jur. p. 439, sec. 106, and cases cited. An ordinary or general partnership, under the Uniform Partnership Act, Sec. 15006 of the Corporations Code, is defined as an association of two or more persons to carry on as co-owners a business for profit. A provision to share losses may be

implied in a partnership or joint venture agreement. *Fitzgerald v. Provines*, 102 Cal.App.2d 529, 227 P.2d 860; *Welch v. Alcott*, 185 Cal. 731, 198 P. 626. A partnership may be formed for one or two ventures as well as for the conduct of a general and continuous business. The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. Sec. 15007, Corporations Code. To constitute a partnership it is not necessary that there should be property forming its capital jointly owned by the partners. *Whitley v. Bradley*, 13 Cal.App. 720, 730, 110 P. 596; *Doudell v. Shoo*, 20 Cal.App. 424, 129 P. 478.

In *Tutt v. Davis*, 13 Cal.App. 715, 110 P. 690, it was held that where a partnership was formed for the purpose of dealing in real estate, as between the parties, in settlement of their equities the assets of the firm must be regarded as personal property. See, also, *Chapman v. Hughes*, 104 Cal. 302, 37 P. 1048, 38 P. 109.

In *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 200 P. 601, it was held that where one holding a lease of premises enters into a partnership with another agreeing to the use and possession of the leased property in the business, a valid interest in the lease is thereby vested in the partnership, and a formal assignment of the lease to the partnership is not required. In addition, it was decided in *McAtee v. McAtee*, 105 Cal.App. 555, 288 P. 114, 116, in an action for accounting of partnership assets, involving an acre of land in which the title was held by one partner and in which an accounting was sought and the other partner claimed that any agreement affecting the interest in real estate must be in writing to be valid, the court said there are two answers to this claim: (1) "The agreement sued upon is one of partnership. The one acre of land was sold by the appellant and the complaint herein seeks an accounting of the partnership funds, which includes the money received from the sale of the land, and does not seek the enforcement of any contract affecting real property." (2), "Furthermore, the evidence discloses that

from the beginning of the partnership, and for nearly four years thereafter, the partnership was in full operation. This is a sufficient performance to take the contract out of the statute of frauds, even if it were a contract affecting real property." (Citing cases.)

[7, 8] In the instant case the evidence does show that plaintiffs first contacted Fairbanks and did offer him a one-half interest in the mining claim conditioned that he pay \$1,000. This fact does, in and of itself, indicate that plaintiffs were willing to give a one-half interest in the mine under certain conditions. Subsequently, Fairbanks was importuned to go upon the mine and perform certain services with plaintiffs and if their efforts proved to be successful in bringing the mine into production it was agreed that Fairbanks was to receive a one-half interest in "it", which may be construed to be the mine as well as the profits therefrom. In view of the fact that Fairbanks did perform his part of the claimed partnership or joint ven-

ture agreement and did assist in bringing the mine into production and performed everything required of him under the agreement, and since plaintiffs failed and refused to turn the mine over to the partnership, as agreed upon, plaintiffs were estopped under the decision in *McAtee v. McAtee*, supra, and the authorities therein cited, from raising the defense of the statute of frauds. The distribution of the net proceeds from the profits of the mining venture was some evidence of the formation of a partnership. Accordingly, it must be held that there is sufficient evidence to show a partnership or joint venture, and that the court was justified in distributing the assets of the partnership accordingly. The evidence does not clearly establish any unjust enrichment or what the ultimate value of the mine may prove to be.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

41 Cal.2d 708

PEOPLE v. DECAILLET.
Cr. 5520.

Supreme Court of California.
Dec. 1, 1953.

Prosecution for murder. Defendant was convicted, the death penalty was imposed by the Superior Court, Yolo County, Ben R. Ragain, J., and case was automatically appealed. The Supreme Court, Spence, J., held that where defendant admitted waiting for the deceased, a thirteen year old girl, and deliberately killing her, evidence sustained conviction of first degree murder.

Judgment affirmed.

1. Criminal Law $\S$ 633(1)

In prosecution for murder, where defendant refused to consult with public defender appointed to act as his counsel, and freely admitting his guilt, endeavored to enter plea of guilty, court ordered alienists to resolve doubts as to defendant's sanity, and evidence corroborated defendant's confession, record showed that defendant's rights were protected at all stages of proceeding.

2. Homicide $\S$ 253(1)

In prosecution for murder, where defendant admitted waiting for deceased, a thirteen year old girl, and deliberately killing her, evidence sustained conviction of first-degree murder. Pen.Code, $\S$ 189, 288.

Thomas E. Reynolds, Public Defender (Yolo), Davis, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an automatic appeal from a judgment imposing the death penalty. Pen. Code, $\S$ 1239.

Defendant was accused of the murder of a 13-year old girl, Phoebe Ann Bair, on June 11, 1953, in the town of Madison, Yolo County. Upon arraignment on June 22, defendant stated that the Public Defender

had represented him at the preliminary hearing but that he did not desire the further services of counsel. The court, however, informed defendant of his rights and appointed the Public Defender to act as his counsel. Defendant refused to consult with his appointed counsel and submitted a plea of guilty. The Public Defender then moved to enter a plea of not guilty by reason of insanity, which the court entered upon refusing to accept defendant's guilty plea. The court thereupon named three alienists to examine defendant.

At a further hearing on July 1, the Public Defender was appointed defendant's counsel at defendant's request and the court again informed defendant of his rights. Defendant's plea of guilty was thereafter accepted on that day. Being in doubt at that time as to defendant's sanity, the court ordered a hearing thereon on July 7. Defendant refused a jury for such hearing and requested that the court determine the matter. On July 7 the three alienists testified and submitted their report, all agreeing as to the sanity of defendant both at the time of the murder and at the time of the entry of the guilty plea on July 1. In accordance therewith, the court found defendant sane and referred the matter to the Probation Officer for pre-sentence investigation, fixing July 23 for the determination of the degree and the passing of sentence. At the July 23 hearing, several witnesses testified for the prosecution, various photographs of the interior and exterior of the Bair home were admitted in evidence, as also was defendant's voluntary statement of his guilt as previously given to the District Attorney. Defendant offered no testimony in his own behalf. The court then fixed the crime as murder in the first degree, and imposed the death sentence.

Defendant, a farm laborer, was 51 years old at the time of the murder. He had an elementary school education. He had recently adopted the Pentecostal religion. At 23 he had married a girl 14, and there were five children born of the union. His wife and four children are living. Defendant and his wife were estranged about five years, and some three months before de-

fendant committed the murder the family, at defendant's request, had moved to other quarters.

According to defendant's own statement, he had been in love with the deceased 13-year old girl for a number of months and had had several acts of sexual intercourse with her. As the result of a warning from the constable, he had stopped these acts sometime prior to Thanksgiving in 1952. Thereafter, the girl had refused to talk to him and he became jealous, believing that "she was messing around with some boys" in the town. On the evening of June 11, 1953, he went to the Pentecostal Church, where he saw the deceased at the meeting but she refused to talk to him. He then left the church, drove a short distance to the Bair home and parked his car about 300 yards from the house. He then walked to the house and entered, carrying a .22 caliber rifle. He had been carrying the rifle in his car for about three weeks and had admittedly determined to stop the girl from leading such an immoral life and to shoot both her and himself, if need be, to carry out his purpose. When defendant arrived at the Bair home, the deceased's sister, two of her brothers and two other boys were there. When they saw defendant with the gun, they immediately left for the constable's home, to tell him of defendant's presence at the Bair home.

About 9:45 p. m. the girl arrived home from church with her parents. The parents, thinking that the deceased's sister should have been with them and that she probably was still at church, returned to the church to look for her. They left the deceased at home, telling her to get ready for bed. Defendant was standing hidden in a closet in the Bair home. As the deceased was standing near the refrigerator in the kitchen, defendant shot through a crack in the door, wounding her in the head. The deceased thereupon started to run toward the front door; but defendant grabbed her, shot her again in the head and then twice more. The deceased's father returned in time to see through the window the last part of the shooting; and he testified at the hearing. When arrested, defendant was

sitting on the davenport with the girl's head cradled in his left arm and the rifle held in his right hand. He had removed the deceased's shoes and panties, but there was no evidence of recent intercourse. A doctor was immediately called and he pronounced the girl dead. Defendant was arrested by two deputy sheriffs in the Bair home about 10:30 p. m.; he made no resistance and readily admitted the killing.

Defendant had previously been a heavy drinker and had once spent four months in the Mendocino State Hospital as an inebriate. In recent months religion had come into his life and he felt that he had to stop the deceased girl's immoral life. He gave up his drinking and stated that he was completely sober at the time he killed the deceased. The affair was common gossip in the town; defendant had been giving the deceased money for her attentions; and her parents had hesitated about taking any legal action against defendant because they all belonged to the same church. Defendant stated that he knew that it was wrong to kill, both morally and legally, and that he should forfeit his life for his crime; that he realized what he was doing when he killed the deceased, and that his act was premeditated for at least three weeks.

[1,2] Defendant's opening brief merely reviews the circumstances leading up to the determination of the degree of the crime and the fixing of the penalty. No claim of error is made. In fairness to defendant's counsel, it should be stated that he was placed in the difficult position of representing a man who had planned and executed the brutal killing of a young girl, had freely admitted his guilt at all times, had insisted on entering a plea of guilty, and had reconciled himself to paying the extreme penalty without any request for leniency. The record shows that both court and counsel carefully protected every right of defendant at all stages of the proceedings, and that the evidence amply sustains the finding of murder of the first degree on any one of three grounds: a murder committed as a wilful, deliberate and premeditated act, *People v. Dessauer*, 38 Cal.2d 547, 241 P.2d 238; *People v. Martinez*, 38 Cal.2d 556, 241 P.2d

224; a murder perpetrated by lying-in-wait, *People v. Thomas*, 41 Cal.2d 470, 261 P.2d 1; *People v. Sutic*, 41 Cal.2d 483, 261 P.2d 241; a murder committed in the perpetration of an act punishable under Penal Code, section 288. Pen.Code, § 189.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



121 Cal.App.2d 466

PEOPLE v. PRIMO et al.

Cr. 2914.

District Court of Appeal, First District,
Division 2, California.

Nov. 24, 1953.

Prosecution on charges of burglary. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment of second degree burglary and defendants appealed. The District Court of Appeal, Nourse, P. J., held that there was sufficient substantial evidence to identify the defendants as perpetrators of the burglary and for jury to find defendants guilty.

Judgments affirmed.

1. Criminal Law ¶742(1)

The credibility of a witness is for the jury to determine.

2. Criminal Law ¶566

In order to sustain a conviction it is not necessary that identification of defendant as perpetrator of crime be made positively or in a manner free from inconsistencies.

3. Burglary ¶41(6)

In prosecution for burglary, evidence on the issue of identification of defendants as perpetrators of burglary was sufficient to support the verdict.

4. Criminal Law ¶1159(2)

Before verdict of jury can be set aside on ground of insufficiency of evidence, it

must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached.

Joseph P. Haley, Jr., Oakland, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendants Primo and Gordon were tried before a jury on charges of burglary. Primo was also charged with a prior felony conviction. They were convicted of burglary in the second degree, and Primo of the prior felony conviction. Probation was denied.

At the request of appellants, counsel was appointed by the court to handle their appeals from the judgments. The sole issue raised is the insufficiency of the evidence to sustain the verdict, more specifically that the evidence was insufficient to identify the appellants as the perpetrators of the burglary.

The burglary took place about 3:00 a. m. on September 25, 1952, in the city of Oakland. Officer Crawford walking his beat heard a tapping noise coming from the vicinity of the Lucky Market. Looking over the wire mesh gate in front of the market he saw the heads of two men behind the counters located near the front of the store. There was a 200 watt light burning over each counter and a light burning in the rear of the store. Officer Crawford testified that he put the barrel of his gun through the wire mesh and ordered the men to stand up and put up their hands. One raised up to look (identified as Primo) at which time Crawford obtained a good look at his face and features and the jacket he was wearing. As the man dropped back, Crawford fired; the men ran to the rear of the store, giving Crawford an opportunity to observe their general appearance and manner of dress. Officer Crawford then ran to the police call box located nearby, put in a request for assistance and returned to the market, which consumed about three minutes in all. He

stood by a shed in the alley, watching the premises until other policemen arrived, six or eight in number. While waiting, Officer Crawford observed two shadows cast from the roof which disappeared just before the policemen arrived. One of the police officers caught Primo going over a six foot fence, which is behind the store, and others located Gordon hiding on the roof of an adjacent building, crouched against the wall. Crawford identified Primo as the man he had seen in the market and noted that both were wearing leather jackets with fur collars similar to those which he had observed on the men in the market. An examination of the roof of the market disclosed one of the hatches had been ripped loose. Through this hatch access could be obtained through the attic to the storeroom adjacent to the portion of the store where Officer Crawford first saw the two men. He testified the open hatch was the only place where the burglars could have entered or left the market. When Officer Crawford inspected the interior of the market he found money bags scattered around in the check stand and the top lid of the safe off. The safe was sunk in the floor by the counters.

[1,2] Appellants denied having entered the Lucky Market. They testified that they parked Gordon's car on Lincoln Avenue to use the facilities of a near-by service station. Finding the place closed they chose instead the alley behind the market, and upon hearing an automobile drive into the alley became frightened, Gordon running up the stairs and Primo starting for the fence. Appellants argue that no stolen property or tools which could be used in a burglary were found upon them when they were arrested, that the fact that they were found near the scene of the robbery wearing clothes similar to those described by Officer Crawford as worn by the men in the market was not sufficient to connect them with the crime. Appellants seek to discredit the testimony of Officer Crawford who identified Primo as one of the men in the store by alleging his testimony given at the trial was inconsistent with that given at the preliminary hearing. However, they show no definite contradiction. At the trial Officer

Crawford positively identified Primo as one of the participants in the burglary. The credibility of a witness is for the jury to determine and they can accept or reject his testimony accordingly. "In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony." *People v. Addington*, 43 Cal.App.2d 591, 593, 111 P.2d 356, 357.

[3] Appellants cite *People v. Draper*, 69 Cal.App.2d 781, 160 P.2d 80 and *People v. Graziano*, 83 Cal.App.2d 701, 189 P.2d 518, to the effect "that evidence that merely raises suspicion, no matter how strong, of the guilt of a person charged with a crime is not sufficient to sustain a verdict and judgment against him." [69 Cal.App. 2d 781, 160 P.2d 83.] However, the evidence in this case connecting the appellants with the crime is much stronger than in either of these two cases cited by appellants. The finding of the two men near the Lucky Market, which had just been burglarized, one going over the fence, the other on a roof top, dressed the same as the two burglars seen in the market by Officer Crawford, one identified by Crawford as one of the men in the market, neither man having a convincing reason for being there at 3 o'clock in the morning, creates more than a mere suspicion as to their guilt.

[4] "[B]efore the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'" *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780.

Appellants filed separate notices of appeal from the judgment and from the order denying defendant's motion for a new trial. However, the record does not show that any motion for a new trial was made by

either defendant or that any order denying defendant's motion for a new trial was made. Therefore the appeals from the order denying defendant's motion for a new trial must be dismissed.

The judgments are affirmed. The appeals from the order denying defendant's motion for a new trial are dismissed.

GOODELL and DOOLING, JJ., concur.



121 Cal.App.2d 491

SAMPSON MOTORS, Inc. v. ROLAND.
Civ. 19629.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1953.

Rehearing Denied Dec. 16, 1953.

Hearing Denied Jan. 20, 1954.

Proceeding on motion of machine shop owner for vacation, modification and correction of arbitrators' award and upon petition of builder for confirmation of amended and supplemental award. The Superior Court, Los Angeles County, Frank G. Swain, J., entered order confirming award, order denying motion to modify and judgment favorable to builder, and machine shop owner appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that in absence of record or detailed findings, it would be presumed that arbitrators included in award any damage to shop owner resulting from builder's breach of contract provision that builder was to furnish receipted bills covering work done and materials furnished.

Judgment and orders affirmed.

1. Arbitration and Award ⚡60

Every reasonable intendment will be indulged to give effect to arbitration proceedings and an award made upon an unqualified submission will not be set aside on ground that it is contrary to law unless the error appears on the face of the award and

causes substantial injustice. Code Civ. Proc. § 1288(c, d).

2. Arbitration and Award ⚡60

The award of arbitrators is sufficient if it is clear and precise and gives the result of the accounts between the parties without detailing the process by which the result was reached. Code Civ. Proc. § 1288(c, d).

3. Arbitration and Award ⚡73

The merits of the controversy between the parties, the nature and sufficiency of the evidence, and the credibility and good faith of the parties, in absence of corruption, fraud or undue means in obtaining an arbitration award, are not matters for judicial review. Code Civ. Proc. § 1288(c, d).

4. Arbitration and Award ⚡29, 31

The measure of damages is a question of fact for arbitrators in absence of a contractual provision therefor and in determining measure and extent of damages arbitrators are not restricted to consideration of the evidence presented, but may inform themselves from private investigation and personal experience. Code Civ. Proc. § 1288(c, d).

5. Arbitration and Award ⚡57

Under contract for construction of machine shop and providing that builder was to furnish receipted bills covering work done and materials furnished and that all questions as to rights and obligations arising under contract would be settled by arbitration, award to builder by arbitrators without production of all bills was not an act in excess of their authority. Code Civ. Proc. § 1288(c, d).

6. Arbitration and Award ⚡66

In proceeding on motion to vacate, modify and correct arbitrators' award and on petition for confirmation of amended and supplemental award, in absence of record or detailed findings, it would be presumed that arbitrators included in their award any damage resulting from breach by builder of portion of contract for construction of machine shop requiring builder to furnish receipted bills covering work done and materials furnished. Code Civ. Proc. § 1288(c, d).

7. Arbitration and Award ⇨57

Under contract for construction of machine shop and providing for relocating of garage and pouring necessary slab for same and for settlement by arbitration of all questions as to rights and obligations arising under contract, arbitrators properly awarded builder sum for extra work performed on storage shed after relocation of shed, although storage shed and garage were same structure and work of relocating shed was included in contract price. Code Civ.Proc. § 1288(c, d).

8. Arbitration and Award ⇨77

In proceeding on motion to vacate, modify and correct arbitrators' award in which arbitrators specifically disallowed claim for delay in completion of building, since by such award arbitrators presumptively had found that delay was not caused (by builder, such conclusion of arbitrators was not open for consideration on appeal. Code Civ.Proc. § 1288(c, d).

9. Arbitration and Award ⇨77

In proceeding on motion to vacate, modify and correct arbitrators' award stating that builders substantially completed performance of contract for construction of machine shop but listing a number of items wherein builder had failed to perform, question whether contract was substantially performed was immaterial in view of fact that arbitrators had awarded damages for each specific failure of builder completely to perform and motion could not be granted on ground that listing of performance failures refuted finding of substantial performance. Code Civ.Proc. § 1288(c, d).

10. Arbitration and Award ⇨42

Where contract for construction of machine shop provided for submission of all questions as to rights and obligations arising under contract to arbitrators and authorized arbitrators to fix own compensation, by original award arbitrators ordered each party to pay one-half of arbitrators' compensation but thereafter machine shop owner had award vacated because certain work was not performed and vacation order resulted in award of damages to owner in trivial sum of \$64, arbitrators did not exceed their powers in assessing

total of over one-half of entire costs of arbitration against owner. Code Civ.Proc. § 1288(c, d).

Robert E. Rosskopf, Beverly Hills, for appellant.

C. C. Dillavou, Ray J. Cusick, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant contracted with respondent July 3, 1951 for the construction of a machine shop according to plans and specifications. The total contract price was \$14,876 which included "relocating garage and pouring necessary slab for same and for chip bins." Neither painting, plumbing nor electrical work was included in the work to be done. The contract required completion of the structure within 90 days and contained a clause for the settlement by arbitration of "all questions as to the rights and obligations arising under the terms of the contract, the plans and specifications." Also, it authorized the arbitrators to fix their own compensation.

A dispute having arisen concerning asserted violations of the contract arbitrators were appointed, hearings were held and an award was made. The findings were that respondent substantially completed performance on October 8, 1951 in a good and workmanlike manner "except as hereinafter found"; that the contractor was entitled to \$1,332.85 less a credit of \$50 for respondent's failure to perform certain work, and for extras and various items he should be paid \$2,323.49, including his work, on the storage shed for \$900 and removal of the west wall for \$361.91. Others items claimed by respondent were disallowed; appellant was awarded \$500 as damages due to unlevelled concrete floor, but its claims for damages for delay and certain defects and other errors in construction were likewise rejected. Respondent was ordered to perform some nine specific items within twenty days. By their award the arbitrators fixed their own total compensation at \$1,020, each party to pay one half thereof. Subsequently, an amended and supplemental award was filed by the arbitrators, making

minor changes in the original award and assessing all the additional costs against appellant. After a motion by appellant to vacate, modify and correct the award had been denied by the superior court, a petition by respondent for confirmation of the amended and supplemental award was granted. This appeal is from the judgment, the order confirming the award and the order denying the motion to modify the award.

Appellant contends that the lower court should have granted the motion to vacate, modify and correct the award because (1) the arbitrators were guilty of misbehavior by which the rights of appellant were prejudiced, Code Civ.Proc. sec. 1288(c), and (2) the arbitrators so exceeded their powers and so imperfectly executed them that a mutual, final and definite award was not made. Code Civ.Proc. sec. 1288(d).

To dwell upon the numerous arguments made to the arbitrators by the parties would add no factual content of value to this discussion. Neither is there anything of value in the contentions made to the court below. Suffice it to say that on February 29, 1952 respondent moved for a confirmation of the final award of the arbitrators which was done by judgment in March 1952. More arguments, motions and modifications followed and final judgment was entered, ordering appellant to pay the balance fixed by the award, costs and fees of the arbitrators.

[1-3] Every reasonable intendment will be indulged to give effect to arbitration proceedings. An award made upon an unqualified submission will not be set aside on the ground that it is contrary to law unless the error appears on the face of the award and causes substantial injustice. *Utah Construction Co. v. Western Pacific R. Co.*, 174 Cal. 156, 159, 162 P. 631; *Popcorn Equipment Co. v. Page*, 92 Cal.App.2d 448, 451, 207 P.2d 647. The award of the arbitrators is sufficient if it is clear and precise and gives the result of the accounts between the parties without detailing the process by which the result was reached. *Carsley v. Lindsay*, 14 Cal. 390, 394; *Popcorn Equipment Co. v. Page*, supra. The merits of the

controversy between the parties, the nature and sufficiency of the evidence, and the credibility and good faith of the parties, in the absence of corruption, fraud or undue means in obtaining an award are not matter for judicial review. *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 233, 238, 174 P.2d 441.

Appellant contends that by reason of the fact that "the award as made by the arbitrators is on its face inconsistent with the facts found and contrary to all the evidence, the action of the arbitrators becomes arbitrary and oppressive and constitutes 'misbehavior,' 'excess of powers,' or an imperfect execution of such powers." In support of this contention, appellant enumerates six specific items, despite the fact that no record was made of the arbitration proceedings.

[4] (1) The arbitrators found that the factory floor was not constructed according to the specifications and awarded \$500 as damages to appellant. Appellant insists that it presented evidence of damages to the extent of \$2000 and argues that the failure of the arbitrators to find such to be a fact is misbehavior. The measure of damages is a question of fact for the arbitrators in the absence of a contractual provision therefor. In determining the measure and extent of the damage they are not restricted to a consideration of the evidence presented to them, but may inform themselves further from private investigation and personal experience. *Sapp v. Barenfeld*, 34 Cal.2d 515, 521, 212 P.2d 233.

[5,6] (2) Under the terms of the contract, respondent was to furnish receipted bills covering work done and materials furnished. Appellant argues that an award to the builder by the arbitrators without the production of all the bills is an act in excess of their authority. Such is not the fact. In the absence of a record or detailed findings, it must be presumed that the arbitrators included in their award any damage to appellant resulting from respondent's breach of this portion of the contract.

[7] (3) The work to be done, as detailed in the contract, included "relocating garage and building necessary slab for same." The

arbitrators awarded to respondent as an extra for "work performed on storage shed after relocating same, \$900." Appellant insists that the storage shed and the garage were the same structure and that therefore this work was included in the contract price. Also, it designates such award an act in excess of authority and misbehavior for failure to follow the contract. But it should be noted that the award is for extra work performed *after* the relocation referred to in the contract was completed.

[8] (4) Appellant claimed damages for delay in the completion of the building, resulting from the fact that appellant removed and replaced the floor of the building. The award specifically disallowed this claim. Presumptively the arbitrators found that the delay was not caused by respondent, and this conclusion is not open for consideration on appeal.

[9] (5) The award stated that respondent "substantially completed the performance," but listed a number of items wherein the builder had failed to perform. Appellant argues that these failures refute the finding of substantial performance. Whether the contract was "substantially performed" or not, is not material, since the arbitrators awarded damages for each specific failure of respondent completely to perform.

[10] (6) Appellant complains that more than half of the costs of the arbitration were assessed against it by the arbitrators. Under the contract, the entire cost of the arbitration could have been validly assessed against appellant. There are no restrictions on the power of the arbitrators in this respect. But in order to demonstrate that the arbitrators wisely exercised their discretion in the matter of assessing costs, a resume of the events before the arbitrators may not be amiss.

By the first award, respondent's total recovery was \$3,106.34 and he was ordered to perform nine unfinished items of work. Two of the nine were satisfactorily completed. Two were substantially done. At a

second arbitration hearing, damages were fixed for respondent's partial failure, in the sums of three dollars for each of the two items. Five of the nine were not adequately performed and damages for the five were assessed at the sums of five, three, thirty, ten and ten dollars respectively. The total damages awarded to appellant by the second arbitration were assessed at \$64, while the total costs of the second arbitration were fixed at \$340 and charged in toto to appellant.

When the respondent sent a painter to complete one of the substantially completed tasks, he was forbidden by appellant to enter the building. Despite appellant's refusal to allow the workman to enter and finish his task, he was credited with three dollars on the incomplete job. This attitude displayed by appellant necessarily and justifiably influenced the judgment of the arbitrators in levying costs. The superior court confirmed the first award without opposition by appellant who about six weeks later was successful in having the order vacated because of the failures in completing some of the work. If the work had not been performed then, it certainly had not been performed six weeks earlier! This vacation of the order resulted in the award of damages to appellant of the trivial sum of \$64. Court costs, arbitrators' fees and attorneys' fees for the second arbitration and the second petition for confirmation, etc., will exceed many times that sum.

Since the arbitrators' assessment of costs is a matter of discretion, it cannot be held that they have abused that discretion. Therefore, they did not exceed their powers.

There was no misbehavior on the part of the arbitrators by which the rights of appellant were prejudiced, nor was there any excess or imperfection in the execution of their powers by which a mutual, final and definite award was prevented.

The judgment and the orders are affirmed.

McCOMB and FOX, JJ., concur.

121 Cal.App.2d 515

PEOPLE v. WHITNEY.

Cr. 928.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1953.

Hearing Denied Dec. 23, 1953.

Prosecution for grand theft by embezzlement. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment against defendant. Defendant appealed from the judgment and from order denying his motion for new trial. The District Court of Appeal, Barnard, J., held that repeated emphasis by the court in its instructions of civil code provision relating to duties of trustee and in connection therewith repeated statements that four items were essential to elements of offense of embezzlement, which did not include the Element of fraudulent appropriation tended to mislead jury and was prejudicial to defendant.

Reversed and cause remanded for new trial.

1. Embezzlement ⇨47

In grand theft by embezzlement prosecution based on alleged fraudulent appropriation of funds by trustee, evidence was sufficient for jury.

2. Embezzlement ⇨48(1)

In prosecution for grand theft by embezzlement instruction that jury must find defendant guilty if they found that he fraudulently took the money mentioned in information or any part of it, was erroneous since it authorized a conviction of grand theft regardless of the amount taken. Const. art. 6, § 4½.

3. Criminal Law ⇨1172(1)

Embezzlement ⇨48(2)

In prosecution for grand theft by embezzlement, instructions which repeatedly emphasized statutory provisions regarding duties of trustee and in connection therewith stated that four certain elements were essential to offense of embezzlement but which did not include element of appropriation with fraudulent intent, mislead and confused jury and were prejudicial to de-

fendant. Civ. Code, §§ 2228, 2229, 2233; Pen. Code, §§ 484, 506.

John R. Nixon, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was found guilty of grand theft by embezzlement, and he has appealed from the judgment and from the order denying his motion for a new trial.

The complaining witness, Smith, became of age in 1943, and entitled to the possession of a trust fund of some \$200,000 which was being held for him by a Detroit bank. Since he was 16 years old he had been intimately acquainted with the defendant, having lived in his home at times, and had looked to him for advice and counsel. In 1944 he gave the defendant a general power of attorney and it was agreed between them that the defendant, who was in the real estate business, would manage and invest his funds for him. There was no agreement for any salary, but it was agreed that the defendant was to be reimbursed for any expenses he incurred. During the next three or four years the entire \$200,000 was brought to this state and most of it was handled by the defendant. Large amounts were invested in various properties, title being taken in defendant's name, and at times large amounts were deposited in defendant's personal bank account. During this period Smith traveled a good deal and considerable amounts were furnished him by checks drawn by the defendant. Smith kept no books, and paid little attention to what was being done with his money. He knew of some of the investments, and that titles were taken in defendant's name, but left practically everything to defendant's judgment and signed anything he was asked to sign. Finally, foreclosures and other litigation began and Smith, discovering that his money was all gone, revoked the power of attorney. Apparently, neither party had anything left out of these funds.

The evidence discloses a rambling series of financial transactions, but this charge

and the trial were centered upon what was done in connection with one item of \$45,000. The information charged the defendant with grand theft in that on or about June 18, 1947, he feloniously took and stole "a sum of money in excess of \$200," the property of Smith. Shortly prior to that date the defendant recommended to Smith the purchase of an automobile agency for \$80,000, a down payment of \$45,000 being required. Smith was anxious to make the deal provided that one Cooper would agree to manage the agency. Cooper declined, and Smith dropped the deal. In anticipation of this deal the defendant had withdrawn \$45,000 from the funds in the Detroit bank. On June 18, 1947, he deposited this \$45,000 in his own bank account, which was overdrawn in the amount of \$13.16. On the same day, June 18, he used \$1,611.07 of that money to pay two notes which he personally owed to that bank. On the next day, June 19, he had Smith sign a written authorization for him to endorse the \$45,000 check, which he had already done, and also purchased a cashier's check payable to himself for \$1,000. Shortly thereafter, he used \$5,516 of that money in purchasing an interest in a shingle mill, in his own name, and used \$10,500 in connection with a ranch in Oregon which had previously been purchased with Smith's funds in the same manner.

There is evidence that at times Smith told other people that he owned these various properties, and that at times the defendant claimed to be the owner of some of them. While the record is voluminous, about 1200 pages, it fails to disclose just what was done with respect to any of these properties, and there is no evidence that anything resembling a satisfactory accounting was ever made. While it discloses that a large amount was ultimately lost to Smith, it is very unsatisfactory with respect to any showing as to what portion of the total amount was received and used by Smith, what part was lost through poor judgment in making investments, what part was actually used by the defendant for his personal benefit, or what part was due him for expenses. The defendant did not take the witness stand,

and offered no explanation of such amounts as were shown to have been personally used by him. There was evidence that both Smith and the defendant had at times taken a position with respect to some of these matters which was different from the position taken at other times.

[1] The defendant first contends that the evidence is not sufficient to support the verdict. It is argued that Smith knew that the \$45,000 had been brought here; that when the automobile agency deal fell through he gave the defendant no new instructions as to its use; that the defendant had a general power of attorney, and was authorized to handle the money in accordance with the course previously followed; that there is no evidence as to the amounts received by Smith from Whitney during the period in question, and no evidence as to the amounts due to Whitney for expenses in transacting Smith's business; that Smith knew of the investment in the shingle mill and in the Oregon ranch, and claimed an interest therein; and that while the evidence may have been sufficient to show conversion in a civil action, it is not sufficient to establish the fraudulent appropriation of a particular sum required in a criminal action.

The \$45,000 check was deposited in the defendant's bank account at a time when that account was overdrawn. He immediately used some \$1,600 of that money to pay his personal debts, and took another, \$1,000 for purposes not explained. There is no evidence that anything was then due him as reimbursement for any expense incurred. In the absence of any explanation it might reasonably be inferred that the defendant converted these sums to his own use in violation of his trust, and an inference could probably be drawn that the defendant fraudulently appropriated a sufficient amount on June 18, 1947, to constitute grand theft. There is also evidence that the defendant shortly before the trial endeavored to suppress certain evidence which might tend to show a consciousness of guilt. *People v. Downs*, 114 Cal.App.2d 758, 251 P.2d 369. However, in view of the evidence as a whole, a close question was presented as to wheth-

er the taking of such an amount at about that date constituted a fraudulent appropriation in the criminal sense, or merely an unlawful conversion in the civil sense.

It is next contended that the court erred in instructing the jury. It is argued that the court failed to instruct the jury as to what constitutes grand theft, the only kind with which the defendant was charged; that by one instruction it directed a verdict of guilty if the jury found that the defendant had fraudulently appropriated an amount less than \$200; that it erred in quoting sections of the Civil Code, relating to the duties of a trustee, without properly qualifying their relation to criminal liability; that it erred in repeatedly giving an instruction as to "the four essential elements of the offense of embezzlement" although that instruction omitted any mention of fraudulent appropriation; that the effect of these errors was to leave it to the jury to convict the defendant if it found that he had in any way violated his trust; and that these errors were necessarily prejudicial under the circumstances here appearing.

In its first instruction the court told the jury that the defendant was charged with grand theft in taking and stealing a sum in excess of \$200, the property of Smith. The sum of \$200 was not otherwise mentioned and no instruction was given as to the distinction between grand and petty theft. After other general instructions the court gave this instruction:

"You are instructed that the four essential elements of the offense of embezzlement are: (1) That defendant was acting in the capacity of an agent; (2) that he obtained and held the money in his trust capacity; (3) that the money belonged to his principal; and (4) that he converted it to his own use in violation of his trust."

The court then gave an instruction which, after quoting sections 2228, 2229 and 2233 of the Civil Code, relating to the duties of a trustee, stated: "This instruction has been given solely for the purpose of showing the degree of responsibility, which the laws of (this state) impose upon a trustee." The

court then gave an instruction which, after stating that one who is entrusted with trust funds and who fraudulently appropriates the same to his own use is guilty of embezzlement, reads:

"* * * and in this case if you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant did unlawfully, fraudulently and feloniously convert, embezzle and appropriate the money mentioned in the information, or any part thereof, to his own use and contrary to his trust as such agent, then your verdict must be guilty."

After other general instructions the jury was sent out.

After being out four hours and 25 minutes, the jury returned and the foreman asked the court to read that part of the instructions "covering the law constituting theft or embezzlement." The court then defined theft and embezzlement by reading the material portions of section 484 and 506 of the Penal Code, and repeated the "four essential elements" instruction as above quoted. The court then reread sections 2228 and 2229 of the Civil Code and stated that he had given the jury those sections merely for the purpose of showing the attitude of the law toward the duties imposed upon a trustee; that he had also given it the Penal Code sections; that one may be "liable civilly for some conduct, but not necessarily criminal"; and that "you should be governed in this case by the law as I have given it to you from the Penal Code with respect to embezzlement and the four elements of that offense which I have given to you." The court then asked if there were any other questions, and the foreman of the jury asked "Would you read those four elements again?" The court then said: "The four elements of the offense of embezzlement are as follows: (repeating the four elements as above given)," and then said: "In other words, those are the four items you have to have in mind, the agency, having the money that belongs to somebody else and the conversion of it." The jury then retired, and in 21 minutes brought in a verdict of guilty as charged in the information.

[2] The instruction in which the jury was told that it must find the defendant guilty if it found that he fraudulently took the money mentioned in the information "or any part of it" is clearly erroneous since it authorized a conviction of grand theft regardless of the amount taken. It might be that this error, standing alone, would not require a reversal in view of the evidence and the provisions of Section 4½ of Article VI of the Constitution. The other errors in repeatedly emphasizing the Civil Code provisions and, in connection therewith, that a certain four items were controlling, are more serious.

[3] The "four elements of the offense of embezzlement," thus emphasized by the court, are appropriate in a civil action for a violation of a trust, and also have a bearing in a criminal prosecution for theft by embezzlement. But they omit the most important element required by the Penal Code sections, the appropriation of such property with fraudulent intent. By the instructions thus given and emphasized the jury would naturally understand that any conversion of the trust property was sufficient to establish the criminal offense of embezzlement. The jury was evidently confused with respect to these very matters when it returned and asked for further instructions. After these were given and when the court asked if there were other questions, the foreman asked to have the "four elements" instruction read again. Not only was this done, but the court went on to state that "in other words" these four items were the ones "you have to have in mind". Not only were these instructions misleading, but it can hardly be doubted that they were prejudicial since a verdict was then returned in a few minutes. This over-emphasis of a part of the essential elements involved seems to have resulted in removing the precise doubt which was in the minds of the jurors. In principle, the situation here was very similar to that involved in the case of *People v. Hatch*, 13 Cal.App. 521, 109 P. 1097.

This defendant had been given very broad powers as shown by the general power of attorney and the manner in which the business was conducted for several years, most of it with the knowledge of Smith and with-

out objection on his part. While the defendant was subject to the obligations imposed by law upon a trustee, there is a difference between a mere violation of a trust and the fraudulent appropriation which will constitute embezzlement by theft. In view of the condition of the evidence and the distinctions which the jury was required to make, it was important that the jury be correctly instructed with respect to the controlling issues. The defendant was entitled to a fair trial, without any confusing element which would naturally tend to mislead the jury.

The judgment and order are reversed, and the cause remanded for a new trial.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



121 Cal.App.2d 387

LOPEZ v. KNIGHT.

Civ. 8236.

District Court of Appeal, Third District,
California.

Nov. 19, 1953.

Pedestrian brought action against motorist to recover for injuries sustained when struck by automobile while pedestrian was crossing highway near city. The Superior Court of Merced County, Gregory P. Maushart, J., entered judgment for motorist, and pedestrian appealed. The District Court of Appeal, Peek, J., held that Superior Court erred in refusing certain instruction requested by pedestrian and that giving of certain other instructions was reversible error.

Judgment reversed.

1. Automobiles ⇌ 245(72)

In action against motorist by pedestrian to recover for injuries sustained when struck by automobile while pedestrian was crossing highway near city, question wheth-

er pedestrian was contributorily negligent was for jury.

2. Trial ⇨295(1)

Instructions must be read as a whole, and a reviewing court is not warranted in reversing a judgment by reason of an erroneous instruction, if charge as a whole, when so read, adequately and fairly instructs jury. Const. art. 6, § 4½.

3. Appeal and Error ⇨1064(2)

Trial ⇨194(16)

In action against motorist by pedestrian to recover for injuries sustained when pedestrian was struck by automobile while he was crossing highway, wherein question of contributory negligence was for jury, it was reversible error to instruct jury that if jury found that last clear chance doctrine did not apply, then doctrine of contributory negligence applied, and pedestrian could not recover, since instruction took question of contributory negligence from jury.

4. Trial ⇨296(9)

Where jury was reconvened after entire charge had been read to jury, and court stated that a question had arisen as to whether instructions read to jury were conflicting and that therefore, to clarify question, court would re-state rule for jury, and then court gave reversibly erroneous instruction which took question of contributory negligence from jury, such error was not cured by previous instructions, since erroneous instruction was accentuated by manner in which it was given.

5. Automobiles ⇨242(8), 246(60)

Where pedestrian, who was struck by automobile, as a result of injuries sustained, had no recollection of the accident, there was a statutory presumption in injury action against motorist that pedestrian was exercising due care at time of accident, and court should have given pedestrian's requested instruction to such effect. Code Civ.Proc. § 1963, subd. 4.

6. Automobiles ⇨242(8)

In action against motorist by pedestrian to recover for injuries sustained when struck by automobile, testimony of motorist, who was called as a witness by pedes-

trian, could not be regarded as evidence of pedestrian to dispel, as a matter of law, the statutory presumption that pedestrian, who, because of injuries, could not recall the accident, was in exercise of due care at time of accident. Code Civ.Proc. §§ 1963, subd. 4, 2055.

7. Trial ⇨296(1)

If an essential principle of law is incorrectly stated to jury, such error will not ordinarily be cured by a correct declaration of same principle in another instruction. Const. art. 6, § 4½.

8. Trial ⇨295(1)

Where an instruction under attack is far more incisive than the general instruction given, error is not cured by instructions as a whole. Const. art. 6, § 4½.

9. Appeal and Error ⇨1064(1)

Automobiles ⇨246(60)

In action against motorist by pedestrian to recover for injuries sustained when struck by automobile, instruction that before pedestrian can recover, it must appear from evidence that injuries of pedestrian were caused by negligence of motorist unmixed with any negligence on part of pedestrian, was reversibly erroneous because it shifted burden of proving contributory negligence from motorist to pedestrian.

Philander Brooks Beadle, San Francisco,
for appellant.

Hansen & Barstow, Fresno, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant in an action for personal injuries. The complaint followed the usual allegations relating to the negligent operation of the car by the defendant and the resulting injuries to the plaintiff. The answer admitted the ownership and operation of the car by defendant, denied generally the allegations of negligence and as affirmative defenses alleged that the accident was unavoidable and that it was the result of the contributory negligence of plaintiff.

No question is raised concerning the sufficiency of the evidence. The sole contention on appeal relates to certain instructions—two of which were given and one which was not. The facts necessary for an understanding of the case are that while plaintiff was either walking or trotting across highway 99 near the city of Merced he was struck by the automobile driven by the defendant. As a result of the injuries sustained plaintiff, at the time of trial, had no recollection of the happening of the accident. Plaintiff's case consisted solely of his testimony concerning events immediately prior to the accident and the testimony of a police officer concerning the physical facts surrounding the accident. Plaintiff also called defendant under section 2055 of the Code of Civil Procedure.

At the conclusion of the trial numerous instructions were offered by both parties, many of which were given to the jury. Following the charge but before the case was submitted to the jury, plaintiff's counsel, believing a conflict was apparent in the instructions (by reason of certain formula instructions given at defendant's request relative to contributory negligence and to the question of last clear chance) requested a conference in the judge's chambers. The trial judge stated that he was not going to take the time to write out a formal instruction but he would give an oral instruction to the jury clarifying the question so raised by plaintiff. Thereafter when the court reconvened the judge instructed the jury as follows:

"A question has arisen, ladies and gentlemen of the jury, whether the instructions that I have just read to you are conflicting. The proposition resolves itself to the question of whether the doctrine of contributory negligence applies, or the doctrine of last clear chance applies. I have stated to you that if you find that the plaintiff was guilty of contributory negligence, he cannot recover. That is true unless you find that the doctrine of last clear chance applies. That eliminates contributory negligence from the case. *If you find, however, that the doctrine of last clear chance does not apply, then*

the doctrine of contributory negligence applies and the plaintiff cannot recover. I am making that statement to you at this time for the purpose of assisting you in arriving at a proper verdict in this case. Should the matter cause you some concern or in reaching a verdict in this case, I want you to feel free to come back into Court and your foreman present any question upon which there is any doubt of law, at which time the matter can be again taken up with you. I think that covers the field. As I stated to you, ladies and gentlemen of the jury, two forms of verdicts have been prepared, one of which you will use. One is in favor of the plaintiff, the other one is in favor of the defendant. Whatever your verdict is, it must be signed by your foreman and it must be dated and then when that is through, you must return with it to this Court. The clerk will swear the Bailiff." (Italics added.)

It was not contended at the time of trial or is it now contended that plaintiff was guilty of contributory negligence as a matter of law. Neither do the facts justify such a conclusion.

[1-4] Because of plaintiff's loss of memory the jury, at the outset, was confronted with the evidence afforded by the presumption of due care, section 1963, subd. 4 C.C.P., which was to be weighed against the evidence offered by defendant. Thus the jury was presented with a conflict solely within its province to resolve. See *Russell v. Anderson*, 101 Cal.App.2d 684, 226 P.2d 350, and cases therein cited. It is true that instructions must be read as a whole and a reviewing court is not warranted in reversing a judgment by reason of an erroneous instruction if the charge as a whole, when so read, adequately and fairly instructs the jury. Here, however, the error of the instruction was accentuated by the manner in which it was given—after the entire charge had been read to the jury and after conference of counsel in the judge's chambers, and by his preliminary statement that a question had arisen as to whether or not the instructions just read

were conflicting and therefore, to clarify the question he would, in effect, re-state the rule for them. Necessarily then, when by that instruction the question of contributory negligence was taken from them such error could not be cured by what the court had previously stated to the jury since to so conclude would be to approve of wholly conflicting instructions. Likewise it cannot be said that the verdict rendered was the only one which the evidence could support. *Bieser v. Davies*, 119 Cal.App. 659, 7 P.2d 388.

Appellant's second contention attacks the refusal of the court to give the following instruction offered by him:

"Defendant railroad (sic) has alleged the affirmative plea of contributory negligence. The burden of proving contributory negligence is upon defendant. Moreover, plaintiff is entitled to the benefit of a settled rule of law on this subject. That rule is that, in the absence of evidence produced by him to the contrary, a plaintiff who is unable to remember the circumstances of an accident is entitled to the aid of the presumption of law that he did everything that a reasonably prudent person would have done under the circumstances for the protection of his own safety. This presumption in favor of plaintiff that he was not guilty of contributory negligence is, in itself, a species of evidence. It continues with the plaintiff throughout this trial and must prevail unless and until overcome by satisfactory evidence to the contrary."

[5,6] The record shows that plaintiff at the time of the trial had no recollection of the facts surrounding the accident. In a deposition taken some months prior he was less hazy than at the time of the trial concerning the happening of the accident. However, at neither time could he make a complete statement regarding the same. The rule is well established that a plaintiff, under the circumstances disclosed, is entitled to the benefit of the presumption contained in section 1963, subd. 4 of the Code of Civil Procedure, which is in itself a

species of evidence. The testimony of the defendant who was called by plaintiff under section 2055 of the Code of Civil Procedure, cannot be regarded as evidence of the plaintiff and hence would not dispel, as a matter of law, the presumption that the plaintiff exercised due care for his own concern. Necessarily it was a question for determination by the jury and the court should have so instructed it.

The final contention of appellant relates to the giving of the following instruction:

"The defendant also presents the defense that if Claude I. Knight was in any sense negligent then plaintiff Pedro G. Lopez was also guilty of contributory negligence, which proximately contributed to his injuries. In this connection you are instructed that *before the plaintiff can recover in this action it must appear from the evidence that the injuries to the plaintiff Pedro G. Lopez were caused by the negligence on the part of defendant Claude I. Knight, unmixed with any negligence on the part of plaintiff Pedro G. Lopez contributed in any manner or in any degree directly and proximately to his injuries, then there can be no recovery and your verdict must be in favor of the defendant.*" (Italics added.)

[7-9] It is plaintiff's contention that by the italicized portion the burden of proving contributory negligence was shifted from defendant to himself. In support of his contention three cases are cited, *Howard v. Worthington*, 50 Cal.App. 556, 559, 195 P. 709; *Rush v. Lagomarsino*, 196 Cal. 308, 314, 237 P. 1066, and *Bellows v. City and County of San Francisco*, 106 Cal. App.2d 57, 234 P.2d 729, 731. In each of the cases so cited a comparable instruction was given. The court in the *Bellows* case discussed at length the *Howard* and *Rush* cases and concluded that if an essential principle of law is incorrectly stated to the jury such error will not ordinarily be cured by a correct declaration of the same principle in another instruction. This is true said the court, since "the giving of instructions which are contradictory in essential ele-

ments may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury." The court in the Bellows case further held that where an instruction under attack is far more incisive than the general instruction given "it is not appropriate to hold that the error is cured by a general view of the instruction as a whole" and it cannot be held that the error comes within the purview of section 4½ of Article VI of the Constitution.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.



121 Cal.App.2d 367

BRAND v. NORRIS et al.

Civ. 15532.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1953.

Reciprocal negligence actions by parties to automobile collision. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment to effect that neither plaintiff nor cross-complainants take anything by their actions, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that verdict that evidence was insufficient to place blame of accident on either party, and that, therefore, jury would not render verdict for any party, was sufficient as verdict that neither party had sustained its burden of proof, and thus decided all issues in case, and was not silent as to one or all of defendants, or issues.

Affirmed.

1. Trial ⇨328

In reciprocal negligence actions by parties to automobile collision, verdict that evidence was insufficient to place blame of

accident on either party, and that, therefore jury would not render verdict for any party, was sufficient as verdict that neither party had sustained its burden of proof, and thus decided all issues in case, and was not silent as to one, or all of defendants, or issues.

2. Trial ⇨344

Explanations by jury cannot give verdict meaning which it would not have had without them.

3. Trial ⇨339(1, 2)

Normal proceeding when jury renders insufficiently formulated verdict is formal correction by jury under advice of court, but informal explanations can be used to confirm correctness of court's understanding. Code Civ.Proc. § 619.

4. Appeal and Error ⇨218(1)

Generally, a party will not be heard to object to verdict for first time on appeal from judgment if verdict is susceptible of construction which may have lawful and relevant effect.

5. Trial ⇨345

Failure of an appellant to draw attention of trial court to claimed infirmity of verdict constitutes waiver thereof.

Nichols, Richard, Allard & Williams, Edward M. Digardi, Oakland, for appellant.

Partridge, O'Connell & Whitney and John P. Whitney, San Francisco, for respondents.

NOURSE, Presiding Justice.

In reciprocal negligence actions of the parties to an automobile collision the verdict of the jury was as follows:

"We, the Jury in this case, find that the evidence is insufficient to place the blame of the accident on either party; therefore the jury does not render a verdict for any party to this case."

On this verdict a judgment was entered to the effect that neither plaintiff nor cross-complainant take anything by their actions. Motions of plaintiff for a new trial and to

set aside the judgment because not supported by a proper verdict were denied and plaintiff appeals from the judgment that he take nothing. There is no appeal from the judgment in so far as it is adverse to cross-complainant.

Appellant contends that no verdict for any party is not a verdict for the defendant and the cross-defendants but no verdict at all, so that there is nothing on which the judgment could be entered. Considering the circumstances of the case we have concluded that this position is untenable.

Originally the last part of the verdict as brought in by the jury read, "the jury does not render a verdict for *either* party to the case" and the word "either" was changed to "any" at the instance of the court. After this had been done the attorney of respondent pointed out that the jury meant that they did not award damages to any party, which would actually be a verdict in favor of defendant (and cross-defendants). The attorney of appellant then stated that no verdict was a proper verdict, after which the foreman of the jury declared that it was their opinion that no damages could be awarded as they could not fix any blame against either party. Answering questions of the court the foreman further declared that it meant that neither party had sustained its burden of proof. A poll of the jury showed that eleven were in favor, one against the verdict.

[1-3] Appellant relies on the cases which hold that a verdict against one of two defendants but which is silent as to the other defendant is not a verdict in favor of the latter but is merely a failure on the part of the jury to find upon all of the issues. *Brokaw v. Black-Foxe Military Institute*, 37 Cal.2d 274, 279, 231 P.2d 816, 821 and cases there cited. This is not a case where the verdict is silent as to one or all defendants or issues. The first part of the verdict "that the evidence is insufficient to place the blame of the accident on either party" means exactly what the foreman later explained it to mean, to wit, that neither party plaintiff

had sustained its burden of proof, and thus it decided all issues in the case. The latter part of the verdict was informally and insufficiently formulated, but because of the preceding part there could be no doubt that the court's understanding of the verdict as a whole, in which the attorneys of the parties acquiesced, was the correct one. See *Herricks v. Hennessey Co.*, 110 Cal.App. 654, 294 P. 739. Although it is true that explanations by the jury cannot give a verdict a meaning which it would not have had without them, compare *Mish v. Brockus*, 97 Cal.App.2d 770, 218 P.2d 849, and that the normal proceeding is formal correction by the jury under the advice of the court, § 619, Code of Civil Procedure, such informal explanations can be used to confirm the correctness of the court's understanding. See *Fennessey v. Pacific Gas & Elec. Co.*, 10 Cal.2d 538, 542, 76 P.2d 104.

[4,5] The following language from *Curtis v. San Pedro Transp. Co.*, 10 Cal. App.2d 547, 548-549, 52 P.2d 528, is apposite to this case:

"If the defendant was dissatisfied with the form of the verdict, he should have asked, at the time it was announced, that it be made formal and certain; otherwise it was the duty of the court to construe it so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language, considered in connection with the pleadings and evidence * * * and, as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect (citation); and this case does not appear to fall within any exception to the rule." See also as to the rule that failure of an appellant to draw the attention of the court below to a claimed infirmity of a verdict constitutes a waiver thereof: *Kirby v. Adcock*, 116 Cal.App.2d 570, 571, 253 P.2d 700; *Brown v. Regan*, 10 Cal.2d 519, 523, 75 P.2d 1063.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

121 Cal.App.2d 533

PEOPLE v. WORKMAN.**Cr. 5056.**

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1953.

Hearing Denied Dec. 23, 1953.

Prosecution for violation of dangerous weapons control law. The Superior Court, County of Los Angeles, Charles W. Fricke, J., sentenced defendant to state prison and defendant appealed. The District Court of Appeal, McComb, J., held that by failure to object at time of arraignment on amended information which eliminated charge of robbery and substituted violation of dangerous weapons control law, defendant waived right to object on ground of denial of due process.

Judgment affirmed.

1. Constitutional Law ⇨43(1)

Where, after defendant had been arraigned on information charging robbery while armed with deadly weapon, an amended information was filed charging violation of dangerous weapons control law, by failure to object at time of arraignment on amended charge and by pleading thereto, defendant waived his right to object to alleged denial of due process. Gen. Laws, Act 1970, § 2; Pen.Code, §§ 995, 996.

2. Indictment and Information ⇨198

Statutes providing for setting aside information where defendant has not been legally committed by magistrate or committed without probable cause, and for waiving these defenses by failure to make motion at time of arraignment are applicable to filing of an amended information. Pen. Code, §§ 995, 996.

3. Constitutional Law ⇨43(1)

A constitutional right accorded to a defendant may be waived either directly or by inaction.

4. Criminal Law ⇨576(5)

The right to a speedy trial is one which a defendant may waive. Const. art. 1, § 13; Pen.Code, § 1382, subd. 2.

5. Criminal Law ⇨576(5)

Where a defendant neither objects to going to trial nor makes a motion to dismiss the action in the trial court, error may not be predicated in the appellate court upon the failure of a defendant to have an earlier trial.

6. Criminal Law ⇨576(5)

Defendant, who was arraigned on amended information nearly 13 months after arraignment on original information, was deemed to have waived his right to speedy trial, where he neither objected to going to trial nor made a motion to dismiss the action. Pen.Code, § 1382, subd. 2; Const. art. 1, § 13.

Alexander L. Oster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violation of the Dangerous Weapons Control Law, predicated upon defendant's plea of guilty, he appeals.

May 26, 1952, defendant was arraigned and pled not guilty as charged in an information charging him with robbery while armed with a deadly weapon. July 8, 1952, defendant failed to appear and bail was declared forfeited and a bench warrant was issued for his appearance. January 20, 1953, defendant was present in court, the public defender was appointed as his counsel and the case continued for trial to January 26, 1953, on which date trial was reset for March 9, 1953. On the latter date at the request of counsel for defendant, the cause was continued to April 14, 1953. On April 14, 1953, at the request of defendant, the case was continued to May 20, 1953, and again at the request of defendant, continued to May 21, 1953.

May 21, 1953, the case was called for trial and on stipulation of the parties an amended information was deemed filed charging defendant with violation of the

Dangerous Weapons Control Law (Act 1970, Deering's Gen. Laws, § 2) only.

Defendant was arraigned on the amended information and entered a plea of guilty. He was given leave to file an application for probation and hearing on the application for probation and judgment was set for June 4, 1953, at which time the matter was continued to June 11, 1953.

June 11, 1953, defendant's application for probation was denied and he was sentenced to the state prison for the term prescribed by law.

Questions: First: *Did the filing of the amended information, eliminating the charge of robbery and substituting violation of the Dangerous Weapons Control Law, deprive defendant of any right guaranteed him by the state or federal constitutions—specifically did it deny defendant the right of due process?*

[1] *No.* The following rules are here applicable:

(1) A defendant may move to set aside an information at the time of arraignment on the ground that he has not been legally committed by a magistrate or that he was committed without reasonable or probable cause. (Penal Code, § 995.) If such a motion is not made the defendant is precluded from making such objections. (Penal Code, § 996.)

[2] (2) Penal Code, sections 995 and 996 are applicable to the filing of an amended information. (People v. Ahern, 113 Cal.App.2d 746, 750 [5], 249 P.2d 63.)

Since defendant pleaded to the amended information and did not move in the court below to set it aside, he has waived any error in the filing thereof and may not complain on appeal.

[3] (3) A constitutional right accorded to a defendant may be waived either directly or by inaction. (People v. Sierra, 117 Cal.App.2d 649, 652 [4], 256 P.2d 577.)

People v. Fyfe, 102 Cal.App. 549, 283 P. 378, relied on by defendant, is not here in point. In the Fyfe case the people appealed from a judgment of dismissal entered after defendant's demurrer was sus-

tained to a second amended information. In such case defendant vigorously opposed the filing of the amended information, demurred thereto and moved to set it aside. In the instant case instead of demurring thereto, defendant through his counsel stipulated that an amended information might be filed charging violation of the Dangerous Weapons Control Law, and when arraigned on the amended information entered his plea of guilty thereto.

Second: Was defendant denied a speedy trial in violation of any right accorded him by the state or federal constitutions?

[4] *No.* The right to a speedy trial under Article I, § 13, of our state Constitution and subdivision 2, of section 1382 of the Penal Code, is a right which a defendant may waive. (People v. Greene, 108 Cal.App.2d 136, 140; [1], 238 P.2d 616; People v. Tenedor, 107 Cal.App.2d 581, 583 [4], 237 P.2d 679.)

[5,6] It is likewise settled that where a defendant neither objects to going to trial nor makes a motion to dismiss the action under section 1382 of the Penal Code in the trial court, error may not be predicated in the appellate court upon the failure of a defendant to have an earlier trial. (People v. Scott, 74 Cal.App.2d 782, 783 et seq., 169 P.2d 970; People v. Dale, 79 Cal.App.2d 370, 378 [10], 179 P.2d 870; People v. Newell, 192 Cal. 659, 669 [7], 221 P. 622.)

In the present case defendant neither objected to his arraignment and plea of guilty, nor did he move to dismiss the action in the trial court. Therefore the above rules are applicable.

No errors appearing in the record, the judgment is affirmed.

FOX, J., concurs.

MOORE, Presiding Justice.

I concur. Defendant was not denied any constitutional right. He was at all stages of the action represented by counsel. After four continuances when the cause came on for trial defendant himself and his attorney stipulated that a second count

might be added. He knew then that he had not been committed on the charge of having violated the Dangerous Weapons Control Law and his counsel knew that, if the pleading should over his objection be amended as proposed, he could obtain its elimination by virtue of section 995 of the Penal Code. Also, he knew that by section 996 if he did not ask it to be set aside, defendant would be precluded from afterwards making the objection mentioned in section 995. Despite such knowledge and the law as thus codified, defendant now seeks to be relieved from his plea of "guilty" to the accusation thus added by amendment to the information. He is in no better position than the accused in *People v. Sierra*, cited by Justice McComb, whose appeal on the very same point was denied.

All points in opposition to the demands of the prosecution should be interposed in the trial court where the trial judge may make such reviewable orders as may be deemed appropriate.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



121 Cal.App.2d 548

PEOPLE v. MARVICH.

Cr. 2487.

District Court of Appeal, Third District,
California.

Nov. 25, 1953.

Hearing Denied Dec. 23, 1953.

Proceeding upon petition for writ of coram nobis by inmate of state prison. The Superior Court, San Joaquin County, R. M. Dunne, J., sustained demurrer to petition and denied petition, and inmate appealed. The District Court of Appeals, Schottky, J., held that evidence was sufficient to sustain trial court's implied finding that inmate had not been induced to waive counsel and plead guilty by reason of threats or promises.

Order affirmed.

1. Criminal Law ⇨997(17), 1177

In coram nobis proceeding by inmate of state prison, trial court's refusal to issue order for prisoner's personal appearance was matter within trial court's sound discretion, and refusal was not prejudicial to prisoner in view of fact that verified petition of petitioner and entire record of proceedings in connection with judgment of conviction were before the trial court.

2. Criminal Law ⇨997(15)

In proceeding for writ of coram nobis by inmate of state prison, evidence was sufficient to sustain trial court's implied finding that inmate had not been induced to waive counsel and plead guilty by reason of threats or promises.

3. Criminal Law ⇨997(12)

In proceeding for writ of coram nobis by inmate of state prison, evidence was not sufficient to excuse delay of 19 years in filing petition for such writ.

4. Criminal Law ⇨997(12)

Showing of diligence is a prerequisite to availability of relief by motion for coram nobis.

Mike Marvich, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant filed in the Superior Court in San Joaquin County, in propria persona, a petition for a writ of coram nobis.

Said petition alleged in substance that on or about November 22, 1934, when a youth of nineteen years, he was arrested by police officers in Stockton and accused of a number of robberies; that he was subjected to prolonged questioning and threatened with bodily harm if he did not admit guilt of several crimes recently committed in and around Stockton; that he asserted his innocence and was confined in jail overnight; that on the following day he was taken for an automobile ride in and around Stockton by a detective of the Stockton

Police Department, who took him to dinner and acted sympathetic toward him, but when he was returned to the police station several police officers entered the room and, upon being informed by the detective that petitioner still protested his innocence, threatened to "beat a confession" out of him; that the detective then asked for time to talk with petitioner alone and again subjected petitioner to prolonged questioning and told him either to confess the recent crimes and go to the industrial school for a few months, or have the officers "beat a confession" out of him and be sent to the state prison for life; that this so "bewildered, confused and scared him" that he no longer had the will to maintain his innocence and he told the detective he was ready to "play ball and clean the books" of recent crimes; that the detective then typed out a confession to several crimes, read it over to petitioner and had him sign it before witnesses; that he was then told he had better go into court and plead guilty to the crimes and waive all proceedings so that he could immediately go to the industrial school for boys; that he was returned to jail and within a few days was taken before a judge in the county courthouse and, as instructed by the detective, stated that he was guilty of the crime; that he was young and inexperienced in the intricacies of criminal procedure, and "if he waived the assistance of counsel it was not an intelligent waiver of his constitutional right"; that a few days later petitioner was taken to what he believed to be the Juvenile Court, at which the late Honorable D. M. Young was presiding, and, as instructed by the detective, again pleaded guilty to the crime charged "without making an intelligent waiver of his right to counsel and waived all his rights and consented to the immediate disposition of the case"; that the judge found the crime charged to be robbery of the first degree, and to petitioner's surprise and dismay sentenced him to California state prison at San Quentin for the term prescribed by law; that petitioner was released on parole after serving five calendar years' imprisonment but was thereafter returned to the California state prison

at Folsom as a parole violator under the aforesaid judgment.

The petition further alleged that in the past few years the petitioner came to realize the enormity of his future position in life and "surrendered himself avidly to the pursuit of education," as a result of which he "became aware that his plea of guilty, conviction and imprisonment was obtained by the prosecuting authorities in violation of the Constitution of the United States and of the State of California," and that he then "immediately commenced a legal research to support his allegations and prepared this petition for the writ of error coram nobis"; that the petitioner has not previously petitioned any court for either the writ of error coram nobis or the writ of habeas corpus in connection with the aforesaid judgment and conviction.

The prayer of the petition is that a writ of error coram nobis issue and that the judgment of conviction be annulled, vacated and set aside, and that petitioner be allowed to withdraw his plea of guilty and to interpose a plea of not guilty.

Attached as an exhibit to the petition was the judgment of the Superior Court, dated December 3, 1934, which recited petitioner's waiver of the aid of counsel and his plea of guilty.

With said petition petitioner filed a motion for an order allowing his appearance in court at the hearing of said petition in order that he might testify and present evidence, and also orally argue the questions involved.

The District Attorney of San Joaquin County demurred to the petition upon the grounds (1) that it failed to state facts sufficient to warrant granting it; (2) that it was indefinite and uncertain; and (3) that it made no sufficient showing of due diligence. The District Attorney also filed an "Affidavit of Statement of Facts" by the detective named in the petition, denying all of petitioner's allegations as to threats and promises and alleging that petitioner was treated with fairness and courtesy; that petitioner freely admitted his guilt of the offenses charged and described said of-

fenses in detail; and voluntarily admitted his guilt at his preliminary examination in the Justice's Court and when arraigned in the Superior Court.

The Superior Court denied petitioner's motion for his personal appearance, proceeded to hear the petition and respondent's demurrer thereto, and ordered, adjudged and decreed that "Respondent's Demurrer is sustained, and petitioner's Petition of Issuance of a Writ of Error Coram Nobis be and hereby is denied on the grounds of laches, and on the further grounds that defendant and petitioner was not deprived at any time of his Constitutional rights."

Petitioner has appealed from the order denying his petition for coram nobis and the People have filed a motion to dismiss said appeal upon the ground that said appeal is frivolous, sham and without merit.

[1] As to petitioner's contention that the court erred in refusing to issue an order for his personal appearance we believe that the denial of such motion was within the sound discretion of the court. Petitioner was confined in the State Prison at Folsom, and, as stated in *People v. Kirk*, 76 Cal.App.2d 496, at page 498, 173 P.2d 367, 368: "The decision of the question of returning a person confined in a penitentiary, to court, to argue a petition for a writ of error *coram nobis*, should be within the sound discretion of the court in which it is to be heard." Furthermore, in view of the fact that the verified petition of petitioner and the entire record of proceedings in connection with the judgment of conviction were before the trial court, petitioner was not prejudiced by the court's refusal to order him brought from Folsom penitentiary for the hearing.

In the case of *People v. Adamson*, 34 Cal.2d 320, at page 329, 210 P.2d 13, at page 17, the court said:

"The proceeding designated 'coram nobis' in this state is a court-made proceeding and, within the limits of the constitutional requirements pointed out in *People v. Shorts* (1948), supra, 32 Cal.2d 502, 506, 197 P.2d 330, must, therefore, be subject to such limitations and procedural requirements as

the creating court may prescribe. Such proceeding is not subject to all the rules applicable to an original trial; it is an attack upon a judgment which has become final and in favor of which there are strong presumptions of regularity; the 'petition' is regarded as a motion to vacate the judgment; it is not a complaint nor does it initiate an independent action (*In re Paiva* (1948), 31 Cal.2d 503, 509, 190 P.2d 604). The facts that the People filed *inter alia* a document entitled 'Demurrer' and that the trial court made an order (superseded by the order now appealed from) that the 'Demurrer' * * * is sustained without leave to amend did not require the trial court and do not require this court to accept every allegation of the petition and supporting affidavits at face value. The trial court considered, and we are entitled to consider, the circumstances in which those allegations were made and the People's affidavits controverting them."

In the instant proceeding the record shows that while petitioner sets forth in his petition that he waived counsel and pleaded guilty because of threats made against him and promises made to him, these allegations are contradicted by the affidavit of the officer. The record also shows that petitioner waived counsel and pleaded guilty. The petition was filed nineteen years after the judgment against petitioner was pronounced, and petitioner's only excuse for the long delay was that it was not until the last few years that he became aware that his plea of guilty, conviction and imprisonment were obtained in violation of his constitutional rights. The petition alleges that after the judgment was pronounced he served five calendar years in prison at San Quentin, then was released on parole and thereafter returned to Folsom State Prison as a parole violator.

In *People v. Adamson*, supra, the court said in 34 Cal.2d at page 326, 210 P.2d at page 15:

"In this state a motion to vacate a judgment in the nature of a petition for coram nobis is a remedy of narrow scope. (See *People v. Darcy* (1947), 79 Cal.App.2d 683, 693, 180 P.2d 752; *People v. Martinez*

PEOPLE v. BOSTON.

Cr. 5042.

District Court of Appeal, Second District,
Division 3, California.

Nov. 24, 1953.

(1948), 88 Cal.App.2d 767, 774, 199 P.2d 375.) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (People v. Gilbert (1944), 25 Cal.2d 422, 442, 154 P.2d 657; In re Lindley (1947), 29 Cal.2d 709, 725-726, 177 P.2d 918; People v. Tuthill (1948), 32 Cal.2d 819, 821, 198 P.2d 505.) The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (People v. Shorts (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)"

[2-4] We are satisfied that upon the record before it the trial court's implied finding that petitioner was not induced to waive counsel and plead guilty by reason of threats or promises is supported by substantial evidence. Furthermore, the trial court was not required to believe petitioner's allegation that he did not realize until a few years ago that his plea of guilty had been obtained in violation of his constitutional rights. In the light of the facts and circumstances shown by the record, a delay of nineteen years in filing a petition for a writ of error coram nobis cannot be excused. As stated in People v. Shorts, 32 Cal.2d 502, at page 512, 197 P.2d 330, at page 336: "It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for coram nobis." (Citing cases.)

For the reasons hereinbefore stated the order sustaining respondent's demurrer and denying petitioner's petition for a writ of error coram nobis is affirmed. For the reason that we prefer to decide the matter upon the merits, the motion to dismiss the appeal is denied.

VAN DYKE, P. J., and PEEK, J., concur.

Prosecution for robbery in first degree. The Superior Court, Los Angeles County, George Francis, J., entered judgment of conviction and entered order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⚖511(2)

Corroboration of testimony of an accomplice is sufficient if it tends to connect defendant with commission of crime in such way as to reasonably satisfy jury that testimony of accomplice is true, and corroboration may be sufficient even though slight.

2. Robbery ⚖24(3)

Fact that robbery victim when pointing out defendant as one of robbers stated that he could not be completely certain, did not rob his testimony of all weight or credibility, where victim pointed out characteristics by which he identified defendant, and robbers had worn stockings over their faces at time of robbery to prevent positive identification.

3. Criminal Law ⚖347, 351(3)

Fact that defendant had been admittedly friendly with, and in company of, confessed robbers on night of robbery, and fact that defendant had left state when he had learned that police suspected him of robbery and were looking for him, were circumstances tending to prove consciousness of guilt.

4. Robbery ⚖24(1)

Evidence sustained conviction for robbery in first degree.

Philip S. Schutz, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Elbert Boston appeals from a judgment of conviction in a jury trial of robbery of the first degree and from an order denying his motion for a new trial. The information also alleged that defendant had suffered a prior conviction. The ground of the appeal is insufficiency of the evidence to justify the verdict.

About 1:20 a. m., October 28, 1952, one Donald Nordstrom, assistant manager of a service station in Los Angeles County, had closed the station and was counting the day's receipts in a dimly lighted office. Two men, one taller than the other, entered the office, each with a silk stocking pulled over his head down to about the mouth. The taller of the two men took the money that was in front of Nordstrom and some more that was on a desk, together with some checks, the amount of the money and checks being \$249. They allowed Nordstrom to walk away; he did not see an automobile but heard one being started up. He remained away from the station a short time, when he returned and called the police.

Bill C. Robinson testified that on the night of the robbery he met one Donald Dawson at Boston's home where they had gone to sell him a gun. Defendant had no money. They told him they were going to commit a robbery and he agreed to join them. They had three guns. Defendant and Dawson bought a pair of ladies' silk hose. They were in a car but stole another one they thought would be faster. Robinson and defendant went into Nordstrom's service station with the stockings over their upper faces, each having a gun, and they committed the robbery taking \$165 or \$170 cash which they divided. They abandoned the stolen car and picked up Robinson's car. Defendant gave them back the gun he had. Donald Dawson admitted having participated in the robbery with Robinson and a man called Dick. He testified that defendant was not with them. Upon cross-examination by the deputy district attorney he testified that he had told the former that defendant and Robinson were the two men

who assisted in the robbery; he also testified he had stayed in the car and the other men entered the station. Two days after the robbery defendant started for New Jersey with three friends. He was arrested in Arkansas and waived extradition. In an automobile enroute from Springdale, Arkansas, to Fort Smith, Arkansas, defendant told Police Officer Simon that he left the State because a friend had told him he was wanted for robbery and the police were staked out at his home.

Officer Baldridge of the Los Angeles Police Force testified that defendant, while under arrest in Arkansas, stated that he had stolen a car to drive to Miami but decided to go to New Jersey; on the plane, returning to Los Angeles, defendant stated: "Well, I can't say I was in the robbery; let's say I heard there was a robbery and a car ditched near Prairie and Imperial" and later "it would be closer to Century than to Imperial." He said he had seen Dawson and Robinson have three guns in a car and had told them they had better keep them out of sight or they would be picked up. He also said he would have friends to testify to an alibi for him; that he would plead guilty to theft of an automobile but not to robbery. When questioned by Officer Simon, on the way to Los Angeles, as to where he was on the night of the robbery defendant said he was at Sally's Cafe. When Officer Simon asked him how he knew when the robbery was, that no date had been mentioned, defendant smiled and said he was at the cafe. He said he had gone to his home, had seen officers waiting in a car, had picked up a suitcase full of clothes, had stolen a car and started east. Nordstrom, when questioned as to whether he recognized anyone in the courtroom, pointed out defendant saying, "The lower part of his face looks similar * * * his jaw and mouth * * *"; that he had seen defendant walk twice since the robbery and that his walk was similar to that of the taller man. On cross-examination he testified that he had told the arresting officers that he thought the tall man was a light Negro, judging from the shape of his lips and color. When questioned whether he was sure defendant was one of

the men he answered, "No, I am not positive." He testified that defendant was probably one of the men but that he could not be completely certain.

Defendant admitted having met Bill Robinson at his, defendant's, home on October 27th in company with Dawson, at which time they offered to sell him a gun which he did not buy. He testified that the three entered the Robinson car and drove to Sally's Cafe where they let him out. They did not mention the robbery; that he was driven home from the cafe at about 9:45 p. m. where he went to sleep and remained until the next morning. There was corroboration of his testimony that he was at home at the time of the robbery, and at Sally's Cafe earlier in the evening. He had been taken into custody and questioned about certain robberies within a week prior to October 27th but was released. He was afraid he would be arrested but was intending anyway to go to New Jersey.

[1] It is well settled that the corroboration of the testimony of an accomplice is sufficient if it tends to connect the defendant with the commission of the crime in such a way as to reasonably satisfy the jury that the testimony of the accomplice is true. It may be sufficient even though slight, and entitled to little consideration when standing by itself, provided it tends to connect the accused with the commission of the crime. *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29.

[2-4] The fact that Nordstrom, having pointed out defendant as one of the robbers, stated he could not be completely certain, did not rob his testimony of all weight or credibility. He stated his reasons for identifying defendant and his failure to testify positively indicates that he was a conscientious and scrupulous witness. Aside from the testimony of Nordstrom there was other corroborating evidence. Defendant admittedly was friendly with, and in the company of, the confessed robbers the night of the robbery; he left the State when he learned that the police suspected him of the robbery and were looking for him. This was a circumstance tending to prove consciousness of guilt. 8 Cal.Jur., sec. 158. There was

ample evidence that three men participated in the robbery, one of them remaining in the car. The third man, if he was not defendant, was not identified other than vaguely as a fellow known only as Dick. Defendant did not testify there was any such person with them on the night of the robbery. Moreover, the probability that Nordstrom was correct in his identification of defendant as one of the robbers was strengthened by the jury's disbelief of the testimony of defendant and his witnesses that he was at home when the robbery took place. The evidence was legally sufficient to establish the guilt of the defendant.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



121 Cal.App.2d 497

WARNER

v.

PACIFIC TEL. & TEL. CO., Inc.

Civ. 19586.

District Court of Appeal, Second District,
Division 3, California.

Nov. 24, 1953.

Rehearing Denied Dec. 10, 1953.

Hearing Denied Jan. 20, 1954.

Action for damages brought by a wife against telephone company which allegedly listed divorced wife of plaintiff's husband in telephone directory under her married name as having same address and telephone number as plaintiff and plaintiff's husband, and which allegedly refused to delete or change listing. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that divorced wife of plaintiff's husband was an indispensable party and that action was properly dismissed where plaintiff refused to

name her husband's divorced wife as a party defendant.

Judgment affirmed.

1. Telegraphs, Telephones and Radio ⚡65(1)

In wife's action against telephone company which allegedly listed divorced wife of plaintiff's husband in telephone directory under her married name as having same address and telephone number as plaintiff and plaintiff's husband, and which allegedly refused to delete or change listing, facts alleged were sufficient to entitle plaintiff to relief consisting of prevention of use by divorced wife of plaintiff's husband of her married name in defendant's telephone directory, or otherwise, if plaintiff was sole owner of such name and such use was causing plaintiff detriment and damage as alleged.

2. Parties ⚡18, 29

One whose rights will inevitably be affected by judgment is an indispensable party. Code Civ.Proc. § 389.

3. Telegraphs, Telephones and Radio ⚡64

In wife's action against telephone company which allegedly listed divorced wife of plaintiff's husband in telephone directory under her married name as having same address and telephone number as plaintiff and plaintiff's husband, and which allegedly refused to delete or change listing, divorced wife of plaintiff's husband was an indispensable party and action was properly dismissed where plaintiff refused to name her husband's divorced wife as a party defendant. Code Civ.Proc. § 389.

4. Parties ⚡50

Provision of Code of Civil Procedure that when a complete determination of controversy cannot be had without presence of other parties, court must order them to be brought in, is mandatory and goes to jurisdiction of court. Code Civ.Proc. § 389.

5. Trial ⚡3

Courts need not try merits of a controversy piecemeal at instance of one who is unwilling to seek a complete and final determination, and courts have duty to broaden scope of case in such manner as to avoid multiplicity of suits and to protect

rights of all persons whose interests might be adversely affected by judgment.

Barbara Ruth Warner, in pro. per.

John A. Sutro, Pillsbury, Madison & Sutro, San Francisco, Leslie C. Tupper, John H. Harriman, Lawler, Felix & Hall, Los Angeles, for respondent.

SHINN, Presiding Justice.

The complaint herein alleges the following: Pacific Telephone & Telegraph Company, Inc., defendant and respondent herein, publishes in its Central Section of the Los Angeles Extended Area telephone directory, the following: "Warner, Caryl atty, 639 S Spring—TUkr 9171 Woodland Hills Office, 21042 Rios—DIamnd 85761"; immediately below, "Warner, Caryl Mrs. 1600 Westrlly Ter—NORMndy 22011"; and below that, "Warner Caryl Mrs. Warner Caryl atty 21042 Rios Wdlnnd Hills—DIamnd 85761." The "Mrs. Caryl Warner" first listed is the divorced wife of Caryl Warner, an attorney; plaintiff, the other Mrs. Caryl Warner listed as having the same address and telephone number as Mr. Warner, is his present wife. The maiden name of the first Mrs. Warner was Jeanne Paula deKoltz, and her final decree of divorce from Mr. Warner was entered September 24, 1950. Plaintiff, Barbara Ruth, married Mr. Warner September 28, 1950. In the November, 1949 issue of the telephone directory Jeanne was listed as "Warner, Jeanne re 1600 Westerley Ter NORMandy 22011" and also as "Warner, Caryl Mrs." with the same address and telephone number. These listings were continued in several editions and in the June, 1952 edition the listings appeared as first herein set forth. Mr. Warner and the present Mrs. Warner from time to time have objected to the listing of Jeanne Warner as "Mrs. Caryl Warner," but the defendant company has refused and still refuses to delete or change the listing.

In five separate causes of action plaintiff seeks damages from the defendant.

[1] It is alleged in the first cause of action that Jeanne Warner intentionally

maintains the several listings for the purpose of hurting plaintiff and to publicly boast wifehood to Caryl Warner for the purpose of establishing a common reputation in the community that she and not plaintiff is the wife of Caryl Warner; that the company is knowingly aiding and abetting her in said purposes; that by reason thereof plaintiff has suffered emotional distress, humiliation, fear, vexation, annoyance, scorn and ridicule as to her marital status, rendering her sick, with recurrent asthma attacks, to her damage in the sum of \$10,000. The second cause of action pleads ownership of the title "Mrs. Caryl Warner" and that the aforesaid actions have resulted in injuring and diminishing the prestige and dignity of the title. The third cause of action alleges that plaintiff's name has acquired a secondary meaning by reason of the professional and social standing of Caryl Warner, the prestige and dignity of which are being depreciated. The fourth cause of action pleads an invasion of privacy in that the actions aforesaid depict plaintiff as a party to a bigamous marriage. The fifth cause of action alleges that the defendant company knew, or in the exercise of ordinary care would have known, that its action would subject plaintiff to the harm which she, allegedly, has suffered. Exemplary damages also are sought. Without elaborating upon the allegations of the complaint it may be said that the facts alleged are sufficient to entitle plaintiff to relief consisting of the prevention of the use by Jeanne Warner of the name "Mrs. Caryl Warner," in defendant's directory or otherwise, should it be judicially established that plaintiff is the sole owner of the name in question, and that its use by Jeanne Warner is causing plaintiff detriment and damage as alleged.

The demurrer of defendant to plaintiff's third amended and supplemental complaint was sustained without leave to amend and plaintiff appeals from the ensuing judgment.

[2,3] One ground of defendant's demurrer was that there was a defect of parties defendant in that plaintiff had failed to join as a defendant an indispensable party, viz., Jeanne Paula deKoltz Warner. The

learned trial judge who sustained the demurrer to the amended and supplemental complaint pointed out that that complaint was deficient in failing to show that Jeanne was the divorced wife of Caryl (an omission which was corrected in the second and third amended complaints), and in his written ruling said: "The court is also of the view that the demurrer upon the ground of a defect of parties defendant is well taken. The defendant is a public service corporation bound under the law to furnish its services to the public without discrimination, with the correlative right in its patrons to be listed in the directory of its subscribers published by it. Under these circumstances it appears clear that the rights of the so-called stranger would necessarily be affected or involved by this proceeding. Moreover, if the present proceeding should be maintained without her presence as a party, and a judgment rendered therein in favor of plaintiff, it is conceivable that the defendant might be subjected to a suit by the stranger if, in compliance with the judgment rendered herein, it refused to list her name as Mrs. Caryl Warner in future directories published by it. Hence, she is a necessary if not indispensable party. Indeed, if plaintiff sincerely desires to contest the right of the stranger to make use of the name or title of Mrs. Caryl Warner, it would seem that she would insist upon making her a party to this proceeding, for, if plaintiff is damaged by the stranger making use of said name, the mere fact that she might be barred from listing in a telephone directory thereunder would not prevent her from continuing to use the name and being known thereby." We agree that there was a defect of parties defendant. One whose rights will inevitably be affected by the judgment is an indispensable party.

[4] Section 389, Code of Civil Procedure, provides, in part: "[W]hen a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings," etc. This requirement is mandatory. *Ambassador Petroleum Co. v. Superior Court*,

208 Cal. 667, 284 P. 445. It goes to the jurisdiction of the court. *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 235, 73 P.2d 1163; *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879; *Child v. State Personnel Board*, 97 Cal. App.2d 467, 218 P.2d 52.

As between plaintiff and the telephone company the question is whether plaintiff's rights are being infringed by the listing of which she complains, but this is merely incidental to the basic controversy between plaintiff and Jeanne Warner. Plaintiff cannot prevail unless she establishes that she has the sole right to the use of the name Mrs. Caryl Warner. If she should establish that right, and recover damages, the company would be obliged, for its own protection, to discontinue the objectionable listing. Upon the other hand, if Jeanne Warner, as a divorced wife, has the right to continue the use of her former husband's name, she has a right to have herself listed in defendant's telephone directory under that name. While the purpose of the present action is to secure a judgment against the telephone company for damages, such a judgment would have the effect of causing Jeanne's present listing to be discontinued. Her rights would necessarily be affected by any judgment that might be rendered in favor of plaintiff. Her use of the name cannot be restricted in any substantial manner without her having had her day in court.

Furthermore, as pointed out by the trial court, if, because of a judgment for damages against it, the company should discontinue Jeanne's listing it might have to defend itself in an action brought by her, in which Barbara Ruth might not be named as a defendant. The possibility of such further litigation was a persuasive reason for requiring Jeanne to be brought in as a defendant in the present action.

Irrespective of the rights of Jeanne that might be affected in the present action, the company has a right to be protected against unnecessary litigation to which it might be subjected. And its claim has added merit because of its neutral position and lack of interest in the contest over the name in question. It was within the discretion of

the trial court to insist that Jeanne be made a defendant in order that the duty of the company with respect to the listing of the name be finally settled as between the company and the two claimants. *Bank of California v. Superior Court*, supra, 16 Cal.2d 516, 106 P.2d 879; 39 Am.Jur., pp. 955, 956; *Syverson v. Butler*, 3 Cal.App. 345, 85 P. 164. In the absence of a showing of an abuse of discretion the order should not be disturbed.

[5]: The courts are not under any duty to try the merits of a controversy piecemeal at the instance of one who is unwilling to seek a complete and final determination. Upon the contrary, they have a duty to broaden the scope of the case in such manner as to avoid a multiplicity of suits and to protect the rights of all persons whose interests might be adversely affected by the judgment.

The company urges defenses which, if valid, would defeat any recovery by plaintiff, even if it should be determined that she has the sole right to the use of the name, but this fact furnished no reason for proceeding with the action after it had been determined that Jeanne Warner was a necessary or an indispensable party. Plaintiff's refusal to name Jeanne Warner as a party defendant deprived the court of jurisdiction to proceed further.

When a court has determined that it is without jurisdiction, further proceedings in the action are idle acts. Although the defendant challenges the sufficiency of the complaint in other respects, it would serve no purpose to discuss the arguments addressed to the other grounds of demurrer.

Although the complaint was amended twice after the court made its original ruling, plaintiff persisted in her refusal to name Jeanne as a defendant. The judgment of dismissal was proper. *Loock v. Pioneer Title Ins. Co.*, 4 Cal.App.2d 245, 40 P.2d 526.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

Hearing denied; CARTER, J., dissenting.

121 Cal.App.2d 362

DARRACH

v.

TRUSTEES OF SAN FRANCISCO COUNTY MEDICAL ASS'N et al.

Civ. 15530.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1953.

Action for personal injuries sustained in fall down stairway at blood bank building at which plaintiff was volunteer worker. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., granted defendants' motion for nonsuit and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence was insufficient to establish that stairway was in unsafe condition and that plaintiff fell because of that condition.

Judgment affirmed.

1. Negligence ⇨48

The primary requisite of liability of a possessor of land for harm caused thereon to business invitees is the existence of a condition which he should realize as involving an unreasonable risk to them.

2. Negligence ⇨121(1)

In action by invitee against owner of blood bank building for injuries sustained in fall down stairway, no inference of negligence would arise merely from fact of absence of handrails at steps, in absence of proof that steps were steep, slippery, worn or littered or that they presented any other defect or quality which would cause them to be dangerous for normal visitor who walked them without gripping handrail.

3. Negligence ⇨121(1)

In action by invitee against owner of blood bank building for injuries sustained in fall down stairway, no inference would arise that steps were worn and slippery from fact that they consisted of marble and that house was forty years old, in absence of evidence as to kind or hardness of marble, the degree of use by visitors, or possible repairs made to steps in course of years.

4. Negligence ⇨121(2)

No inference of negligence arises from mere proof of fall upon stairway.

5. Negligence ⇨121(2)

While under some circumstances negligence may be inferred from existence of a dangerous condition, burden rests upon plaintiff to show existence of a dangerous condition and that defendant knew or should have known of it.

6. Negligence ⇨136(22)

In action by invitee against owner of blood bank building for injuries sustained in fall down stairway, where there was evidence that there was no handrail, and it was alleged that balustrade could not be touched easily because of presence of newel, in absence of evidence that any danger was involved in going down steps without support, there was no evidence of the existence of a dangerous condition substantial enough to go to jury.

Brobeck, Phleger & Harrison, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff, a 78 year old lady, brought a negligence action for serious injuries suffered in a fall on the outside steps of the building at 2180 Washington Street in San Francisco, owned by the San Francisco County Medical Association and occupied by its Irwin Memorial Blood Bank, for which plaintiff was a volunteer worker. The cause was tried before a jury. At the close of plaintiff's case a motion for nonsuit was made on the grounds that no evidence had been introduced tending to prove negligence of defendants or that said negligence was the proximate cause of the injury, and that the evidence showed as a matter of law contributory negligence of, and acceptance of the risk of the use of the premises by plaintiff. Plaintiff appeals from the judgment entered on the granting of said motion.

It is not disputed that plaintiff was as to defendants in the position of a business

invitee. Plaintiff's evidence consisted solely of her testimony, a photograph of the steps on which the accident took place and the testimony of one other witness, transcribed only in part, which contains no more than that she testified that the steps were made of grey-white marble and that they were quite wide, at least eight feet where plaintiff fell.

Plaintiff's testimony showed that the accident happened on October 18, 1950, at 5 o'clock P.M. when she left after having worked at the Blood Bank that afternoon. She had done volunteer work there one afternoon a week since the latter part of August of that year. Up to the time of the accident she had done so seven or eight times. She always left the building in the same way.

Her testimony together with the photograph in evidence shows that when leaving she first descended three or four steps to a large outer platform. On this she turned to the right to a flight of nine steps ending in a landing from which six further steps led to the lowest level. The first flight had broad stone balustrades at both sides. She was accustomed to go down these steps at the right side supporting herself with her hand on the right-hand balustrade until she came to the landing. This balustrade had newels (end posts) somewhat wider and higher than the balustrade itself, both at the upper platform and at the landing. The lower steps which she had to go down had a balustrade only at her left-hand side. She was therefore accustomed to cross over on the landing and put her left hand on that balustrade to support her in going down these last steps. The broad balustrade had nothing of which she could take hold.

On the day of the accident she started to follow the same proceedings. She first testified that in that manner she came down to the lower landing helping herself with her hand on the balustrade and that she fell when she was on the landing at a spot which she marked on the photograph. Thereafter she changed her testimony to the effect that the place marked was where she landed at the end of her fall. She marked the base of the right-

hand newel at the upper platform (at the top of the upper flight of steps) as the place from which she fell, and testified: "It began up there, right here, when I reached out to try to touch that balustrade. * * *" She marked as the place for which she reached the beginning of the balustrade itself, not the newel next to which she was standing. She fell when she was reaching for that location. She could not reach it standing erect but had to bend over when she reached for the balustrade. "It was too low." Under cross-examination she further testified that she had known the building since the year 1911 when she visited it as the private dwelling of the Irwin family. The stairway looked exactly the same as it did then except that then it was, of course, much newer. On every prior occasion she had managed to get down to the sidewalk in safety. This time she fell when she reached to put her hand on the top of the balustrade. She did not think she made contact with it. "I just put my hand forward and then I fell." She did not remember where she was looking at the time. She was not conscious of missing a step or slipping. "No, I haven't any memory of that. I don't know how it happened. Q. You don't really know how it happened? A. No; the only thing I am conscious of is that reaching and the fall. Q. And then you simply fell? A. Yes, Yes."

Appellant's main contention is that the above contains evidence of negligence of defendants and of causation of the damage by said negligence, substantial enough to go to the jury; that it shows negligence of defendants in not providing a functional handrail for the steps of the former private mansion now that it is used for a public purpose, and in leaving the old balustrade as an inadequate substitute for a handrail; that the proximate causation can be inferred from the fact that plaintiff fell when she bent in reaching for the balustrade because "it was too low." We do not agree.

[1,2] The primary requisite of liability of a possessor of land for harm caused thereon to business invitees is the existence of a condition which he should realize as involving an unreasonable risk to them. 2

Restatement, Torts, § 343. The absence of a handrail at steps used by the public does not in itself indicate an unreasonable risk. Appellant does not cite any rule of law, and we do not know of any, which requires the outside steps of a building in public use always to be provided with a handrail. To predicate negligence on the absence of a handrail the plaintiff has to show that the specific steps on which an accident took place constituted an unreasonable risk if not provided with a handrail. This appellant completely failed to do. There is no evidence whatever that the steps were steep, or slippery or worn or littered, or that they presented any other defect or quality which caused them to be dangerous for a normal visitor who walked them without gripping a handrail or using other hand support. If such qualities existed it was for plaintiff and her witness, who described the stairs, to bring them out in their testimony. They did not do so. To the contrary, appellant testified that she had managed the descent of the steps safely seven or eight times without complaining of any such dangerous condition. Neither does the photograph show anything of this kind. So far as can be seen on it the steps have wide treads and low risers and no visible signs of wear. There is nothing in the oral evidence to the contrary and no showing that the steps are not easily practicable.

[3] Appellant contends that the jury could infer that the steps were worn and slippery from the fact that they consisted of marble and that the house was forty years old as shown by the fact that plaintiff visited it in 1911. There was no evidence as to the kind or hardness of the marble, the degree of use by visitors, or the possible repairs made to the steps in the course of the years. Under these circumstances the jury could not be permitted to draw such an inference, certainly not where direct evidence of such conditions could easily have been produced if they had existed, and when plaintiff denied any knowledge of having slipped.

[4-6] "No inference of negligence arises from the mere proof of a fall upon the stairway. 'In order to impose liability on the owner it must be shown that a danger-

ous condition existed, and that the defendant knew or should have known of it. While under some circumstances, negligence may be inferred from the existence of a dangerous condition, the burden rests upon the plaintiff to show the existence of a dangerous condition, and that the defendant knew or should have known of it.'"

Harpke v. Lankershim Estates, 103 Cal. App.2d 143, 145, 229 P.2d 103, 104. Here there is over and above the fact of the mere fall, no other proof of a dangerous condition than that plaintiff fell in an unexplained manner, without slipping or missing a step, when standing on the upper platform next to the right-hand newel and bending somewhat in reaching for the balustrade itself, it being too low to touch it standing erect. If here had been evidence that the steps were dangerous for a person descending them without holding a handrail or leaning on a balustrade, the question whether a dangerous condition was shown by the fact that the balustrade could not be touched easily from the upper platform because of the presence of the newel there, might possibly have been for the jury. But as there was no evidence whatever that any danger was involved in going down one or two steps without support, where plaintiff could without bending have touched the balustrade on which she was accustomed to support herself, and even no evidence that any support at all was necessary, there was nothing from which the jury could conclude that a dangerous condition existed. The absence of all proof on this essential point alone justifies the nonsuit.

In the cases on which appellant mainly relies there was evidence of special circumstances which indicated that the use of the stairs without hand support would be dangerous—in *Kidd v. Thomas Gilcrease Foundation*, 5 Cir., 194 F.2d 129, that the stairway was dark and the treads narrow, in *Rau v. Redwood City Woman's Club*, 111 Cal.App.2d 546, 245 P.2d 12, that the stairs were worn and slippery, in *Gerard v. Wilson Holding Co.*, 79 Cal.App.2d 553, 180 P.2d 380, that a guardrail on the platform did not continue along the steps. Cases in which a nonsuit of a plaintiff who

fell on stairs was upheld, although there was somewhat more indication of a dangerous condition than in the case before us, are *Harpke v. Lankershim Estates*, supra, 103 Cal.App.2d 143, 229 P.2d 103, and *Marples v. Manspeaker*, 88 Cal.App. 682, 263 P. 1022.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



21 Cal.App.2d 473

MATHES

v.

CITY OF LONG BEACH et al.

Civ. 19714.

District Court of Appeal, Second District,
Division 1, California.

Nov. 24, 1953.

Rehearing Denied Dec. 8, 1953.

Action by contractor to determine whether street improvement contract with city was valid. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for contractor, holding that contract was invalid, and city appealed. The District Court of Appeal, Drapeau, J., held that clause which provided for termination, suspension or renegotiation of contract in case improvement work was stopped pursuant to federal regulations did not impose illegal burden on property owners in assessment district.

Judgment reversed.

I. Municipal Corporations ☞408(1), 455

Although statutory procedure for street improvement by assessment must be substantially complied with, absolute literal compliance is not required and proceedings should be construed liberally, and where property owners have had due notice and an opportunity to be heard, such substantial compliance is sufficient. Streets and Highways Code, §§ 5100 et seq., 5271.

2. Municipal Corporations ☞339(1)

Clause in street improvement contract which made provision for termination or suspension of work and renegotiation of contract in case federal government stopped work, did not impose on property owners in assessment district a burden not authorized by law. Streets and Highways Code, § 5100 et seq.; Government Code, §§ 4410-4412.

3. Appeal and Error ☞1176(4)

Where contract for street improvement between city and contractor was held to be valid by District Court of Appeal, the proper disposition of case, in view of legislative mandate for speedy termination of litigation, was to order Superior Court to enter judgment. Streets and Highways Code, § 5270.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Roscoe R. Hess, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff contractor was the successful bidder for the construction of an ornamental lighting system on Santa Fe Avenue in the City of Long Beach. The work was planned by the city, and plaintiff bid for it, in accordance with the provisions of the Improvement Act of 1911, Sec. 5100 et seq., Streets and Highways Code.

The contract was executed by the contractor and by the city. The contractor furnished to the city the bonds and contracts of indemnity called for by the contract. Prior to the time fixed for commencement of his work, the contractor brought this action to determine whether the contract was or was not valid. This action is authorized by section 5266 of said Code.

In his complaint the contractor questioned the validity of the contract and of the proceedings leading up to it, in nineteen particulars.

After the case was submitted for decision, the trial judge prepared a memoran-

dum opinion evidencing a prodigious amount of work and research. Subject, of course, to its legal limitations on review, *Strudthoff v. Yates*, 28 Cal.2d 602, 170 P.2d 873; *Southern California Jockey Club v. California etc. Racing Board*, 36 Cal.2d 167, 223 P.2d 1, the opinion has been of great help to this court.

In his memorandum opinion the trial judge directed findings and judgment for the city on all of the issues presented. After hearing on objections to the proposed findings, the judge reiterated his original conclusions, with one exception.

Inasmuch as the decision in this case must turn upon that exception, the finding is as follows:

"This Court further finds that none of the matters alleged or questions of law raised by Paragraph XV of the said complaint in any wise affect the validity of the proceedings described in Paragraphs IV to XIV, inclusive, of the complaint on file herein, and the Court therefore finds that all of the allegations of Paragraph XV as to matters of fact therein alleged are untrue, except the Court finds that it is true that there is no authority under the Improvement Act of 1911, or otherwise, for the inclusion in the contract described in Paragraph XIV of the complaint, a true copy of which is annexed to the answer of the defendants, City of Long Beach and James Kincaid and marked 'Exhibit A' of the covenants and conditions contained in said contract and which are set forth and described in sub-paragraph 8 of said Paragraph XV of said complaint, and which constitutes Paragraph XVII of said contract, and the Court further finds that the inclusion of said paragraph as a part of said contract imposed upon the contractor a burden unauthorized by statute and imposed upon the owners of property within the assessment district affected by the proceedings described in the ordinance, a burden not authorized by law, in that the imposition of such burden by the terms of said Paragraph XVII of said contract, the property in said assessment district might be subjected to charges and assessments without receiving any benefit from the work

done and without the completion of the work described in the contract. The Court further finds that none of the owners of property within the assessment district affected by the proceedings described in the complaint on file herein were put upon notice that said Paragraph XVII would be included in said contract, and that no property owners ever had an opportunity to object to the inclusion of said provision in said contract."

From the judgment that the contract was void the city appeals.

Inasmuch as this decision must also turn upon the clause, because of which the whole contract was adjudged and declared to be void, it also is quoted verbatim.

"17. *Coordination With Governmental Orders.* The parties understand that, pursuant to Federal regulations, the improvement contemplated hereunder may be stopped at any time. Contractor agrees that in the event such work is terminated, pursuant to any such order, the Contractor will accept as the full and complete compensation under the contract such an amount of money as will equal the total proportion of the items of the work theretofore completed by the Contractor, at the reasonable value therefor, together with the estimated fractional parts of finished work theretofore performed on uncompleted items at the reasonable value thereof. In the event the work is so terminated, or halted, the Director of Public Service, after consultation with the Contractor, shall estimate such fractional parts of finished work on uncompleted items and the reasonable value thereof based upon the unit prices herein, and the decision of the Director of Public Service shall be final and conclusive thereon.

"In the event the Contractor is prevented, in any manner, from a strict compliance with the plans and specifications herein referred to, due directly or indirectly to any Federal law, valid rule or regulations, as an incident to any national emergency, in addition to all other rights and remedies reserved to the parties, the City may, by resolution of the City Council, suspend performance under the contract until the cause

of disability is removed, renegotiate the contract by extending the time for performance, or by making changes in the character of the work or materials required, or, without liability upon either party, terminate the contract."

It is conceded by all that this is a case of first impression. Neither the industry of counsel, nor of this court, nor of the superior court, has brought to light any case reasonably in point.

[1] Certain basic rules may, however, be formulated from the statute and case law. Street improvement by assessment proceedings is a well known and well recognized function of municipalities. The Act of 1911 sets up a procedure whereby the cost of the improvement may be legally assessed against the property benefited by it. These proceedings must substantially comply with every step specified in, and required by the law. For the final result is to charge the cost of the improvement to every property owner in the district benefited, and to fix a lien upon the property within the district.

However, absolute literal compliance with the law is not required. *Gustine City v. Silveira*, 67 Cal.App.2d 403, 154 P.2d 474. When property owners have had due notice and an opportunity to be heard by the legislative body of the municipality, substantial compliance with the law is sufficient, liberal construction should be given to the proceedings, and all doubts resolved in favor of their validity. Section 5271, Streets and Highways Code; *Hannon v. Madden*, 214 Cal. 251, 5 P.2d 4; *Rice v. Hanrahan Co.*, 210 Cal. 625, 293 P. 57; *Woodill v. City of Glendale*, 208 Cal. 564, 282 P. 797.

The clause here under consideration, defining the rights of the parties if the federal government should stop the work, would seem to be similar to clauses in contracts excusing performance because of natural calamities. These covenants, sometimes loosely called acts of God, are familiar in the law of contracts.

"'Force majeure,' or the Latin expression '*vis major*,' is not necessarily limited to the equivalent of an act of God. The test is

whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care." *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 238, 174 P.2d 441, 447.

[2] It was entirely proper for the governing body of the City of Long Beach and for the contractor to provide what would be done in the event the federal government should stop the work. Instead of impinging upon, this clause recognized and protected substantial rights of the city, the property owners affected, and the contractor. Therefore, this court has come to the conclusion that it was error to hold that this clause, measured by the provisions of the Improvement Act of 1911, imposed upon the owners within the assessment district a burden not authorized by law.

This conclusion is supported by sections 4410, 4411 and 4412 of the Government Code, which recognize the possibility of a stoppage of public work by order or proclamation of the President of the United States, and provide that in such circumstances the contracting parties for public works may agree for the payment of compensation for work done before it is stopped by an overriding power.

This then brings us to the other eighteen asserted defects in the proceedings leading up to the contract. Each of them was given careful consideration by the trial court. The findings were that none of them affected the validity of the contract.

It would prolong this opinion to unreasonable length to state and discuss each objection separately. Suffice it to say that, tried by the foregoing rules, this court agrees with the findings of the trial court as to all the objections.

[3] Counsel for the contractor suggests that reversing the judgment without remanding the case to the Superior Court for further trial would inflict extreme hardship upon the contractor. This because of increases in wages and costs of material since the contract was entered into. While such increases have unquestionably oc-

curred, this Court can see no way by which equitable relief could be extended to the contractor. In view of the legislative mandate for speedy termination of this type of litigation nothing can be gained for anyone by sending the case back for trial upon any of the issues. Section 5270, Streets and Highways Code.

The judgment is reversed, with directions to the superior court to enter judgment for the City of Long Beach.

WHITE, P. J., and DORAN, J., concur.



121 Cal.App.2d 370

SAWYER et al. v. PALMER.

Civ. 15654.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1953.

Personal injury action wherein the Superior Court, County of Santa Clara, Leonard R. Avilla, J., granted defendant's motion to dismiss, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that under circumstances trial judge had not abused his discretion in dismissing action for plaintiffs' failure to bring it to trial within three years after filing.

Affirmed.

1. Dismissal and Nonsuit $\S$ 60(1)

Dismissal for lack of prosecution lies within discretion of trial court. Code Civ. Proc. $\S$ 583.

2. Dismissal and Nonsuit $\S$ 60(1)

Under circumstances trial judge did not abuse his discretion in dismissing personal injury action for plaintiffs' failure to bring it to trial within three years after filing. Code Civ.Proc. $\S$ 583.

Earl C. Berger, San Francisco, for appellants.

Maurice L. Martin, San Jose, for respondent.

NOURSE, Presiding Justice.

This appeal involves the propriety of the order of the trial court dismissing an action for plaintiffs' failure to bring it to trial within two years after the action was filed.

A complaint for damages for personal injuries was filed July 12, 1950. No service of process was made. On September 28, 1950, respondent, having learned of the pendency of the action, filed his answer and a cross-complaint. On the following day appellants filed a memorandum to set the cause for jury trial. The cause was duly set for trial to a jury for March 24, 1952. No appearance was made on that day and the matter was stricken from the calendar. The record does not disclose that appellants deposited the jury fees as required by the rules of court.

On the 14th of August, 1952, the respondent filed his motion to dismiss under section 583, Code of Civil Procedure. The record does not disclose that the appellants filed any affidavit or made any other opposition to this motion.

[1,2] The appeal does not involve any legal difficulties. Action on such a motion lies in the discretion of the trial court. Sec. 583, Code of Civil Procedure. The long delay in bringing the cause to trial is admitted and no excuse for that delay is apparent from the record. The matter is controlled by two recent decisions—Smith v. Wiget, 75 Cal.App.2d 591, 594, 171 P.2d 563, 564, and Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343, 345. In the latter case this court relied on the rule stated in 9 Cal.Jur. p. 529, which reads: "No fixed or certain rule can be laid down as to the circumstances which will justify a court in exercising its discretion in dismissing an action on the ground of want of prosecution, for the obvious reason that no two cases present precisely the same facts. The exercise of this power must in

the very nature of things be left to the discretion of the nisi prius court, subject only to a reversal for a patent abuse of such discretion."

Order affirmed.

GOODELL and DOOLING, JJ., concur.



121 Cal.App.2d 449

BOOMER et al. v. ABBETT et al.
Civ. 15408.

District Court of Appeal, First District,
Division 1, California.

Nov. 24, 1953.

Rehearing Denied Dec. 24, 1953.

Hearing Denied Jan. 20, 1954.

Action by subcontractors against contractor for alleged breach of subcontract to perform excavation for and installation of transmission line towers and other work called for by contractor's prime contract with United States Bureau of Reclamation to construct a transmission line. The Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., granted directed verdict for contractor and, upon subcontractors' motion for new trial, ordered that such motion would be denied upon condition that contractor stipulated to pay subcontractors \$3,152.71, and the subcontractors appealed. The District Court of Appeal, Peters, P. J., held that question whether deletion of sixteen towers covering one mile in middle of transmission line could be made by Bureau without liability by Bureau and contractor to subcontractors except for an equitable adjustment was for jury.

Judgment reversed.

1. Appeal and Error ⇨866(3)

Upon appeal from judgment for defendant based on directed verdict, problem presented was whether there were any factual issues that should have been presented to jury, that is, whether there was any evidence, or reasonable inferences

therefrom, that would have supported judgment for plaintiffs at least in amount in excess of that allowed plaintiffs on motion for new trial as condition upon which plaintiffs' motion for new trial would be denied.

2. Contracts ⇨284(1)

Where subcontract provided that terms of contractor's prime contract with Federal Bureau of Reclamation were, as between subcontractor and contractor, binding upon both, contractor was bound, under prime contract for construction of transmission line, to transmit and urge subcontractor's claims before Bureau and subcontractor was bound to present his claims to contractor in fashion provided in prime contract for presentation of claims by contractor.

3. United States ⇨73(14)

Under federal contract for construction of transmission line, protest clause, which provided that unless protest was made to ruling of contracting officer, such ruling should be final and conclusive, did not make such ruling final if a protest was made.

4. Contracts ⇨323(3)

In action by subcontractor against contractor for alleged breach of subcontract under federal contract for construction of transmission line, questions whether federal change order provided for or contemplated excavation of type already committed to subcontractors under the common excavation clause of the contract and whether change of method of payment for common excavation work on part of project constituted breach of contract by government and, in turn, by contractor were for jury.

5. Contracts ⇨321(1)

Where portion of change order raising height of towers and changing amount of excavation called for was valid under federal contract for construction of transmission line but that portion of order which refused to pay for such new work as provided in such contract was invalid and could have been found to result in breach of subcontract, subcontractors would be entitled to attempt to secure damages for

preparatory and other expenses incurred in trying to comply with provisions of such order as to work other than excavation and yet to renounce order as invalid in so far as excavation was concerned.

6. Contracts ⇨321(1)

Where subcontractors did not complete excavation under subcontract based upon federal contract for construction of transmission line after change order had made changes in amount of excavation and had denied payment for such excavation as originally provided for in contract, fact that they had not completed such excavation would not prevent subcontractors from recovering damages for breach from contractor since damages would not constitute payment.

7. United States ⇨73(9)

Under federal contract for construction of transmission line, contracting officer's authority under the "disputes" clause, which provided that all disputes of fact arising under contract should be decided by contracting officer subject to certain administrative appeal, is limited to disputes arising under contract and does not extend to disputes over breach of the contract.

8. Contracts ⇨323(3)

In action by subcontractors against contractor for alleged breach of subcontract under federal contract which provided for construction of transmission line and which contained a "disputes" clause, question whether contract was breached by federal change order, which made change in amount of excavation called for but which refused payment for such work as provided for in original contract, was for jury.

9. United States ⇨72

If a contract imposes duty on government to complete construction of structure involved in a contract, a "changes" clause does not authorize deletion of an integral part of the work, but government may make only changes incidental to primary object of contract.

10. Contracts ⇨323(3)

In action by subcontractors against contractor for alleged breach of subcontract under federal contract for construction of transmission line, question whether deletion of 16 towers covering one mile in middle of transmission line could be made by government without liability by government and contractor to subcontractors except for an equitable adjustment was for jury.

Erskine, Erskine & Tulley, San Francisco, Blewett, Blewett, Macey & Garrettson, Stockton, for appellants.

Melvin, Faulkner, Sheehan & Wiseman, San Francisco, for respondents.

PETERS, Presiding Justice.

Defendant, George W. Abbett, entered into a contract with the U. S. Bureau of Reclamation to construct a transmission line in northern California. Plaintiffs H. H. Boomer, Jr. and S. C. Giles, a copartnership, entered into a subcontract with defendant to perform the excavation for and installation of the transmission line towers, and certain other work, called for by the prime contract. The Bureau, purporting to act under the terms of the prime contract, issued a change order that affected the method and amount of excavation on one mile out of the total of 25 miles of the transmission project. This change order asked for new bids on some of the excavation work in this limited area. The plaintiffs promptly and vigorously objected, and contended that the prime contract and their subcontract covered the additional work called for by the change order, and refused to bid on the excavation work called for by the change order. The work on this portion of the job was awarded to another. Later, another change order and a stop order were issued by the government stopping all work in the disputed area and deleting this work from the prime contract. Plaintiffs have been fully paid for all past work. They incurred substantial preparatory expenses and also suffered a major loss of claimed profits. This action was then

brought against defendant for breach of contract, it being averred that defendant had wrongfully repudiated the subcontract, and hindered performance thereunder. Damages were asked for preparation expenses in the form of debts and judgment liabilities owed to plaintiffs' subcontractors for material and equipment costs, for a portion of the cost of doing business, and for loss of profits. The case was tried before a jury. At the conclusion of the evidence the trial court granted a directed verdict in favor of defendant. On plaintiffs' motion for a new trial it was ordered that such motion would be denied on condition defendant stipulated to pay to plaintiffs the sum of \$3,152.71. A check in that amount was delivered by defendant to plaintiffs, subject to a stipulation that acceptance of the check would not adversely affect plaintiffs' right of appeal. The new trial was then denied, and this appeal followed.

[1] This being an appeal from a judgment based on a directed verdict, the problem presented is whether there were any factual issues that should have been presented to the jury, that is, whether there was any evidence, or any reasonable inferences therefrom, that would have supported a judgment in favor of plaintiffs, at least in an amount in excess of that allowed on the motion for a new trial. If so, it was error to have taken the case from the jury. To determine this question some of the evidence in the lengthy reporter's transcript must be reviewed. Inasmuch as we have concluded that a reversal is required, it should be stated that in the summary of evidence that follows all conflicts have been resolved, as required by law, in favor of appellants. Therefore, when it is stated in that summary that there was evidence as to certain facts all that is meant is that there is evidence in the record, contradicted or uncontradicted, as to those facts. Where the evidence is conflicting, on the new trial, the jury may, of course, find that some of the facts contained in this statement of facts are not true.

The job involved was for the construction of a transmission line of about 25 miles in length in northern California, that

required the construction of an estimated 225 steel towers. Abbett, the individual defendant, after competitive bidding, contracted, under date of October 24, 1947, with the Bureau of Reclamation to do the construction work on the project for \$587,383. On December 18, 1947, the plaintiffs, a copartnership, entered into a subcontract with defendant, whereby they contracted to furnish all material and perform all work in reference to the excavation, concrete, reinforcing, and some welding upon the transmission towers. The plaintiffs contracted for this work, with one exception, at a level allowing the defendant a 10 per cent profit upon his bid. The contract estimated that 225 steel towers were to be constructed. Since the prime contract did not contain final specifications, plaintiffs could only estimate their total bid, which they did at \$196,747.50. This contract, so far as excavation work was concerned, called for payment to plaintiffs at a price fixed at so much a unit of excavation in accordance with lines to be staked out by Bureau employees at each tower site.

Certain provisions of the prime contract and of the subcontract are relevant to the problems here involved. The prime contract is a regular form contract prepared by the government for use on such projects. It contained a complete schedule of the unit and lump sum payments to be made by the Bureau to the prime contractor. Article 3 provided that the contracting officer of the Bureau "may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof." Changes in amounts due as a result of such changes were to be settled by an "equitable adjustment." Changes involving estimated increases or decreases of more than \$500 could not be ordered without the approval in writing of the head of the department. Claims for adjustment under this provision had to be asserted within 10 days after the change was ordered, provided that the contracting officer, with the approval of the head of the department could, if he determined the facts warranted it, consider any claim up to the date of

final settlement of the contract. Disputes over such adjustments were to be settled in accordance with the "disputes" clause of the contract contained in Article 15.

Article 4 provided that if either party should discover "during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings * * *, or unknown conditions of an unusual nature differing materially from those ordinarily encountered" the contracting officer should be notified, and if he found the conditions different from those specified, the contract should, with department head approval "be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions." This provision apparently contemplated that the contractor should perform the increased work called for, and that new bidders should not be solicited.

Article 15 is the "Disputes" clause. It provided that except as otherwise provided "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department * * *, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The specifications are attached to the prime contract and are made an integral part of it. Paragraph 13 of the specifications provided, among other things, that if the contractor "considers any record or ruling of the contracting officer * * * to be unfair" he shall ask for written instructions, continue with the work in accordance with the ruling, and within 20 days after receiving such instructions he shall file a written protest with the contracting officer. Unless such protest is made, the ruling of the contracting officer "shall be final and conclusive." Paragraph 33 of the specifications classifies the various types of excavation work called for and covered by the contract. Subdivision (a) defines "Rock excavation." Subdivision (b) defines "Common excavation" as "Ex-

cavation of all material other than rock as defined above, including, but not restricted to earth, gravel, and such material as hard pan, cemented gravel, and soft or disintegrated rock; also all boulders or detached pieces of solid rock not exceeding one-half cubic yard in volume * * *." Paragraph 34 of the specifications provided, in part, that "All excavation for tower footings shall be made accurately to the locations, grades, and neat lines of excavation shown on the drawings, insofar as practicable * * *." Subdivision (c) of this paragraph provided that payment for excavation would be made at applicable unit prices per cubic yard as set forth in the bids. Another portion of this subparagraph contained a "changes" clause particularly applicable to excavation. It provided that "During the progress of the work, it may be found necessary or desirable to vary the slopes or the dimensions of the excavations from those shown on the drawings, staked out, or otherwise established by the contracting officer, and the contractor shall be entitled to no additional allowances above the unit price per cubic yard bid in the schedule for excavation by reason of such changes: *Provided*, That if such changes are made after the excavation has been made to the slopes and dimensions shown, staked out, or otherwise established, and if it is determined by the contracting officer that unit costs will be increased or decreased as a result of such changes, the excavation to the changed slopes or dimensions will be ordered, in writing, as extra work by the contracting officer and payment will be made in accordance with article 5 of the contract and paragraph 9 of these specifications." Paragraph 57 of the specifications is also pertinent. It provides, in part: "The following tables indicate the estimated number of towers that will be required in the transmission lines covered under these specifications. These quantities are approximate only and the Government does not guarantee the construction of all or any number of the towers listed."

The subcontract between plaintiffs and defendant, which is a standard printed form of subcontract used by subcontractors

on public work, refers to the prime contract, provides that appellants agreed to perform the portion of the work covered "in accordance with the General Conditions" and specifications of the prime contract, and that the "General Conditions, Drawings and Specifications" of the prime contract "hereby become a part of this Contract." Another clause provided that the subcontractor agrees to be bound to the prime contractor by the terms, conditions and specifications of the prime contract and "to assume * * * the obligations and responsibilities" of the prime contractor as set forth in his contract with the government. The subcontract also provided that the subcontractor agreed to make "all claims for extras * * * and for damages for delays or otherwise, to the Contractor" in the manner provided in the prime contract.

The plaintiffs started performance of their subcontract in December of 1947, being paid periodically by the unit according to pay lines fixing the boundaries and depth of each excavation at each tower site as set forth by Bureau employees. The subcontractor had estimated the total cost of the work covered at \$196,747.50, but, because more work was called for than originally contemplated, the appellants were in fact paid \$218,989.19 in accordance with the unit prices set forth in the subcontract. They testified, however, that no profit was made on the excavation work paid for—in fact, losses were incurred. Plaintiffs concede that they were paid for all completed work performed by them, and for all materials furnished in connection with the completed work.

Everything proceeded without difficulty until February of 1948. On February 3rd the defendant wrote to plaintiffs setting forth several complaints made by Bureau engineers, and stating that "the Bureau will require excavation of several hundred cubic yards of material now unclassified in our contract. This excavation is located in the Placer Mining Area. Please give us your quotation as soon as possible so that we can obtain authority to proceed." It appears from the

evidence that this "Placer Mining Area" had not been previously tested by any government borings. It turned out that this area was covered with dredger tailings, material that could be removed with power equipment. Plaintiffs promptly notified defendant that they refused to bid upon this project because they contended that this so-called new work was already included and covered by the prime contract and their subcontract. They contended that the removal of the dredger tailings was but another form of excavation necessary to be made to install the footings for the towers. The removal of these dredger tailings was much easier than the work covered by the balance of the contract, and plaintiffs therefore expected to make a big profit in this area, that would permit them to recoup losses suffered in other areas.

Under date of May 13, 1948, Bureau employees wrote to defendant notifying him that the heights of some 12 designated towers in this area were to be increased, that the required excavations would have to be deeper. The letter stated that the excavation of "overburden-dredger tailings" was not covered by the original contract and requested new unit prices for this work, and for certain other additional work. This letter apparently was written pursuant to change order No. 2 dated February 5, 1948, and addressed to defendant. By this change order the government, purporting to act under article 3 of its contract, ordered changes in the heights of 12 towers in the dredger area and in the nature and depth of the excavations required. The change order provided that for excavating "overburden-dredger tailings for footings" of the 12 towers defendant would be paid but \$.75 per cubic yard.

On May 14, 1948, defendant made a public request for new bids on the excavation work covered by the change order. Plaintiffs refused to bid, and this new work was awarded to one Draper at \$.60 per cubic yard. Between May and July of 1948 plaintiffs vigorously protested to defendant the Bureau's actions, asserting their right to undertake this newly-specified excavation work under their contract and at the

prices therein contained, but expressing a willingness to perform the other new work called for by the change order at the new rates. Defendant conveyed these objections to the Bureau officials, but did not file a formal protest. In July, 1948, plaintiffs were notified that the excavation work involved in the dispute had been awarded to others. Plaintiffs again protested by letter to defendant. Defendant, in two letters dated in July of 1948, ordered plaintiffs to perform the work in this area, other than the removal of the dredger tailings overburden, in accordance with the revised plans. Plaintiffs proceeded to try to comply by purchasing materials and letting subcontracts. However, on August 4, 1948, plaintiffs were ordered to stop all work called for by the revised drawings because the work might not be done, and on September 10, 1948, were definitely informed that this part of the work would not be performed. This was predicated upon change order No. 3 and a stop order stopping all work on 16 towers, 12 of which were in the dredger area and 4 were not.

The evidence of the Bureau engineers was to the effect that after the prime contract was executed they discovered that it would be dangerous to erect the 12 contemplated towers upon the foundation of the dredger tailings, so that deeper excavations removing the dredger tailings were required. There was much controversy between the parties and their witnesses as to the meaning of "overburden." Boomer testified that the term had no specialized significance in contracting terminology, but simply signified a strata of material that was on top of another strata. He conceded that the overburden of dredger tailings could be removed very cheaply by bulldozer and would not have to be removed by hand or truck-mounted tools, as much of the other work had to be done. Plaintiffs testified that, although most of the other excavation work had been done by hand tools or truck-mounted tools, some tailings existed in these other areas and had been removed by bulldozers with Bureau permission. "Excavation, common, hand, for footings" was provided for in the prime contract at \$9 per cubic yard, and

at \$8.10 per cubic yard in the subcontract, while as already pointed out, the change order fixed defendant's allowance for overburden at but 75 cents per cubic yard, and Draper agreed with defendant to perform the work for 60 cents. Thus, of course, plaintiffs expected to make a large profit in the dredger tailings area so as to recoup losses suffered elsewhere.

After the work on the 16 towers had been stopped plaintiffs submitted to defendant claims for damages for breach of the contract. They first submitted statements claiming over \$10,000 for out-of-pocket expenses incurred in reliance on the orders given by defendant to continue work in accordance with the revised plans except for the removal of the overburden, almost \$70,000 for damages suffered because of the cancellation of the contract, which damages were computed by ascertaining the loss of anticipated profits on the entire job. A later demand increased the claim for these losses by several thousand dollars.

The reliance damages were incurred in preparing for performance of the revised work called for by change order No. 2 other than excavation in the form of purchase orders for additional steel necessitated by raising the height of the towers, for new required reinforcing steel and steel dowelling, for losses on a subcontract for furnishing and driving piling, for expenses on certain necessary trips, and for expenses in hiring new equipment. Plaintiffs, after the dispute in reference to the overburden had arisen, had received from defendant two letters dated July 15 and 21, 1948. These letters notified plaintiffs to proceed with all the work called for in the specifications found in change order No. 2 except the removal of the overburden.

After the Bureau had eliminated the construction of the 16 towers, there was considerable correspondence between all the parties resulting in the Bureau finally making an award to defendant for plaintiffs of \$3,152.71, representing certain materials ordered by plaintiffs in connection with the preparatory work and then sold to the Bureau. The Bureau disallowed several

items, including the amount of a judgment a subcontractor had secured against plaintiffs by reason of the cancellation. This is the precise amount later allowed by the court to plaintiffs as a condition of denying the new trial. This sum was not paid to plaintiffs until the denial of the motion for a new trial.

At the trial plaintiffs, besides offering evidence as to loss of profits, showed substantial losses upon judgments obtained by subcontractors against them because the work on the towers in the disputed area was stopped. On this evidence the court denied a nonsuit, but later granted a directed verdict in favor of defendant. On the motion for a new trial the trial court did allow plaintiffs the \$3,152.71 that had been awarded them by the Bureau. The plaintiffs appealed.

Although the facts are quite complicated, the long record containing many facts not contained in the above summary, the primary issue presented on this appeal is whether there was any factual issue that ought to have been submitted to the jury. The basic arguments of respondent are that no factual issues were involved because, under the "protest" clause of the prime contract, appellants did not exhaust their administrative remedies granted to them by such clause, and, under the "disputes" clause, determinations of the contracting officer were made final. We do not agree with either of these contentions.

[2] In order to decide the issues presented, reference must be again made to some of the provisions of the contracts already summarized. We have no doubt at all, and in this connection agree with respondent, that the terms of the prime contract, including the conditions contained in the specifications, became, so far as applicable, part and parcel of the terms of the subcontract. The subcontract expressly provides that this shall be so. This being so, the provisions of the prime contract, as between appellants and respondent, are binding on the subcontractor and upon the original contractor. This means that respondent, as prime contractor, was legally bound to the subcontractor, among other

things, to transmit and urge the subcontractor's claims before the Bureau, and the subcontractor was bound to present his claims covered by the clause to the contractor in the fashion, so far as applicable, provided in the prime contract for presentation of claims by the contractor.

The prime contract authorized the contracting officer to settle "all disputes concerning questions of fact arising under this contract," and provided that on such questions his decision should be final and conclusive. The prime contract requires a protest to be made as to any "ruling of the contracting officer" deemed to be unfair. The question that is first presented is whether respondent and appellants complied with these protest provisions.

[3] There is ample evidence to show that appellants lodged appropriate and numerous protests with respondent in reference to the problems arising out of the prohibition against excavating for the 12 towers in the dredger tailings area. From the time the Bureau first announced its intention to reclassify the work in this area the appellants orally and by letter claimed the right to perform this work under their contract. Thus, as to this claim the jury could have found that this amounted to a compliance by appellants with the protest clause of the prime contract. There is also evidence that indicates that respondent complied with his duties owed to appellants under this clause, at least to a certain extent. The record shows that respondent forwarded all claims of appellants to the Bureau and urged such claims on behalf of appellants. But there is also evidence that respondent never filed with the Bureau any claim, in his own right, that his contract covered the dredger tailings excavation. It might well be argued that this should have been done to fulfill respondent's obligations to appellants. At any rate, under the evidence, the jury could have found, had the case been submitted to it, that appellants had protested the Bureau's decision sufficiently to the respondent to comply with the protest clause, and that if there was a failure to present such protests to the Bureau as required by the prime contract it was the fault of the respondent.

This is important because, if it had been found that appellants preserved their rights by a sufficient protest, the protest clause here involved provides that unless such protest is made to a ruling, the ruling shall be final and conclusive. Thus the protest clause does not purport to make the ruling of the contracting officer final if a protest is made.

Respondent cites *United States v. Moorman*, 338 U.S. 457, 70 S.Ct. 288, 94 L.Ed. 256, and *United States v. Wunderlich*, 342 U.S. 98, 72 S.Ct. 154, 96 L.Ed. 113, claiming that they establish the law to be that under such a protest clause decisions of the contracting officer are final on all questions whether protested or not, and whether legal or factual. But these cases did not involve the interpretation of clauses such as the one here exempting properly protested rulings from being final and conclusive. While these cases do declare a strong policy in favor of the finality of arbitral decisions, a policy also expressed by this court in *Crofoot v. Blair Holdings Corp.*, 119 Cal.App.2d 156, 260 P.2d 156, they are of no help in the present case where the clause cannot be interpreted to include protested rulings. (See for a discussion of the *Moorman* and *Wunderlich* cases 39 Am.Bar Ass'n Journal 373.)

[4] In the instant case there was conflicting evidence and inferences therefrom as to the meaning of "overburden" and of "common excavation," and over whether the latter included the former. The specifications define various types of excavation in paragraph 33 and then make "common excavation" the residual class. In paragraph 34 the excavation portions of paragraph 33 are made applicable to "excavation in loose or unstable soil," and expressly made applicable to excavation by power-driven machinery other than augers. See, also, for definition of "excavation"—*United States for Use and Benefit of Davies v. Blauner Const. Co.*, D.C., 37 F.Supp. 968. Certainly it was a factual question as to whether the change order provided for or contemplated excavation of a type already committed to appellants under the "common excavation" clause of their contract. If the jury had found that

the prime and subcontracts included the removal of the overburden, then the jury could have found that the issuance of change order No. 2, insofar as it attempted to change the method of payment for common excavation work on the 12 towers, was a breach of the contract by the Bureau, and in turn by respondent.

[5] It is true that appellants are trying to use change order No. 2 to secure damages for preparatory and other expenses incurred in trying to comply with its provisions as to the work other than excavation, and to renounce it as invalid insofar as excavation is concerned. This is a permissible approach. It seems quite clear that change order No. 2 is divisible. Insofar as it ordered a change in the type of work to be done on the 12 towers it merely provided for a needed change required by the nature of the work, and a change that was contemplated and provided for by the contract in its "changes" clauses. When the prime contract was executed there were no final plans for these towers. The evidence shows that the original plans called for spot excavation in the dredger tailings area, a method of excavation that would have required the towers to stand in rock and gravel. This, according to Bureau engineers, would have been unsafe. The portion of the order raising the height of the towers and changing the amount of excavation called for was valid, and pursuant to the contract. But the portion of the order refusing to pay for this new work as provided in the contract was invalid, and could have been found to result in a breach of the contract. Of course, if the jury had found that change order No. 2 provided for excavation already included in the contract, appellants would have been entitled to perform and receive payment for all units necessary to the performance of a unit price contract. *Callahan Construction Co. v. U. S.*, 91 Ct.Cl. 538; *McGaw v. Master Craft Homes*, 105 Cal.App.2d 304, 233 P.2d 185; *Keystone Structural Co. v. Link-Belt Co.*, D.C., 265 F. 320.

[6] The contention of respondent that since appellants did not complete the excavation they could not receive payment

for such work under specifications paragraph 34, and that payment of damages would amount to payment, is unsound. Damages for breach are, of course, not "payment" at all.

Thus the jury could have found that change order No. 2 was a breach, but a breach that appellants did not treat as a discharging breach, but in part, at least, tried to continue performance. The breach occurred prior to any attempt by the Bureau to discontinue work in the area and the right to damages accrued before change order No. 3 and the stop order were issued.

But, says respondent, if this determination was factual, it is necessarily controlled by the "disputes" clause of the prime contract, making determinations of the contracting officer final and conclusive as to questions of fact. In other words, respondent contends that if the meaning and application of the common excavation clause is factual, it is governed by the "disputes" clause. It is urged that at most appellants had a right of "equitable adjustment" under Article 3 of the prime contract. There can be no doubt at all that "equitable adjustment" is a question of fact upon which the administrative ruling is final. *U. S. v. Callahan Walker Const. Co.*, 317 U.S. 56, 63 S.Ct. 113, 87 L.Ed. 49; *United States v. Blair*, 321 U.S. 730, 64 S.Ct. 820, 88 L. Ed. 1039. Thus the pivotal question on this appeal is the extent and application of the "disputes" clause.

[7,8] Of course, by holding that the interpretation of the "common excavation" clause was one of fact for the jury, at first blush it would seem that such question was then one of fact within the meaning of the "disputes" clause. But, upon analysis, this conclusion does not follow. This is so because the cases interpreting federal contracts have clearly established that actions that amount to an actual breach of the contract are not covered by the "disputes" article. *Callahan Construction Co. v. U. S.*, 91 Ct.Cl. 538; *Silberblatt & Lasker, Inc. v. United States*, 101 Ct.Cl. 54. The *Silberblatt* case held, and properly so, that the contracting officer's authority is

limited to disputes arising *under the contract* and does not extend to disputes over a *breach of the contract*. In *Continental Illinois Nat. Bank & T. Co. v. United States*, 101 F.Supp. 755, 121 Ct.Cl. 203, certiorari denied 343 U.S. 963, 72 S.Ct. 1057, 96 L.Ed. 1361, it was held that claims for unliquidated damages for breach of contract are not proper subjects for departmental adjudications. See, also, *Gemsco, Inc. v. United States*, 115 Ct.Cl. 209; *Peter Kiewit Sons' Co. v. United States*, 74 F.Supp. 165, 109 Ct.Cl. 517; *Blair v. United States*, 8 Cir., 147 F.2d 840, rehearing granted 8 Cir., 150 F.2d 676. Thus, it must be held that the "disputes" clause was not applicable to questions arising out of a breach of contract. Thus, whether the Bureau breached its contract by change order No. 2 was a question of fact for the jury, and a question not included within the "disputes" clause of the contract.

Now we turn to legal rights arising after change order No. 2 was issued. That change order only affected the 12 towers in the dredger tailings area. As to the 4 additional towers later affected by change order No. 3 and the stop order, change order No. 2 specifically recognized that appellants were entitled to do the excavation work on these towers at the unit prices quoted in the contract. Respondent admitted that, since these 4 towers were outside the dredger tailings area, the appellants were authorized by change order No. 2 to proceed with the excavation and conceded that his letter of authorization sent to Draper did not authorize Draper to conduct operations on these 4 towers. But the revised footings contained in the change order applied to these 4 towers. In other words, as to these 4 towers the jury could have found that appellants' right to excavate was enlarged and not removed by change order No. 2.

After the dispute had arisen by reason of change order No. 2, the Bureau issued change order No. 3 stopping work on the 12 towers in the dredger tailings area and on the 4 additional towers. In other words, this change order deleted all 16 towers out of the total 225 estimated in the prime con-

tract, that is, deleted about 1 mile of the 25 mile transmission line. Some 4 years after the events here occurred, this 1 mile was bridged with wooden poles. Now what was the legal effect of the attempted deletion of these 16 towers? Respondent claims that under the contract the Bureau had the right to delete the 16 towers without violating the contract. The appellants claim the contrary. We agree with appellants.

Under the terms of the prime contract (Article 3) the contracting officer was empowered to make "changes in the drawings and/or specifications of this contract and *within the general scope thereof.*" (Italics added.) Damages caused by such changes were to be settled by an "equitable adjustment" as to which the arbitral provisions of the contract applied, under the rule of the cases already cited. The specifications declared that the number of towers shown in the plans was a mere estimate, and that the government did not guarantee the construction of "all or any number of the towers listed." Thus, the question is presented whether the government had the legal right, as a matter of law, to delete the 16 towers, or whether such deletion could be found to be a breach of the contract.

We do not believe that the prime contract, as a matter of law, authorized the deletion of the 16 towers without liability except for an "equitable adjustment." There can be no doubt that the prime contract contemplated that some towers might be deleted during construction, and that such deletion could be made without liability. But the contract also contemplated and provided that the transmission line was to be constructed. It is a contract to construct a transmission line, not to construct about 225 towers. It is one thing to delete towers found to be unnecessary in the construction of the transmission line. It is quite another to delete an integral part of the work that results in the transmission line not being constructed. This 1-mile gap in the transmission line was not bridged until 4 years after this dispute arose, and then by a wooden pole line. The Bureau section chief testified that the work was stopped in this area only because of the dispute with appellants.

[9] Under the cases, if the contract imposes a duty on the government to complete the construction of the structure involved in the contract, a "changes" clause does not authorize the deletion of an integral part of the work. General Contracting, etc., Co. v. U. S., 84 Ct.Cl. 570; Stapleton Construction Co. v. U. S., 92 Ct.Cl. 551; Silberblatt & Lasker, Inc. v. United States, 101 Ct.Cl. 54; Del Balso Const. Corporation v. City of New York, 278 N.Y. 154, 15 N.E.2d 559; Litchfield Const. Co. v. City of New York, 244 N.Y. 251, 155 N.E. 116; see first opinion in Blair v. United States, 8 Cir. 147 F.2d 840; Peter Kiewit Sons' Co. v. United States, 74 F.Supp. 165, 109 Ct.Cl. 517; Continental Illinois Nat. Bank & T. Co. v. United States, 101 F.Supp. 755, 121 Ct.Cl. 203. These cases established the law to be that under a changes clause the government has no power to change the essential nature or main purpose of the contract, but may only make changes incidental to the primary object of the contract. The change order under such clauses may not essentially alter the project contemplated by the contract.

This construction of such clauses is not only in accordance with their obvious purpose, but is also strongly supported by public policy. If the government were empowered by such clauses to alter materially the object of the contract, after construction had started, all bidders would have to take such possibility into consideration and materially raise their bids in anticipation of such losses, thus increasing the cost of public works.

[10] Thus the question is, did the deletion of the 16 towers materially alter the fundamental object of the contract, or merely provide for a deletion incidental to the primary object of the contract? This was a question of fact not covered by the "disputes" clause for reasons already discussed, and was a question of fact that should have been left to the jury. There was evidence that this deletion was a material alteration that defeated the object of the contract by prevention of the completion of the object of the contract. The deleted area was in the middle of the trans-

mission line. This being so, it was error to have taken this issue from the jury.

There are many other points discussed by counsel. These need not be discussed. Enough has been said to demonstrate that prejudicial error was committed in granting the directed verdict, inasmuch as the trial court erroneously thus took from the jury the determination of fundamental factual issues.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



121 Cal.App.2d 598

Ex parte ROBELET.

Cr. 5102.

District Court of Appeal, Second District,
Division 1, California.

Nov. 30, 1953.

Habeas corpus proceeding by father to secure custody of his minor children. The District Court of Appeal, White, P. J., held that where father, at time he appealed from order modifying divorce decree by awarding custody of children to mother, was entitled to custody of the children, father was entitled to retain custody pending determination of the appeal, in absence of any showing that interests of children would be imperiled by their remaining in his custody, and was entitled to writ of habeas corpus ordering delivery of children to him pending determination of appeal.

Order in accordance with opinion.

1. Divorce ⇨312.4

Appeal from order modifying divorce decree by awarding custody of minor children to mother suspended power of trial court to enforce such order and precluded trial court from interfering with custody as it existed at time of appeal. Code Civ.Proc. §§ 946, 949.

2. Divorce ⇨298(1)

The welfare of minor children of divorced parents must be protected by court action.

3. Divorce ⇨312.4

In exercise of its appellate jurisdiction, reviewing court clearly has power in custody matters involving minor children of divorced parents to protect the subject matter of the order or judgment appealed from during pendency of appeal, but without a showing that serious evils threaten welfare of children, status quo at time appeal was taken will not be disturbed.

4. Divorce ⇨312.4

Where father, at time he appealed from order modifying divorce decree by granting custody of minor children to mother, was entitled to custody of children, father was entitled to retain custody during pendency of appeal, in absence of any showing that interests of children would be imperiled by their remaining in his custody. Code Civ.Proc. §§ 946, 949.

5. Habeas Corpus ⇨25(2)

Where father of minor children was entitled to their custody pending determination of his appeal from order modifying divorce decree by awarding custody to mother, but mother refused to return children, who had been with her pursuant to visitation privileges, father was entitled to writ of habeas corpus ordering delivery of children to him pending determination of appeal.

Paul M. Hupf, San Francisco, for petitioner.

Franklyn M. O'Brien, San Francisco, for respondent.

WHITE, Presiding Justice.

On March 22, 1950, a final decree of divorce was entered dissolving the marriage of Doris Robelet and Victor M. Robelet.

The decree awarded custody of their minor children, now aged eleven and ten, to Doris. Although awarded custody of the minor children, Doris did not take them with her, and they remained in the actual

care and custody of their father, the petitioner herein.

In her return to the writ, respondent Doris alleged that the reason she did not take actual custody of the children was because of a serious physical and mental illness and upon the advice of her physician. She further alleged that now she has fully recovered from her illness.

In June, 1952, petitioner applied to the Superior Court of the County of San Mateo, where the divorce decree was granted, for an order modifying the custody provision of said decree to vest custody of the children in him. Following a hearing, the order in regard to custody was, on October 3, 1952, modified and petitioner was awarded the care, custody and control of said children, with the proviso that the respondent mother, Doris, have the children with her during the 1953 school summer vacation until the reopening of school in September, 1953, together with other privileges of visitation.

In June, 1952, petitioner remarried and the children continued to reside with him in San Mateo County.

In April, 1952, respondent mother remarried and with her husband, William Alvarado, took up residence at Covina, in Los Angeles County.

At the end of the school term at San Mateo, in June, 1953, pursuant to the foregoing order, the children came to Covina in Los Angeles County, to be with their mother until the reopening of school in September of that year.

While the children were with respondent mother during this vacation period, she applied to the Superior Court of San Mateo County in August, 1953, for an order changing custody of said children to her. Following a hearing on her application, the court, on September 8, 1953, further modified the custody provision of the decree and awarded the care and custody of the children to respondent mother.

On September 10, 1953, petitioner herein filed Notice of Appeal from the last mentioned modification order, and his appeal, at the time of filing this petition, was pending in the supreme court.

On September 10, 1953, after Notice of Appeal was duly filed, and while the children were with respondent mother, pursuant to the visitation privileges of the order of October 3, 1952, she refused to return said children to petitioner, although the school vacation had terminated and the fall term of school in San Mateo County had commenced.

Petitioner instituted the present Habeas Corpus proceeding in the supreme court on September 25, 1953, where his appeal was pending, and the proceeding was thereafter transferred to this court for hearing and determination.

Petitioner contends that his appeal stayed the September 8th modification order and that he is therefore entitled to custody of the children pending appeal.

[1] As was said by our supreme court in *In re Barr*, 39 Cal.2d 25, 27, 243 P.2d 787, 788, " * * * it is clear that the appeal suspended the power of the trial court to enforce the order modifying the custody provisions of the divorce decree. (Citing cases.) '(A) perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal.' (Citing cases.)"

[2,3] But while the effect of an appeal is to remove the subject matter of the appeal from the jurisdiction of the trial court, Code of Civil Procedure, §§ 946, 949; *Lerner v. Superior Court*, 38 Cal.2d 676, 680, 242 P.2d 321; *Vosburg v. Vosburg*, 137 Cal. 493, 496, 70 P. 473, nevertheless, as was so cogently stated in *Gantner v. Gantner*, 38 Cal.2d 691, 692, 242 P.2d 329, 330, "At all times, however, the welfare of the child must be protected by court action. Civ.Code, § 138. In the exercise of its appellate jurisdiction, this court clearly has the power in custody matters 'to protect the subject matter of the order or judgment appealed from during the pendency of such appeal.' (Citing cases.)"

But, observed the supreme court in the case just cited, 38 Cal.2d at page 692, 242 P. 2d 329, 330, "Without a showing that serious evils threaten the welfare of the chil-

dren, the status quo at the time the appeal was taken will not be disturbed."

In order to determine whether it would not be in the best interests of the children or might imperil their welfare, to remain for the duration of the appeal with the parent previously having custody, this court made an order referring that question for factual findings to Commissioner Robert L. Brock of the Superior Court of Los Angeles County.

The order of reference submitted to said Commissioner, acting as a referee, two questions upon which he was to take testimony and make findings.

(1) Whether the interests of the children would be imperiled if they remained in the custody of the father pending determination of the appeal and;

(2) Whether the best interests of the children would be served by continuing them in the custody of the mother pending determination of the appeal.

A hearing was had before said referee at which both petitioner and respondent with their attorneys were present. At the conclusion of the hearing the referee made findings, among which are included the following:

"Both of the prospective homes are fully adequate for the children and all of the parties, including the present spouses of each parent, are fit persons to have custody of the children and sincerely interested in the children's welfare.

"The father's present wife is in the home most of the time and personally has cared for the children. She expects a child of her present marriage in the near future. The mother is a housewife and except for a very short period, which was unavoidable, has been at home with the children at all times when they were not in school.

"The children have adjusted excellently to the changed situation of living in the mother's home, particularly since the last court order was made. Their conduct has improved measurably since being in the custody of their mother, particularly in regard to their manners, respect for elders and affection toward their mother. They have also improved since being in the

mother's custody in respect to their eating habits and physical appearance."

During the hearing before the referee, pursuant to stipulation, the children were interviewed by him outside the presence of the parents, but in the presence of the attorneys for both parents. As a result of such interview the referee states in his findings, "The children seem unusually alert and intelligent and expressed themselves as being happy in their present home. They did express a preference to be in the custody of their father, which preference they explained as being due mostly to the proximity of his home to the home of their paternal grandmother of whom both children are extremely fond."

In answer to the other question submitted to the referee, he found that, "The interests of the children would not be imperiled by their remaining in the custody of the father pending determination of the appeal."

[4] From the foregoing it is manifest that in the case at bar there is no showing "that serious evils threaten the welfare of the children" if they remain with the father. Therefore, the status quo at the time the appeal was taken should not be disturbed. *Gantner v. Gantner*, supra, 38 Cal. 2d at pages 692, 693, 242 P.2d 329.

Under the facts here present the extra legal seizure or retention of the children by the respondent mother, or any attempted execution of the last modification order by the trial court in violation of the express provisions of sections 946 and 949 of the Code of Civil Procedure is unauthorized. As said by the supreme court in *In re Barr*, supra, 39 Cal.2d at page 29, 243 P.2d at page 789, "Otherwise, litigants would be encouraged to seize possession of the child pending appeal in the hope that in subsequent habeas corpus proceedings they could persuade an appellate court that their action was in the best interests of the child and that it should ratify their conduct by refusing to issue the writ. As colorfully pointed out in *In re Browning*, supra, 108 Cal. App. 503, 507, 291 P. 650, 651, the child would be 'in the category of a human football whose possession by either parent de-

pend upon the agility, activity, and determination of each.'"

Should the welfare of the children in the instant case, at any time in the future, be imperiled by remaining with the father, who had custody when the order appealed from was made, adequate protection of their welfare may be had by application to the court having jurisdiction over the appeal or to the juvenile court. In *re Barr*, supra, 39 Cal.2d at page 29, 243 P.2d 787.

At the present time, there is no showing that the children may not safely remain with the father pending the appeal.

[5] By reason of the foregoing, it is ordered that the children be delivered to the petitioner, who, pending determination of the appeal, is entitled to their custody pursuant to the terms of the superior court order of October 3, 1952.

DORAN and DRAPEAU, JJ., concur.



121 Cal.App.2d 379

HAGEN v. LAURSEN et al.

Civ. 8086.

District Court of Appeal, Third District,
California.

Nov. 19, 1953.

Hearing Denied Jan. 13, 1954.

Action for injuries to visitor upon defendants' premises, sustained when two dogs owned by defendants and playing about the premises, ran against visitor, causing her to fall. The Superior Court, Sonoma County, Hilliard Comstock, J., entered judgment from which defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that when there was no known propensity on part of such dogs to collide with persons or objects while so playing, owner of dogs was not guilty of actionable negligence, especially when visitor and others in the group with whom she

was talking had observed the antics of the dogs.

Judgment reversed.

1. Animals ⇨70

Generally, an owner or keeper of a dog is not liable for damage it does without having knowledge of an abnormal propensity of the dog to commit it.

2. Animals ⇨48

A possessor or harbinger of a domestic animal, such as a dog, which, because it is of a class unlikely to do harm and difficult to confine, is privileged to allow such animal to run at large, if possessor does not have reason to know the animal to be abnormally dangerous.

3. Animals ⇨74(2)

A person who seeks to recover damages for injuries caused by a dog, must plead and prove that the injury was caused by some abnormal action, in the sense of being abnormal with regard to the usual actions of such animals, and that the owner or keeper knew of a tendency to the abnormality, and it is not sufficient to allege the injury caused by the animal and that the owner had been generally negligent in keeping or controlling of the dog.

4. Animals ⇨74(3)

Generally, a dog is presumed to be tame, docile and harmless until the contrary appears.

5. Animals ⇨68

Owner of dogs which were not known to habitually run against persons or objects while playing, was not negligent in connection with injuries to visitor who was knocked down when one of owner's dogs ran against visitor as dogs were frolicking about, especially when the frolicking dog had been observed by visitor and other members of group in which she was standing.

6. Negligence ⇨6

A violation of a statute constitutes actionable negligence only to those persons for whose benefit or protection the statute was enacted, and if none of the consequences which the enactment was de-

signed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted.

7. Animals ⇌68

County ordinance making it a misdemeanor for any person to permit any dog owned by him to roam off the premises where kept or harbored between the hours of six o'clock P.M., and six o'clock A.M. of the day following, was not violated when playing dogs occasionally ran off owner's premises and onto public road from whence they returned immediately in the course of their exercise and play, and even if owner's visitor, who was knocked over by dogs, had sustained an injury which the ordinance was designed to protect against, there was no violation of the ordinance which could serve as basis for liability.

8. Animals ⇌68

County ordinance making it a misdemeanor for any person to permit any dog owned by him to roam off the premises where kept or harbored between the hours of six o'clock P.M., and six o'clock A.M. of the following day, was designed to prevent dogs from leaving the premises where they are kept, during the night hours, for purpose of protecting livestock against depredation by roaming dogs at nighttime, and there was no intent to protect a person who, as a visitor or invitee upon owner's premises, was knocked down when struck by one of the owner's dogs which were engaged in playing, and thus the ordinance even if violated, could not suffice as basis of such visitor's claim of actionable negligence.

Geary, Spridgen & Moskowitz, Santa Rosa, for appellant.

DeCastle & Eymann, Santa Rosa, Toland C. McGettigan, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This was an action wherein plaintiff sought to recover damages from defendants for personal injuries suffered by her while a

visitor upon defendants' property. She suffered injuries when two dogs owned by defendants which were playing about the defendants' premises ran against her, causing her to fall. She secured a judgment from which the defendants have appealed.

It appears that appellants were the owners of two Irish setters, one weighing about 45 pounds, the other about 35 pounds, and both being approximately 5 years old. These dogs were generally kept upon appellants' premises. When appellants were at home the dogs were usually in the basement of the home or on an enclosed porch. They were occasionally let run on appellants' property which was not fenced and so the dogs were on and off the appellants' premises while running about. That was the situation when respondent received her injuries. Appellants and respondent were neighbors and habitually exchanged social visits. They lived across a road from each other. On the occasion when plaintiff was injured the dogs were frolicking, occasionally going into the road and back to their home grounds. They romped and played with each other; would jump at each other, wrestle, run, roll over, pretend to bite each other, and generally indulge in the antics usual with dogs at play. Their actions were described as the average play of a dog. No one had seen them run into anyone while playing, before respondent received her injuries. They were not shown to have been more boisterous than dogs usually are. There was no evidence that these dogs were vicious. During the years that they had been observed there had been a time when one of them had reared up and placed his paws against a visitor, another when one of the dogs jumped on the shoulder of a man who came upon the premises and who ran. The dog did not bite or injure the man. At another time one of the dogs grabbed a man by the coat sleeve. But these instances were all that could be gathered over the years the dogs had been owned by appellants, and there was no claim, and could be none, that the dogs were shown to have been vicious or apt to attack. In addition, such proclivities, if shown, were not being exercised at the time

respondent was injured and were not the cause of injury.

Respondent was well acquainted with the dogs and had often observed them at play. At the time of the accident respondent had seen the dogs playing and while this was going on had gone across the road and on to the premises of appellants, where she stood conversing with a group of people, which included Mrs. Laursen and some relatives of respondent. The dogs were frolicking about, the women were talking; respondent stood with her back toward the area in which the dogs were for the moment at play and did not, therefore, see them approaching her. Others, however, including Mrs. Laursen, saw the dogs coming, but no one said or did anything. One or perhaps both of the dogs while so playing and frolicking ran against the back of respondent's legs at about the knees, causing her to fall sharply to the ground and to suffer a broken hip and various less serious bruises and lacerations. There was nothing in the nature of an attack by either animal.

At the trial much reliance was placed by respondent upon what was claimed to be a violation of a Sonoma County ordinance having to do with the licensing and control of dogs, but in addition thereto it was respondent's theory that appellants, as owners of the dogs, were liable as for general negligence proximately causing her injuries.

We will first discuss this assignment of negligence, it being the contention of appellants here that as a matter of law the record fails to support a finding that they were so negligent.

[1-4] It is lawful to keep dogs and, speaking generally, an owner or keeper is not liable for damage they do without having knowledge of an abnormal propensity of the dog to commit it. "There are certain domestic animals so unlikely to do harm if left to themselves and so incapable of constant control if the purpose for which it is proper to keep them is to be satisfied, that they have traditionally been permitted to run at large. This class includes dogs. * * * While it is not impossible to confine dogs to the premises of their keepers or

to keep them under leash when taken into a public place, they have been traditionally regarded as unlikely to do substantial harm if allowed to run at large, so that their keepers are not required to keep them under constant control." Restatement of the Law of Torts, sec. 518, Comment j, p. 40. "A possessor or harbinger of a domestic animal which, because it is of a class unlikely to do harm and difficult to confine, he is privileged to allow to run at large, and which he does not have reason to know to be abnormally dangerous, is not liable for any harm done by it while at large." Restatement of Torts, sec. 518, subd. (2). "The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner." Restatement of Torts, sec. 302, Comment h. Pursuant to these long-established rules found in the common law and in most, if not all, of the states of the Union, including California, it has always been necessary in a complaint seeking to recover damages for injuries caused by dogs to plead and prove that the injury was caused by some abnormal action, that is, abnormal with regard to the usual actions of these animals and that the owner or keeper knew of a tendency to the abnormality. It was not sufficient to allege the injury caused by the animal and that the owner had been generally negligent in the keeping or the controlling of the dog. "In the complaint in an action against the owner for injuries caused by his dog, it is essential to allege the vicious character or evil propensity of the dog and the owner's scienter. * * * The dog's bad character or evil disposition is not presumed. The view expressed in *Mason v. Keeling*, supra. [1699, 12 Mod. 332] that 'the law takes notice, that a dog is not of a fierce nature, but rather the contrary' is generally adopted. A dog is presumed to be tame, docile and harmless until the contrary appears. (Citing cases.) Harming a human being is regarded as contrary to a dog's nature. 'He errs contra naturam suam by biting or any serious misdoing,

* * * Beven, 'The Responsibility at Common Law for the Keeping of Animals,' 22 Harvard Law Rev. 465, 485." Olson v. Pederson, 206 Minn. 415, 288 N.W. 856, 859. The foregoing was said in a case declaring the insufficiency of the complaint to state a cause of action which alleged that the defendants owned and kept a certain dog and that while plaintiff was lawfully standing on the lawn of her home the dog jumped on her, causing her to fall and sustain personal injury. The same rule applies to cats, as appears from Buckle v. Holmes, 2 K.B. 125, 54 A.L.R. 89, a case brought to recover damages done by a cat in killing fowls on plaintiff's property. The rule is stated in a headnote as follows: "One who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following the natural propensity of its kind to do damage in certain circumstances, unless the animal is one for whose trespasses the owner is liable", it being held in the opinion that dogs and cats were not animals for whose trespasses there was owner liability. See also Brown v. Moyer, 186 Iowa, 1322, 171 N.W. 297, a case where a large dog owned by the defendant ran out into the highway along which plaintiff was proceeding, striking her with such force and in such manner as to throw her violently to the ground. See also Hicks v. Sullivan, 122 Cal.App. 635, 638, 10 P.2d 516, 517, where, quoting from 1 Ruling Case Law 1116, the court approved a statement of the rule as follows: "In case of injury the gravamen of the action is knowledge of the owner that the beast was the possessor of vicious or mischievous propensities. Negligence or lack of care on the part of the owner in keeping or restraining the animal need not be shown." See also O'Brien v. Gateway Stables, 104 Cal.App.2d 317, 231 P.2d 524 (inexperienced rider falling from spirited runaway horse); Brown v. Willard, 303 N.Y. 727, 103 N.E.2d 343 (plaintiff knocked down by mare in exercise yard); Fine v. Hiller, La.App., 146 So. 50 (plaintiff knocked down by dogs let loose to exercise).

[5] Giving full play to the rule that negligence is usually a question of fact, still

negligence cannot be here predicated upon any act or omission of appellant Alletta Laursen. The ground of liability here is reasonable anticipation of the occurrence and reasonable opportunity to act. Dogs at play rarely run against stationary objects whether tree, post or person. They generally look where they are going and this is self-preservation. We are unable to see where in the situation confronting her Alletta Laursen could reasonably be held to anticipate that the playing dogs would blindly run into a group of people and knock one of them down. We are somewhat persuaded to this view by considering that if there was danger here it was as well known to respondent and to each member of the group as to Alletta Laursen. No superior knowledge was possessed by her. And she had no superior opportunity to take preventive action. Here was misadventure pure and simple without liability, as was held in Eigner v. Race, 54 Cal.App.2d 506, 129 P.2d 444, a similar case.

We reach the same result if we consider the status of respondent. She was a licensee to whom appellants owed the duty to refrain from active negligence, Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, and to warn of existing conditions unknown to her which were dangerous. Restatement of Torts, sec. 342. If there was danger it was because the dogs were playing in the area where respondent stood. Knowing just as well as appellants of this situation she went upon their property and was hurt from this known danger. In effect she says she had a right to say to her neighbors, "take up your dogs for I want to visit." She had no such right. When she went where she did, knowing the danger, appellants owed her no duty to protect her from the risk she elected to run. Apparently no one in the group sensed danger. Under the circumstances we hold respondent failed to prove negligence unless by virtue of violation of a Sonoma County ordinance next discussed.

At the time of the accident to respondent there was in force Ordinance No. 215 of the County of Sonoma. The ordinance provided for the registration and licensing of dogs

in the county, for the impounding and killing of unlicensed dogs running at large, created the office of poundmaster, provided for maintenance of a pound for the care and disposition of impounded dogs, and from fees, fines and charges set up a fund wherewith to compensate persons whose livestock or poultry were damaged or killed by roaming dogs. The ordinance is somewhat lengthy, containing some 21 sections, all having to do with the matters listed, but in sections 5 and 6 the following appears:

"It shall be unlawful and a misdemeanor for any person to permit any dog owned by him to roam off the premises where same is kept or harbored, between the hours of six o'clock P.M., and six o'clock A.M., of the day following and all persons owning or harboring dogs shall keep said dogs confined either on leash or chain in any building, in any yard with enclosure sufficient to prevent such dogs from escaping.

"It shall be unlawful and a misdemeanor for any person to permit or cause any dog to run on the lands of another, whereon poultry or livestock is kept without the permission of the owner of such lands."

[6] Respondent was injured shortly after 6 o'clock P.M. She claims that appellants were guilty of violation of the ordinance and that this per se negligence proximately caused her injuries, she being one of a class for whose protection the ordinance was intended. These claims are contravened by appellants and their contentions must be sustained. The conditions under which actionable negligence may be predicated on violation of a statute or ordinance are well stated in *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 497, 225 P.2d 497, 500. It was there held that not every infraction of the statute will result in civil liability; that violation of a statute constitutes actionable negligence only as to those persons for whose benefit or protection the statute was enacted; that violation of a statute by failing to do a required act results in liability only if the harm which the violation causes is that from which it was the purpose of

the enactment to protect. Quoting from *Flynn v. Gordon*, 86 N.H. 198, 200, 165 A. 715, the court said: "'The violation of a statute or ordinance becomes an actionable wrong only when the consequences contemplated by the provision in question have actually resulted from its violation. If none of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him.'" See, also, *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279; *Harris v. Joffe*, 28 Cal.2d 418, 170 P.2d 454."

[7, 8] It is not claimed that appellants' dogs were unlicensed, but it is claimed that appellants were guilty of violating sections 5 and 6 of the ordinance which we have quoted. The evidence shows that at about five o'clock Alletta Laursen released the dogs to exercise. These dogs occasionally ran off appellants' premises and on to the public road between the homes of appellants and respondent, returning again to appellants' premises. But by these actions the dogs were not roaming off the premises where they were kept or harbored. Leaving appellants' premises momentarily and returning thereto in the course of exercise and play did not constitute that roaming off the premises prohibited by the ordinance. Further if by way of argument it be assumed that the described action of the dogs violated the provisions prohibiting roaming off of the owners' premises yet it was not this roaming off the premises that caused the injury. When the injury occurred these dogs were on the premises of appellants. The damage was not done while they were off the premises. Turning to the rest of Section 5 of the ordinance, however, respondent asserts and appellants deny that appellants violated the ordinance in that they did not at and after six o'clock P.M.

on the day of the injury and while respondent was on their premises keep their dogs confined "either on leash or chain in any building, in any yard with enclosure sufficient to prevent such dogs from escaping." This is a strange provision, the rest of the ordinance considered. The first part of the sentence made it unlawful for a person to permit his dog to roam off the premises where the dog was kept between certain hours; and the remainder of the sentence appears to impose the added precautions that during the same period dogs shall be confined on leash or chain in a building or enclosed yard. If that be the meaning of the closing clause, the first part of the sentence which prohibits roaming would be needless. Taking the ordinance as written, however, and construing it literally as requiring dogs to be chained and also kept in a building or enclosed yard, nevertheless visitors to appellants' premises are not within the protective purposes of the ordinance. It is clear that the purpose of this particular section of the ordinance is to prevent dogs from leaving the premises where they are kept during the night hours. Considering the ordinance as a whole it is clear that the only purpose of section 5 was the prevention of night roaming. This was to protect livestock against depredation by roaming dogs. It may have been the intention also to protect people traversing the highways at night or going about on their own property where the dogs might be roaming. But surely there was no intent or purpose here of protecting persons who might be visitors or invitees, business or otherwise, of the dogs' owners, for if such had been the purpose then around the clock protection would have been provided for, since to such persons the selected hours were those during which they least needed protection. Since respondent failed to show that she was within the class for whose protection the ordinance in question was enacted, she has failed to show actionable negligence on the part of appellants, assuming a violation by them of the ordinance provisions we have been discussing.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

121 Cal.App.2d Supp. 851

KLINE v. JOHNSON et al.

No. 181783.

Appellate Department, Superior Court,
San Diego County, California.

Oct. 22, 1953.

Action by salesman for real estate commission. The Municipal Court, San Diego Judicial District, Ronald Abernethy, J., entered judgment for salesman and vendors appealed. The Superior Court, Appellate Department, Burch, J., held that where salesman procured signatures of prospective purchasers and of vendors on an offer to purchase, which stated that salesman was to be entitled to one-half of purchasers' deposit if deposit were forfeited, but purchasers made no deposit and refused to complete purchase, the provision for forfeiture controlled the original listing agreement, and salesman was not entitled to commission for procuring purchasers.

Judgment reversed.

1. Brokers ⇨64(2)

Where broker procured prospective purchasers for vendors' real estate, under listing agreement with vendors, and vendors, purchasers, and broker signed offer to purchase, which stated that broker was to be entitled to one-half of deposit if deposit were forfeited, and where purchasers made no deposit and refused to complete the sale, broker was limited to compensation according to forfeiture provision in the offer to purchase, and could recover nothing.

2. Brokers ⇨60

Where broker procured prospective purchasers for vendors' real estate, under agreement with vendors whereby broker would be entitled only to one-half of deposit if deposit were forfeited, and purchasers signed agreement to purchase which was accepted by vendors, but made no deposit, even if contract of sale was rescinded by mutual agreement, broker was not entitled to commission in absence of excuse which would waive the express condition of forfeiture.

3. Brokers 60

Where broker, who had listing agreement with vendors whereby he was to receive 5% of sale price of vendors' real estate, procured purchasers, and signed, with vendors and purchasers, agreement to purchase stating that if deposit were forfeited, broker's commission would be limited to one-half the deposit, this substituted agreement was supported by sufficient consideration and binding on the parties.

Renwick Thompson and Eugene A. Horton, San Diego, by Eugene A. Horton, San Diego, for appellants.

Ward & Ward, Antioch, by M. Luther Ward, Jr., San Diego, for respondent.

BURCH, Judge.

Plaintiff Marian Frances Kline brings this action against defendants, Clifford E. Johnson and Ethel M. Johnson, for a real estate commission. Judgment was entered for plaintiff by the court below and defendants appeal.

The court found that on September 2, 1952, defendant Mrs. Johnson entered into an open listing agreement with plaintiff for the sale of Lots 11 and 12 in Block 4 of West Teralta Addition in the City of San Diego, State of California; that on September 6, 1952, plaintiff produced as purchasers of said real property Reagan Ratliff and Ethel V. Ratliff, who were then and there ready, willing and able to purchase for the consideration of \$16,000 the real property described in the listing agreement; that the Ratliffs executed an offer to purchase said real property on September 6; that the defendants accepted said offer on the same date; that on September 8, the purchasers refused to complete the purchase; that said sale has not been consummated and said purchasers have not paid any sums upon said purchase price nor opened any escrow in connection with said purchase.

Though the court also found that in " * * * said listing agreement defendant (Mrs. Johnson) agreed to pay plaintiff a commission of five per cent (5%)

of the sale price obtained in consideration of her services as agent.", this term was limited by a substituted agreement, as will appear. It is undisputed and set forth in the settled statements as follows:

Plaintiff produced a standard "Offer to Purchase Real Estate and Receipt for Deposit" form, completed the form in plaintiff's own handwriting, and secured the signatures of the Ratliffs upon said document. Plaintiff then signed the document as agent opposite the printed words, as follows:

"Receipt of above mentioned deposit is herewith acknowledged."

Then plaintiff secured the signature of both defendants upon said document under the following words:

"I agree to pay above named agent 5% as commission, or one-half of the above mentioned deposit in case same is forfeited by purchaser, provided that one-half of such deposit does not exceed the full amount of the commission."

Plaintiff did not ask for or receive any deposit money from Mr. and Mrs. Ratliff, the prospective purchasers. When defendants signed (Offer to Purchase) they knew that no deposit money had been asked for or received. The provision of the contract relating to one-half of the down payment is put in issue by the answer.

[1] We see no escape from its controlling effect in the present case.

Under the circumstances here present and understood by the parties, there was written into the contract which superseded the listing a condition—upon the happening of a forfeiture plaintiff's commission was to be limited to one-half on the down payment but not to exceed 5% of the sale price. At the time of the contract all parties expected there would be payments on the purchase price, out of which plaintiff's compensation was to be paid. None were in fact made. The plaintiff and defendants made this provision to cover compensation in the event of a forfeiture. By the substituted contract plaintiff assumed the risk of forfeiture. Whatever right plaintiff may have had otherwise to a 5% commission,

the vendors made this provision an element of the consideration for their promise to accept the prospective purchasers as ready, willing and able to buy.

"In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract * * *." *Richter v. Union Land and Stock Co.*, 129 Cal. 367, 372, 62 P. 39, 40. See also *Bray v. Lowery*, 163 Cal. 256, 260, 124 P. 1004; *Mulborn v. Montezuma Improvement Co.*, 69 Cal.App. 621, 628, 232 P. 162; *Bliss v. California Co-operative Producers*, 30 Cal.2d 240, 181 P.2d 369, 170 A.L.R. 1009.

This provision of the contract may not be disregarded. A similar situation arose in *Mitchell v. Green*, 110 Cal.App. 259, 293 P. 879. Plaintiff broker there had a listing for the sale of defendant's ranch for \$110,000, upon which a commission of 15% was to be paid. Plaintiff procured a purchaser who entered into a purchase and sale contract by which the broker agreed to accept her commission from funds which were to be received on the purchase price. Such funds were not paid. The court said, 110 Cal.App. at page 264, 293 P. at page 880:

"With the default of DeVries and his failure to pay, the right of the agent to receive her commission failed. The parties are bound by their contract. If the appellant expected to demand her commission from respondents without regard to any payments made by DeVries, she should not have made its payment conditioned and contingent upon DeVries fulfilling the obligations of his contract. *Cannon v. Selmsier*, 85 Cal.App. 783, 260 P. 332. * * * it was incumbent upon her (broker) to allege the existence of this fund or a valid reason for its non-existence. *Edwards v. Baker*, 39 Cal.App. 755, 180 P. 33; *Lindley v. Fay*, [119 Cal. 239, 51 P. 333]."

See also *Lindley v. Fay*, supra [119 Cal. 239, 51 P. 334], from which we quote:

"Ignoring the question as to the pleading, however, the evidence shows

no right of action in the plaintiff. It tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond."

[2] Even though the purchase and sale contract was rescinded by mutual action of all parties, plaintiff has neither alleged nor proved an excuse which would waive the express condition of forfeiture, *Eddy v. Hickman*, 136 Cal.App. 103, 28 P.2d 66; see *Williston on Contracts*, Sec. 676, 677, because the parties specifically provided in the contract for the effect of forfeiture. The rule is stated in *Sousa v. First California Co.*, 101 Cal.App.2d 533, 539, 225 P.2d 955, 959, where it is said:

"To the rule that prevention by the promisor excuses the condition there is an exception in case the preventing action is allowed under the contract. *Restatement Contracts* § 295; 3 *Williston on Contracts*, § 677, p. 1956."

Here forfeiture was expressly stated in the contract.

[3] Assuming for the purposes of decision that the original listing by Mrs. Johnson was binding on both defendants, the substituted performance agreed to be given, being different from the original promise, the latter agreement is supported by sufficient consideration. 3 *Williston on Contracts*, § 680, pp. 1965, 1966; *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 606, 117 P. 767; *Wakeham v. Barker*, 82 Cal. 46, 22 P. 1131; *Sullivan v. Grass Valley Quartz Milling & Mining Co.*, 77 Cal. 418, 19 P. 757; *Rest. Contr.*, § 296.

The rule is stated:

"A condition is excused by a new contract between the parties which expressly or impliedly dispenses with the condition." (*Rest. Contracts*, § 296, supra.)

Plaintiff cites *Moore v. Balboa Escrow Co.*, 116 Cal.App.2d Supp. 921, 253 P.2d 1043; *Ralston v. Demirjian*, 86 Cal.App.2d 124, 126, 194 P.2d 41; *McNamara v. Steckman*, 202 Cal. 569, 573, 262 P. 297. In these cases the vendors relieved the broker of further responsibility as to the ability of the prospective purchaser to complete the purchase by entering into an unconditional purchase and sale or exchange contract with the purchaser. The vendor protected himself in this contract with the acceptance of the broker against a forfeiture which might result from the in-

ability of the purchaser to meet his obligation. The all-important difference lies in the fact that in the cases cited the vendor assumed that responsibility and here, by express condition, refused so to do.

The rights of the parties are governed by their undertaking. Since it is undisputed that no money was deposited, no commission is due plaintiff.

Judgment is reversed.

TURRENTINE, P. J., and GLEN, J., concur.

41 Cal.2d 704

MARTINEZ v. MARTINEZ.

L. A. 22445.

Supreme Court of California.

In Bank.

Dec. 1, 1953.

Action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser. The Superior Court, Los Angeles County, Percy Hight, Judge pro tem., in trial before court without jury, entered judgment for plaintiff, and defendant appealed. The Supreme Court, Gibson, C. J., held that, where judgment for buyer in action by buyer against seller to reform written instrument for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, could be construed as restraining seller from operating his business in Long Beach, but agreement was restricted in scope to San Diego County, judgment could not be broader than the agreement and, therefore, would be modified to accord therewith.

Judgment modified and, as modified, affirmed.

Prior opinion 258 P.2d 39.

1. Reformation of Instruments ⇨45(2)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, evidence was sufficient to support findings that covenant was omitted by mutual mistake and that covenant was omitted by reason of defendant's fraud.

2. Reformation of Instruments ⇨46

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, where evidence sustained finding that covenant had been omitted by mutual mistake of parties and omitted by reason of seller's fraud, inconsistency in such findings was immaterial since evidence was sufficient to support judgment for plaintiff on either

theory, and therefore finding on theory of fraud would be disregarded as surplusage.

3. Reformation of Instruments ⇨47

Where, in action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, there was testimony that seller agreed never to re-engage in such business in San Diego County and represented that written contract so provided, duration of covenant was properly limited so that it would continue only so long as buyer, or any person deriving title to the good will from buyer, should carry on a like business in San Diego County. Business and Professions Code, §§ 16600, 16601.

4. Reformation of Instruments ⇨46

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, finding that all allegations in complaint were true, if taken as a finding that seller solicited "each" of buyer's customers in San Diego County, was too broad and would be disregarded to extent that it went beyond admission in seller's answer concerning solicitation of some such customers.

5. Appeal and Error ⇨1152**Reformation of Instruments ⇨48**

Where judgment for buyer in action by buyer against seller to reform written instrument for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser could be construed as restraining seller from operating his business in Long Beach, but agreement was restricted in scope to San Diego County, judgment could not be broader than the agreement, and therefore would be modified to accord therewith.

Geo. W. Trammell, Long Beach, for appellant.

Alfred Einstein, V. Lustig, National City, Stead & Boileau, Charles Stead, Pomona, for respondent.

GIBSON, Chief Justice.

This action was brought to reform a written contract for the sale of a ship supply business so as to include a covenant by defendant seller not to re-engage in that business in San Diego County and for injunctive relief. Judgment was entered for plaintiff, and defendant appealed.

Defendant was engaged at Long Beach and San Diego in furnishing supplies to ships, and he employed plaintiff, his younger brother, to work for him in San Diego. Plaintiff offered to buy the San Diego branch of the business, and defendant agreed to sell it and not to re-enter the same business in that locality. Thereafter defendant presented a written agreement which provided for the sale of the business "including the good will" but did not contain any provision restricting him from resuming his operations in San Diego County. Plaintiff, who did not understand legal terminology, asked to be shown the provision preventing defendant from re-engaging in the business, and defendant stated that the good will provision meant that he was through with San Diego and would not come back there to work. The agreement was then signed, and about a year later defendant renewed his operations in San Diego. At the trial he denied that he made any representation to plaintiff as to the meaning of the good will provision and stated that he knew that it would not prevent him from operating in the San Diego area.

[1, 2] There is sufficient evidence to support the finding that the covenant not to re-engage in business was omitted from the written agreement by mutual mistake of the

parties. The further finding that the covenant was omitted by reason of fraud on the part of defendant is likewise supported by the evidence. While it is true that these findings are inconsistent because they involve different mental attitudes on defendant's part, the inconsistency is immaterial since there is sufficient evidence to support a judgment for plaintiff on either theory. Accordingly, the finding on the theory of fraud may be disregarded as surplusage. *Baird v. Ocequeda*, 8 Cal.2d 700, 703, 67 P.2d 1055; *Epstein v. Gradowitz*, 76 Cal.App. 29, 31-32, 243 P. 877.

[3] Although there was testimony that defendant agreed never to re-engage in the business in San Diego County and represented that the written contract so provided, the court properly limited the duration of the covenant by providing that it should continue so long as plaintiff or any person deriving title to the good will from him should carry on a like business in San Diego County, that being the period permitted by sections 16600 and 16601 of the Business and Professions Code.¹ *Gregory v. Spieker*, 110 Cal. 150, 153-154, 42 P. 576; see *Mahlstedt v. Fugit*, 79 Cal.App.2d 562, 566-567, 180 P.2d 777.

[4] With respect to defendant's solicitation of plaintiff's customers, the finding that all the allegations in the complaint are true is too broad if taken as a finding that defendant solicited "each" of the customers of plaintiff in San Diego County. No evidence relating to solicitation was introduced at the trial, but defendant's answer admitted solicitation of some of the customers. Insofar as the finding goes beyond the admission, it must be disregarded. Cf. *Wil-*

1. Business and Professions Code, § 16600 provides: "Contracts void. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Business and Professions Code, § 16601 provides: "Exceptions: Sale of good will or corporate shares." Any person who sells the good will of a business, or

any shareholder of a corporation selling or otherwise disposing of all his shares in said corporation, may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof, in which the business so sold, or that of said corporation, has been carried on, so long as the buyer, or any person deriving title to the good will or shares from him, carries on a like business therein."

liams v. Silverstein, 213 Cal. 269, 2 P.2d 165; Sacre v. Chalupnik, 188 Cal. 386, 390, 205 P. 449; Bradbury v. Cronise, 46 Cal. 287, 288; see 24 Cal.Jur. 953.

[5] It is possible to construe the judgment as restraining defendant from operating his business in Long Beach, whereas the agreement was restricted in scope to San Diego County. The judgment, of course, should not be broader than the agreement. Accordingly, paragraph 3 of the judgment is modified to read as follows: "3. That the defendant Julian Martinez be and he is hereby enjoined and restrained from either directly or indirectly carrying on or conducting in San Diego County a ship supply business similar to the business heretofore sold by him to the plaintiff and now conducted by the plaintiff in San Diego County, so long as the plaintiff Leonard Martinez or any person deriving title to the good will of said business from him carries on the same."

The judgment sets out the agreement in full as modified by the addition of the covenant not to compete. By what obviously was a clerical error, paragraph 4 of the contract relating to the time for payment of installments omits the words "each and every month thereafter until the 15th day of," and both parties agree that the quoted words should be restored. The second sentence of paragraph 4 of the contract, as set forth in paragraph 2 of the judgment, is therefore modified to read as follows: "Said purchase price shall be paid in installments of \$100.00 or more on the 15th day of February, 1949, and of \$100.00 or more on the 15th day of each and every month thereafter until the 15th day of February, 1954, on which last mentioned date the entire balance of principal and interest then unpaid shall become due and payable."

The judgment, as so modified, is affirmed. Plaintiff to recover his costs on appeal.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

121 Cal.App.2d 595

PEOPLE v. NATIONS.

Cr. 2947.

District Court of Appeal, First District,
Division 2, California.

Nov. 30, 1953.

Rehearing Denied Dec. 15, 1953.

Prosecution on information charging six counts of burglary, one count of violation of Dangerous Weapons Act, and two prior felony convictions. The Superior Court, County of Alameda, James R. Agee, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Burglary ☞41(1)
Criminal Law ☞1202(3)
Weapons ☞17(4)

Evidence sustained convictions for first and second degree burglary, and violation of Dangerous Weapons Act, and supported finding that defendant had been guilty of two prior convictions. Gen.Laws, Act 1970.

2. Criminal Law ☞511(4)

In prosecution for burglary, presence of stolen goods in room rented and occupied by defendant, false statements by defendant to arresting officers as to his residence in another part of town, and testimony of owners identifying the goods were sufficient to corroborate incriminating testimony of accomplice.

3. Weapons ☞17(4)

In prosecution for violation of Dangerous Weapons Act, defendant's statement to police at time of arrest that he had guns in his possession and could have used them if he had wished was sufficient evidence of possession. Gen.Laws, Act 1970.

Freddie Nations, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Clayton R. Jansen, Jr., Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant and appellant was tried to a jury on an information of six counts of burglary and one count based on the Dangerous Weapons Act. Gen.Laws, Act 1970. He was also charged with two prior felony convictions. He was acquitted on count one, convicted of burglary in the second degree on counts two, four, five and six; of burglary in the first degree on count three, convicted of a violation of the Weapons Act, and found guilty of the two prior convictions. He appeals from the judgment and from the order denying a new trial. He has elected to appear as his own attorney though this court has always been ready to assign him legal counsel.

One of the burglaries was found to have been made after dark. As to the others the proof was not clear. This accounts for the verdict of first degree burglary on count three. The evidence supporting the verdict is clear and requires merely a brief statement. The residents of the various homes burglarized testified to the unlawful taking and identified their property which was later found in defendant's possession. Police officers testified to their entry into defendant's hotel room where the goods taken were found in his possession. They also found two loaded pistols in his closet. The hotel proprietor identified defendant as the one who rented and occupied the room, and also testified that the room had been rented by defendant under an assumed name. A witness testified that he and defendant jointly burglarized some of the homes listed. He also identified some of the stolen articles found in defendant's hotel room.

[1] The evidence was sufficient to support the conviction in every respect. The only question remaining is whether asserted errors were prejudicial. We pass his complaint that he was tried by an "all white" jury, and that legal papers were taken from him without his consent as not worthy of comment.

[2] The only debatable ground raised here is whether the testimony of the accomplice Rodriguez was corroborated. The

possession of the stolen goods in the room rented and occupied by the defendant, his false statements to the arresting officers as to his residence in another part of town, the testimony of the accomplice stating where the goods had been taken and that of the owners identifying the same was sufficient. See *People v. Bridges*, 73 Cal.App.2d 913, 167 P.2d 793; *People v. Sandelin*, 105 Cal. App.2d 179, 233 P.2d 147; *People v. Monteverde*, 111 Cal.App.2d 156, 244 P.2d 447.

[3] Defendant's statement to the police at the time of the arrest that he had the guns in his possession and could have used them if he had wished was sufficient evidence of possession.

His attempt to prove an alibi totally failed. He claimed that at the time of the several burglaries he was living at another place in the city. The place was a vacant lot.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.



121 Cal.App.2d 642

ROUNDS v. BROWN.

Civ. 8240.

District Court of Appeal. Third District.
California.

Dec. 1, 1953.

Personal injury action wherein the Superior Court, Sacramento County, Grover W. Bedeau, J., rendered judgment for defendant, notwithstanding jury verdict in favor of plaintiff, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that plaintiff's imprisonment would toll statute limiting time for beginning action to recover from police officer for injuries allegedly resulting from such officer's negligence, but would not toll stat-

ute limiting time within which plaintiff was required to present his claim to such officer.

Affirmed.

1. Municipal Corporations ⚡189(1)

Mere fact that plaintiff sought recovery against police officer rather than from city would not prevent his failure to present claim to police officer within 90 days after injury from being fatal to his action. Government Code, § 1981.

2. Municipal Corporations ⚡189(1)

Plaintiff's imprisonment would toll statute limiting time for beginning action to recover from police officer for injuries allegedly resulting from such officer's negligence, but would not toll statute limiting time within which plaintiff was required to present his claim to such officer. Code Civ. Proc. §§ 340, 352; Government Code, § 1981.

3. Municipal Corporations ⚡189(1)

Even if disability resulting from injuries allegedly inflicted upon him through negligence of defendant police officer had caused plaintiff to choose imprisonment rather than alternative fine after pleading guilty to charge upon which he was being held at time of injury, he would not be relieved from necessity for compliance with statute requiring presentation of claim within 90 days after injury, in absence of showing that method of imprisonment was such as to prevent him from making his claim and taking any other needful action. Vehicle Code, § 502; Code Civ.Proc. §§ 340, 352; Government Code, § 1981.

Pease & Lally, Sacramento, for appellant.

Gerald M. Desmond, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment notwithstanding a jury verdict rendered in favor of plaintiff. Appellant, as plaintiff below, was injured on September 9, 1949, through the alleged negligent action of respondent Brown, a police officer of the City of Sacramento. Appellant had been charged with violation of Section 502 of the California Vehicle Code and was in-

jured while being held in custody responsive to that charge. After his injury he pleaded guilty to the charge and was sentenced to pay a fine or to serve a specified jail term. He served out the jail sentence and within 90 days after his release he presented to and filed with respondent Brown his claim of negligent injury. He then began this action. In his complaint he named as defendants the respondent, and three fictitious defendants, making no service, however, as to any of the three.

By his complaint appellant alleged that Brown was at the time appellant received his injuries "a qualified and acting police officer of the City of Sacramento * * * engaged in the performance of his assigned duties as a police officer and acting within the scope and terms of said employment." It was further alleged that on the 4th day of May, 1950, the plaintiff's claim had been presented to the respondent, but in this connection it was further alleged that from the time the injuries had been received and until within 90 days of the presentation of said claim plaintiff had been imprisoned on a criminal charge. The motion for judgment notwithstanding the verdict was granted by the trial court upon the ground that the failure of the plaintiff to present his claim to the respondent within 90 days of the injury was fatal to his action.

[1] The argument in support of the appeal falls into two main classifications: 1. That since the action was not against the city and was solely brought against the respondent officer of the city, the provisions of Section 1981 of the Government Code were not applicable. This section requires presentation of a claim for negligent injury to a public officer or employee claimed to be liable, within ninety days after injury. 2. That, assuming those provisions to be applicable, still the claim was presented in time because the imprisonment of appellant rendered him incapable of presenting his claim and extended his time to do so. Since the opening brief of appellant was filed, the Supreme Court handed down an opinion in the case of *Ward v. Jones*, 39 Cal.2d 756, 249 P.2d 246, which, in conjunction with certain cases which preceded it, is decisive against appellant in respect of his first con-

tention. In *Veriddo v. Renaud*, 35 Cal.2d 263, it was said at page 265, 217 P.2d 647, at page 648 that by section 1981 "the Legislature has extended to public officers and employes, who incur liability in the performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated" in the code. In *Huffaker v. Decker*, 77 Cal.App. 2d 383, 175 P.2d 254, it was held that the failure of the plaintiff therein to allege compliance with the claim provisions of section 1981 was fatal to his cause of action. In *Ward v. Jones*, *supra*, a painter employed in the Department of Water and Power in the City of Los Angeles was killed through contact with high-tension wires carried on a tower which he was engaged in painting. His widow and minor children brought action against certain fellow employees whom they charged with negligence in requiring decedent to work under unsafe conditions. A claim was filed with the city clerk, but the complaint did not allege any such claim was presented to or served upon the defendants. It was held that, notwithstanding the city was not a party to the action, and that therefore the complaint did not depend in any sense upon the doctrine of respondeat superior, still the presentation of a claim to the individuals involved was a prerequisite and the failure to present such a claim prior to action brought and within the time limited by said section 1981 was fatal to the cause of action. On the authority of the cases referred to we hold that for the failure to present a claim to the respondent officer within the time required by said section 1981 appellant's action must fail unless the specially-pleaded matter of his incarceration sufficiently excuses his failure to comply with the time provisions of that section.

[2,3] Contending that the incarceration of plaintiff excuses his late presentation of his claim, appellant argues that Section 352 of the Code of Civil Procedure applies. This section provides:

"If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, * * * imprisoned on a

criminal charge, or in execution under the sentence of a criminal court for a term less than for life; * * * the time of such disability is not a part of the time limited for the commencement of the action."

This section is concerned solely with defining disabilities which toll those time limitations for beginning actions which are provided in the sections contained in the preceding chapter referred to. Thus section 352 declares that the time during which one is imprisoned on a criminal charge is not to be considered as a part of the time limited for the commencement of an action such as appellant brought here, that is, an action to recover for injury caused by the wrongful act or neglect of another. Section 340 C.C.P. But section 352 does not affect the provisions of Section 1981 of the Government Code, which section, in so far as time limitations are concerned, has to do solely with the period of time within which after an injury a claim must be presented to the public officer or employee claimed to be liable for that injury. Appellant's imprisonment tolled the statute limiting the time for beginning his action, but it did not toll the statute limiting the time within which he must present his claim. Appellant argues further that the failure of appellant to present his claim in time was due to his imprisonment, which, in turn, was caused by the very tort which is the basis of the action brought. Says appellant: "This is so as defendant at the time of the entry of his plea of guilty to a violation of Vehicle Code Section 502 had the necessary money to pay the alternative fine, but because of his injury and consequent inability to work would not have been able to sustain himself had he used his limited funds to pay the alternative fine." Appellant relies on *Schulstad v. City and County of San Francisco*, 74 Cal.App.2d 105, 168 P.2d 68, holding that the time for presentation of claim did not run while the claimant was mentally incapable of presenting his claim due to the injuries he had suffered. But this case and other cases, such as *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, holding that there can be equitable estoppel preventing a defendant from

urging the failure to present a claim in time, all have no application to appellant's case since they must be distinguished on their facts. Here respondent did not imprison appellant nor cause his imprisonment; appellant elected to undergo that imprisonment rather than to use his available funds to pay his fine. Furthermore, the injury which the appellant charges respondent inflicted upon him did not render him incapable of pursuing his remedies. It was not shown that the method of imprisonment was such as to prevent appellant from presenting his claim and taking any other needful action. Finally, no conduct of respondent after the injury, such as urging delay in the prosecution of appellant's remedies, was here present as in the Farrell case.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



121 Cal.App.2d 505

DE YO v. UMINA et al.
Civ. 19637.

District Court of Appeal, Second District,
Division 3, California.

Nov. 24, 1953.

Rehearing Denied Dec. 10, 1953.

Hearing Denied Jan. 20, 1954.

Action for injuries received by southbound motorist when he collided with right rear portion of defendants' truck, which had been parked in left lane of westerly roadway of divided highway which was not signposted as one-way street. The Superior Court of Los Angeles County, Elmer W. Heald, J., entered judgment adverse to motorist, and motorist appealed. The District Court of Appeal, Shinn, P. J., held that giving of instruction which did not state exceptions to general rule that vehicles on roadway should be driven on right half thereof constituted prejudicial error.

Judgment reversed.

1. Automobiles ⇨14

Upon streets designated and signposted as one-way streets, vehicles need not comply with general requirement that they be driven on right half of roadway, left half may be used in same manner as right half. Vehicle Code, § 525.

2. Automobiles ⇨153

On roadways of divided highway, which is not signposted as one way street, right half is for general traffic and left half is for faster moving vehicles in act of passing. Vehicle Code, § 525.

3. Automobiles ⇨14

Division of highway into two roadways does not automatically make each roadway a one-way street, but this may be done by appropriate signposting. Vehicle Code, §§ 525(a), 604.

4. Automobiles ⇨153

Where roadways of a divided highway were not signposted as one-way streets, and no part thereof was closed to traffic, vehicles were required to be driven on right half of their roadway except when passing another vehicle or preparing to make a left turn. Vehicle Code, § 525.

5. Evidence ⇨86

In personal injury action arising out of collision on westerly roadway of highway made up of two such roadways separated by center strip, presumption that motorist, who because of his injuries was unable to recall any circumstances of accident, was not negligent and was obeying law constituted evidence. Vehicle Code, § 525.

6. Appeal and Error ⇨1064(1)

Automobiles ⇨246(13)

In action for injuries received by southbound motorist when he collided with right rear portion of defendants' truck, which had been parked in left lane of westerly roadway, which was not signposted as one-way street, giving of instruction which did not state exceptions to general rule that vehicles on roadway should be driven on right half thereof constituted prejudicial error. Vehicle Code, § 525.

Lynch & Reilly, Los Angeles, for appellant.

Sampson & Dryden, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff's automobile collided with a parked truck of defendants. In this action for damages plaintiff appeals from an adverse judgment in a jury trial.

Gerhart Street, in the County of Los Angeles, is 100 feet wide, and runs north and south. It is divided into two paved roadways, each 35 feet wide, by a 30-foot center strip, which is planted with trees and grass and bounded by curbs.

On August 4, 1952, at about 11:30 p. m. defendant Antonio Umina parked a flat-bed truck on the east side of the westerly roadway of Gerhart Street, facing south, parallel with the dividing strip, and with the left front wheel touching the westerly curbing of the strip. All lights were extinguished, and the ruby reflectors mounted on the rear of the truck were caked with dirt so that they did not reflect the lights of a police car focused on them from a distance of 40 feet.

At about 2:20 the following morning, plaintiff's passenger car collided with the right rear portion of defendant's truck. Plaintiff, who was driving alone, suffered

serious injuries, including damage to his brain resulting in a partial amnesia which prevented him from remembering anything that had occurred immediately preceding the accident. The evidence indicated that immediately prior to the collision plaintiff had been driving south in the left-hand portion of the west roadway. There was no eyewitness to the accident.

The principal question is whether the jury was properly instructed to the effect that it was the duty of a motorist traveling south on the west roadway of Gerhart Street to keep on the right or west half of the roadway. If the code made it the duty of motorists to travel on the right half of the roadway in question defendant violated the law when he parked his truck against the left curb of the roadway, and it was a question for the jury whether plaintiff was driving unlawfully when he collided with defendant's truck. Defendant contends that plaintiff was required to drive on the right half of the roadway, and in so contending, necessarily concedes that he parked his truck unlawfully. Vehicle Code, sec. 525.¹

Defendants requested instructions which, after modification by the court, were given as follows:

1. "Drive on Right Side of Roadway—Exceptions. (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn.

"(3) When the right half of a roadway is closed to traffic while under construction or repair.

"(4) Upon a roadway designated and signposted for one-way traffic.

"(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a state highway where the volume of traffic or the vertical or other curvature of the roadway renders it

hazardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place, the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway.

"(c) It is unlawful to drive any vehicle upon any highway which has been divided into two or more roadways by means of intermittent barriers or by means of a dividing section of not less than two feet in width delineated by curbs, lines or other markings on the roadway except to the right of such barrier or dividing section, or to drive any vehicle over, upon, or across any such dividing section, or to make any left turn or semi-circular or U-turn on any such divided highway, except through an opening in such barrier designed and intended by public authorities for the use of vehicles or through a plainly marked opening in such dividing section."

(1) "In the State of California we recognize what is known to the law as the defense of contributory negligence. If you find, under the evidence, that the defendant was negligent in the manner in which he parked his truck, and if you further find that the plaintiff violated the law with relation to driving on the right hand side of the street, and if you find that such violation constituted negligence, and you further find that such negligence on the part of the plaintiff proximately contributed in any degree, no matter how slight, to the happening of the accident, and you further find that all of said facts were proven and established by a preponderance of the evidence by the defendants, then the plaintiff would be subject to the rule of contributory negligence and your verdict should be for the defendants on the issue of contributory negligence."

(2) "Section 525 of the Vehicle Code of the State of California reads in part as follows: 'Drive on Right Side of Roadway. Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway.'" Plaintiff urges two criticisms: (1) He was not required to stay on the right half of the roadway at all; and (2) if he was required to do so under normal conditions, the court should have stated the conditions that would have excused him for being on the left half.

It is quite necessary that motorists should know whether they must travel on the right-hand half of roadways of divided highways which are not *designated* and *signposted* as one-way streets, except when passing, or preparing to make a left-hand turn or when the right-hand half is obstructed. As we shall see, an inadequate understanding of the law could lead one into the mistake of regarding such roadways as one-way streets upon which traffic could proceed as freely on one half of the street as upon the other.

[1-3] Gerhart Street is a highway divided into two roadways. Each roadway is for one-way traffic as required by section 525(c) by reason of the dividing strip. It was not otherwise designated and was not signposted as a one-way street. Other

roadways may be converted into one-way streets by being designated and signposted as such, even though they are not roadways of a divided highway. Vehicle Code, secs. 459, 465. One-way city streets made such by local authorities are examples. The requirement of section 525 that vehicles be driven on the right half of roadways applies to all roadways other than those specifically excepted, and there is no exception of roadways that are created by the division of a highway. Section 525(a) (4) sets up a special class of roadways consisting of those that are designated and signposted for one-way vehicular traffic. These are referred to as one-way streets as distinguished from roadways of divided highways. Vehicle Code, sec. 529. On one-way streets, namely, streets designated and signposted as such, vehicles need not comply with the general requirement that they be driven on the right half of the roadway. No vehicle shall be operated or moved thereon in a direction opposed to that indicated by such description or signpost. Vehicle Code, sec. 604. Another class of roadways, of which Gerhart Street is an example, consists of those that have been or may be created by the division of highways as described in section 525(c), and which are not designated and signposted for one-way traffic. On the signposted one-way streets the left half may be used in the same manner as the right half. On roadways of a divided highway that are not signposted as such the right half is for general traffic and the left half is for faster moving vehicles in the act of passing. The division of a highway into two roadways does not automatically make each of them a one-way street within the fourth exception stated in section 525(a). If it is desired to do away with the requirements for driving on the right half of the roadway this may be done by appropriate signposting.

We know from experience that there exist many through highways designed to accommodate heavy, fast moving traffic that have been divided into separate roadways and also many one-way streets, especially in municipalities. To these the fourth exception of section 525(a) has

been made applicable by means of designating and signposting. Also there are many highways which have been divided into roadways of normal width and which, although restricted to one-way traffic, have not been signposted as such. The legislature has not seen fit to include these roadways in the exception found in section 525 (a). We see a logical reason for this in view of the requirement of section 525.1 that vehicles traveling at less than normal speed of traffic on the highway shall be driven in the right-hand lane or as close as practicable to the right-hand edge or curb, except as provided in section 525. The left half of the roadway is rendered more available for faster moving traffic.

[4] Since the west roadway of Gerhart Street was not signposted as a one-way street, and no part thereof was closed to traffic, vehicles were required to be driven on the right half except when passing another vehicle or preparing to make a left-hand turn.

[5] The court also instructed that from the testimony of plaintiff that because of his injuries he was unable to recall any of the circumstances of the accident, a presumption arose that he was not negligent and was obeying the law. Plaintiff contends that it was therefore to be presumed that he was driving on the left-hand side of the road lawfully, that is to say, that he was passing another vehicle or preparing to make a left-hand turn. He says the omission of the exceptions from the instruction deprived him of the benefit of the presumption and was, in effect, an instruction that he was driving in violation of law. The point is well taken. The presumption was evidence. There was no direct evidence that plaintiff was not passing another car or preparing to make a left-hand turn. Had the verdict been in favor of plaintiff the presumption, itself, would have constituted substantial evidence that he was driving lawfully, which could mean only that some condition existed which legally justified his being on the left-hand side of the road. *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590; *Douglas v. Hoff*, 82 Cal. App.2d 82, 185 P.2d 607; *Wahrenbrock v.*

Los Angeles Transit Lines, 84 Cal.App.2d 236, 190 P.2d 272.

[6] We are of the opinion that the court erred in reading only a portion of section 525 and that the error was prejudicial. Under the instructions the jury was bound to find that defendants were negligent in leaving their truck parked at the left-hand curb. A colloquy occurred between the court and a juror when the jury was brought in pursuant to their request for an explanation of the instructions. The jury asked for enlightenment as to their duty if both plaintiff and defendants were found to have been negligent and for further instructions as to proximate cause, which the court gave. The verdict can be accounted for only on the theory that plaintiff was found to have been guilty of a violation of law and hence of contributory negligence. It is not improbable that the verdict would have been different had the jury been properly instructed.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



121 Cal.App.2d 554

FORD

v.

RIVERSIDE CITY SCHOOL DIST.

Civ. 4485.

District Court of Appeal, Fourth District,
California.

No. 25, 1953.

Rehearing Denied Dec. 16, 1953.

Hearing Denied Jan. 20, 1954.

Action against school district for personal injuries to student whose eye was pierced while pulling thorns from palm tree in shrub area. The Superior Court of Riverside County, O. K. Morton, J., entered judgment from which school district appealed. The District Court of Appeal, Mussell, J., held that thorny palm tree located in

isolated area not a part of the school playground, and in area which children had been expressly prohibited from entering, was not a "dangerous or defective condition of school grounds or property" within meaning of the Public Liability Act.

Judgment reversed.

1. Schools and School Districts ⇨89.6

A thorny palm tree located in shrub area not a part of school playground, but in an isolated area which school children had been expressly prohibited from entering, did not constitute a "dangerous or defective condition" of the public school ground within meaning of Public Liability Act, and thus that act could not serve as basis for liability for eye injury suffered when student stealthily entered the area to play with the thorns. Gen.Laws, Act 5619, § 2.

2. Schools and School Districts ⇨89.6

Under Public Liability Act relating to liability of a school district for injuries resulting from a dangerous or defective condition on the grounds, liability exists only if the school district or its officers had notice of the dangerous character of the property, and when a thorny palm tree, located in an isolated shrub area, had been standing for many years without causing injury to any students, no liability existed for eye injury of student who trespassed into shrub area and suffered severe injury from thorn. Gen.Laws, Act 5619, § 2.

3. Schools and School Districts ⇨121

In action to impose liability on school district for eye injury suffered by student who entered isolated shrub area in which there was located a thorny palm tree, evidence was insufficient to support any implied finding by jury that defendant negligently failed to supervise the conduct of its pupils, including the plaintiff, all of whom had been expressly prohibited from entering the shrub area, or that plaintiff's injury was proximately caused by any lack of reasonable supervision. Education Code, § 1007.

4. Negligence ⇨136(8)

Where there is no conflict in the evidence, it is the province of the court to determine as a matter of law whether there is substantial evidence upon which a finding of negligence may be based.

Thompson & Colegate, H. L. Thompson, Roy W. Colegate and Robert D. Allen, Riverside, for appellant.

Reid & Waugh, Enos C. Reid, Best, Best & Krieger, Eugene Best and Gerald Brown, Riverside, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries. It is alleged in the complaint that on May 10, 1949, plaintiff, a minor of the age of nine years, was a pupil at the Bryant elementary school in the city of Riverside; that during the morning recess, he and another third grade pupil (James Miller) were pulling thorns from a palm tree in a shrub area on the school grounds; that as James Miller was pulling a thorn, it suddenly came loose, the force of the pull driving the point of the thorn into the left eye of the plaintiff, severely injuring it; that the damages and injury to plaintiff were occasioned by the direct result of the negligent, reckless and careless management, operation, control and supervision of said school and school grounds by the defendants and that the defendants negligently, recklessly and carelessly maintained and allowed to be maintained, under their direction and control and with their knowledge the said shrub area and palm tree; that the said palm tree and the said palm tree thorns thereof is a dangerous agency and was so known by the defendants; that defendants failed to prune said palm tree and to prune off said palm tree thorns or to take any precautions to protect children from them.

The action was dismissed as to defendants Robertson and Moan and a jury trial was had resulting in a verdict for plaintiff in the sum of \$15,000. Defendant Riverside school district appeals from the judgment.

Facts

The Bryant school buildings and grounds occupy a city block in a residential section in the city of Riverside. There are two school buildings on the property, the main building, located on the south side of the school grounds about midway between the southwest and southeast corners of the block and a small classroom building situat-

ed on the west side of the block a short distance northwest of the main building. The remainder of the school yard, with the exception of certain shrub areas is an open playground. The entire school ground is raised above the surrounding sidewalk and street level and a concrete wall encompasses the grounds on all sides. At the southeast corner of the block, the top of this concrete wall and the school ground are approximately two to three feet above the adjacent sidewalk. At the time of the accident, shrubs, including rose bushes, were planted next to the two buildings and there were two shrub areas, one at the southwest corner and the other at the southeast corner of the grounds. The area at the southeast corner covered a triangular area extending a distance of approximately thirty feet from the extreme corner in all directions inward toward the school ground. Seventeen or eighteen varieties of shrubs were planted in this area, many of which were bushy and close together, ranging in height from four to ten feet and in width from two to six feet. Among these shrubs were three ornamental date palm trees of the same species. Two of them were located near the borders of the area toward the playground and the third was situated in the extreme southeast corner of the yard, the base of the tree being about three to four feet inward from the concrete retaining wall. This tree was about ten or eleven years old, was about ten to twelve feet in height and the lower fronds were approximately four feet above the ground level. At the base of the branches or fronds of the tree there were sharp thorns or growths several inches in length. The remaining shrubs, trees and bushes formed a semicircular ring around this corner palm and the density and height of the other shrubs and trees rendered this tree almost invisible to a person looking to the southeast corner from any point within the playground area.

On the day of the accident, plaintiff was a third grade student. When the morning recess commenced, the entire third grade class, with the exception of plaintiff and his friend, James Miller, left the school building by the west door and proceeded immediately to their assigned playground area in

the northwest section of the school yard. The two boys were the last to leave the building, "at the back, the last of the children, the back part." As soon as they arrived outside, they decided to proceed to the shrub area in the southeast corner of the block to obtain "some palm thorns" with which to play. They observed a teacher on the west side of the playground and in order to avoid being seen by her, they "waited until the teacher got to the other side of the building." They then immediately went to the shrub area and "then started playing with the thorns." Plaintiff testified that while he was going over there, he had a feeling inside that he was doing something wrong. When the two boys reached the palm tree in the southeast corner of the shrub area, they commenced pulling on one of the "thorns" or sharp spiny growths near the base of the branches of the tree. Plaintiff "started pulling and twisting it" and "got it a little loose". At the time of the accident James was tugging at the thorn and plaintiff was standing behind him looking over his shoulder, when suddenly the thorn came out, James fell back, and the thorn went over his shoulder and into plaintiff's left eye.

For many years there had been a rule of the school prohibiting the pupils from entering or playing in the shrubs or shrub area. Pupils playing in this area would trample the ground and interfere with the custodian's proper care of the trees and shrubs. On occasion, children had injured or damaged the shrubs, and while playing in the area, were not readily observable to the teachers. At the commencement of each school term this rule was formally announced to the classes. On occasion, the principal would go from room to room reminding the children not to play in the shrubs and at times she sent formal notes to that effect to be read to the classes by the classroom teachers. When infractions of the rule occurred, students were individually cautioned against entering the forbidden area and sometimes were "chased" and removed from the shrub area by the teachers and punished for violation of the rule. Plaintiff was thoroughly familiar with the rule at all times during the three years in

which he attended the school and testified that about three weeks prior to the accident a message was read to his class by someone admonishing the children "to stay from this corner—the shrubs, and to stay away from the thorns because they might hurt you."

During the recess period there were approximately 200 pupils playing on the school ground and there were 34 students in the third grade. Mrs. Fulton, one of the teachers, was in charge of supervising pupils during the recess period. She was assisted by the principal (Miss Robertson) and a safety committee of fifth and sixth grade students which was "functioning".

Appellant first contends that the evidence is wholly insufficient to establish liability against the school district under the Public Liability Act of 1923; that as a matter of law, the shrub area, together with the palm tree, was not a "dangerous or defective condition of school grounds or property" within the meaning of said act and that the evidence is insufficient to show that "the governing or managing board of the Riverside city school district or other board or officer or person having authority to remedy such condition" had knowledge of any dangerous or defective condition of the school ground.

The Public Liability Act of 1923 as it existed at the time of the accident, Stats.1923, p. 675, Deering's Gen.Laws, Vol. 2, Act 5619, subd. 2, is as follows:

"Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to rem-

edy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Appellant argues that any physical object, be it real or personal, stationary or moveable, can be deemed "dangerous or defective" depending upon the use to which it is put, and that it would be difficult to conceive of any object commonly found upon the school ground, which, if applied to some hazardous use foreign to the purpose for which it was intended, could not become "dangerous or defective", using such words in their proper sense, and that all of the common ornamental shrubbery found in southern California, harmless when devoted to the purpose for which it was created or maintained, can, by misuse, be converted into an instrumentality of danger to life and limb.

In *Beeson v. City of Los Angeles*, 115 Cal.App. 122, 132, 300 P. 993, 997, it is said:

"We are of the opinion that in passing and adopting section two of the act approved June 13, 1923, the Legislature intended to limit the liability of the city for damages resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof. As was said in the case of *Commonwealth v. Allen*, 148 Pa. 358, 23 A. 1115, 1117, 16 L.R.A. 148, 33 Am.St.Rep. 830: 'As a general rule, highways and bridges are constructed for ordinary use, in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed or by the passing of a very large and unusual weight. A township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them.'"

This rule was again stated in *Demmer v. City of Eureka*, 78 Cal.App.2d 708, 713, 178

P.2d 472, where it was held that the city of Eureka was not liable under the cited statute for the death of a child who had left the street on which he was walking, became attracted to a pond which extended over part of the street, climbed on a log, used it as a plaything, paddled it out on the pond, fell off and was drowned. It is there said, 78 Cal.App.2d at page 712, 178 P.2d at page 474:

"One who enters the premises of another as a trespasser or mere licensee does so at his own risk, and the owner owes him no duty to keep the premises in a safe condition. His only duty is to abstain from wanton or wilful injury." (Citing cases.)

In *Woodman v. Hemet Union High School Dist.*, 136 Cal.App. 544, 553, 29 P.2d 257, 261, this court held:

"It is our conclusion that, under the terms of the Public Liability Act, a public agency should only be held liable for damages resulting from the defective condition of its property in its ordinary, usual, and customary use, and not from the unauthorized and unusual use shown in the instant case."

In *Howard v. City of Fresno*, 22 Cal.App. 2d 41, 70 P.2d 502, plaintiff children were injured while playing in a trash burning area in a city park. This area was about 300 feet from the children's playground. The trash burning area had been maintained by the city for about six years. There was no evidence that any person other than the plaintiffs had been injured or burned in this area which was surrounded by trees and well isolated. Judgment for plaintiffs was reversed and it was held, 22 Cal.App.2d at page 44, 70 P.2d at page 503:

"That a municipality is not an insurer against accidents on its streets or property; that it is required to guard against dangerous or defective conditions of which its responsible representatives have actual or constructive notice; that it is not sufficient that the municipal representatives have notice of the condition, but that they also must have notice 'of the dangerous character

of such condition' (*Whiting v. City of National City*, supra [9 Cal.2d 163, 69 P.2d 990]); that the question of the dangerous character of a defective condition depends largely on the intended lawful use of the property. (*Rodkey v. City of Escondido*, supra [8 Cal.2d 685, 67 P.2d 1053]; *Beeson v. City of Los Angeles*, supra [115 Cal.App. 122, 300 P. 993])."

In *Betts v. City & County of San Francisco*, 108 Cal.App.2d 701, 239 P.2d 456, plaintiff's seven year old son was playing about a city reservoir with another boy about the same age. When they decided to get a drink of water out of the pipe where the water was thrown upon a spillway, they climbed over a picket fence and descended the side of the reservoir. The deceased went first and, while trying to drink out of the pipe, lost his footing, slipped into the water and was drowned. It was there held that the Public Liability Act, here involved, applied only when the injured party was using the public property in the ordinary and usual manner in which the property would be used.

In the instant case there was uncontradicted evidence that the palm tree involved was in the shrub area where the accident happened for many years; that trees of the same kind are ornamental trees and are known as ornamental date palms; that the city of Riverside owned and maintained in its parkways and parks some 15,000 of such trees in 1949. There is no evidence that any person, pupil or otherwise had ever been injured by these trees, or any of them. No complaints had ever been made to the school authorities concerning them and no prior accident, if any, had ever been reported. The use of these trees was unquestionably for ornamental purposes. The area involved was not intended to be used as a playground and the school authorities by rule and by conduct attempted to keep all of the school children out of it.

[1] Plaintiff, well aware of the school rule prohibiting the students from entering the shrub area, was a trespasser, and his injuries resulted from an unauthorized and prohibited use of the tree involved. The

area in which it was situated was isolated and not a part of the school playground. It is our conclusion that, under the circumstances shown by the record, the tree in question did not constitute a "dangerous or defective condition" of the public school ground within the meaning of the cited Public Liability Act. To hold otherwise is to declare that a liability exists in favor of minors injured as a result of their own misconduct and misuse of ornamental palm trees in all public parks, parkways, and school grounds in the state where such trees are accessible to the public.

[2] One of the conditions precedent to the establishment of liability under the statute is that the school district or its officers must have had notice of the dangerous character, if any, of the property. *Howard v. City of Fresno*, supra. Here, the tree involved had been in place for many years. There is no evidence that prior to the date of the accident anyone had been injured by it or that the school authorities knew that the students or any of them had removed branches or thorns therefrom.

[3] Appellant next contends that the evidence is insufficient to establish liability against defendant school district under the provisions of Section 1007 of the Education Code. There is no evidence to support any implied finding by the jury that the defendant negligently failed to supervise the conduct of the pupils, including plaintiff or James Miller, during the recess period or that plaintiff's injury was proximately caused by any lack of reasonable supervision.

Section 1007 of the Education Code reads:

"The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after the accident has occurred. The claim shall specify the name and address of the

claimant, the date and place of the accident, and the extent of the injuries or damages received."

In *Pirkle v. Oakdale Union Etc. School Dist.*, 40 Cal.2d 207, 210, 253 P.2d 1, it was held that the standard of care required of an officer or employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances. (Citing cases.)

In *Weldy v. Oakland High School Dist.*, 19 Cal.App.2d 429, 431, 65 P.2d 851, 852, it is said:

"The liability of a school district for injuries to its students rests upon section 2.801 of the School Code (Stats. 1931, p. 2487), which permits recovery only when the injuries arise from 'the negligence of the district or its officers or employees.' The statute does not create a liability upon the district for injuries arising from the unlawful or wilful misconduct of its students. (*Whiteford v. Yuba City Union H. S. Dist.*, 117 Cal.App. 462, 464, 4 P.2d 266), nor for injuries arising from the negligence of a fellow student." (Citing cases.)

It is further stated therein that the law does not make school districts insurers of the safety of the pupils at play or elsewhere. Citing *Goodman v. Pasadena City High School Dist.*, 4 Cal.App.2d 65, 40 P.2d 854.

It is alleged in the complaint that the defendants were negligent and careless in supervising the children during the recess period. The particular and only act alleged is that defendant negligently failed to keep the plaintiff and his companion away from the shrub area and the palm tree. The evidence shows without conflict that the boys were warned by the teachers to stay away from the area; that they purposely endeavored to and did hide from the teacher. It is not alleged, and there was no substantial evidence introduced showing that the teachers in charge of the playground failed to exercise the same care as that which a person of ordinary care, charged with his duties, would exercise under the same circum-

stances. The evidence shows that the school authorities had no knowledge or notice of any dangerous practice engaged in by the school students in connection with the palm tree. There is no evidence that any of the teachers could reasonably expect that the plaintiff would surreptitiously visit the shrub area during the recess period or that the yard supervisors had knowledge of his concealed presence at the palm tree.

[4] Plaintiff argues that the question of the existence of a "dangerous or defective condition of grounds" within the meaning of the Public Liability Act of 1923 is a matter for the jury. Citing *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723 and *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P.2d 952; that under the provisions of section 1007 of the Education Code the question as to whether there is liability is to be determined by the ordinary negligence rules as to whether district officers or employees (teachers) ought to have seen and prevented an injury; that this question is one of fact to be resolved by the jury. Citing *Bellman v. San Francisco High School District*, 11 Cal.2d 576, 81 P.2d 894, holding that the implied finding of the jury that the employees of the school district were negligent is conclusive if there is substantial evidence which, when read with the inferences most favorable to the respondent, supports the verdict. The rules stated in the cited cases are subject to the limitation that there must be substantial evidence to support the findings of the court or jury. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. Where, as here, there is no conflict, it is the province of the court to determine as a matter of law whether there is substantial evidence upon which a finding of negligence may be based.

Since we conclude that the evidence is insufficient to establish liability against the defendant Riverside city school district under the Public Liability Act of 1923 or the provisions of Section 1007 of the Education Code, it is unnecessary to pass upon the other grounds urged for reversal.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DIST.

v.

STANLEY.

No. 16008.

District Court of Appeal, First District,
Division 1, California.

Nov. 17, 1953.

The Alameda County Flood Control and Water Conservation District, a body corporate and politic of the State of California, petitioner, brought mandamus proceedings against the chairman of Board of Supervisors of the Alameda County Flood Control and Water Conservation District, respondent, to compel respondent to execute bonds of the district, and the respondent demurred to the petition, on ground that the Act creating the district is unconstitutional. The District Court of Appeal, Bray, J., held that the Act does not violate constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable, or constitutional provision that the Legislature shall not pass local or special laws creating offices or prescribing the powers and duties of officers in counties.

Peremptory writ of mandate issued.

1. Statutes $\S$ 76(1)

The Legislature is vested with a very wide discretion in exercising its power to classify under statute without violating constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable. Const. art. 4, $\S$ 25, subd. 33.

2. Constitutional Law $\S$ 48

Every presumption must be exercised in favor of validity of legislative classification claimed to violate constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable. Const. art. 4, $\S$ 25, subd. 33.

3. Evidence $\S$ 10(1)

The District Court of Appeal could take judicial notice of the geographical pattern of certain county.

4. Mandamus Ⓒ163

On hearing on demurrer to petition in original mandamus proceeding in District Court of Appeal, District Court of Appeal must disregard alleged facts that do not appear in the petition.

5. Constitutional Law Ⓒ47, 48

Not only must court view statute in light of every presumption and intendment favorable to its constitutionality, but court must limit itself to a consideration of such facts as appear on face of statute, together with such others as are matters of judicial cognizance.

6. Statutes Ⓒ76(1)

A distinction in legislation is not arbitrary within meaning of constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable, if any set of facts reasonably can be conceived that would sustain the distinction. Const. art. 4, § 25, subd. 33.

7. Statutes Ⓒ76(1)

The Alameda County Flood Control and Water Conservation District Act does not violate constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable. St.1949, p. 2240, as amended by St.1953, p. 920; Const. art. 4, § 25, subd. 33; Government Code, §§ 25680 to 25684, 25680; Water Code, § 8110.

8. Constitutional Law Ⓒ70(2)

The District Court of Appeal has no right to attempt to substitute its judgment for that of the Legislature that statute does not violate constitutional provision that the Legislature shall not pass local or special laws where a general law can be made applicable. Const. art. 4, § 25, subd. 33.

9. Statutes Ⓒ100(2)

The Alameda County Flood Control and Water Conservation District Act does not violate constitutional provision that the Legislature shall not pass local or special laws creating offices, or prescribing the powers and duties of officers in counties because the act provides that members of the Board of Supervisors of Alameda County are ex-officio members of the board

of supervisors of the district and that certain officers of the county are ex-officio officers of the district. St.1949, p. 2240, as amended by St.1953, p. 920; Const. art. 4, § 25, subd. 28.

J. F. Coakley, Dist. Atty., in and for Alameda County, R. Robert Hunter, Chief Asst. Dist. Atty., Richard J. Moore, Dep. Dist. Atty., Maury Engel, Dep. Dist. Atty., Oakland, for petitioners.

Hubert W. Bryant, Oakland, for respondents.

BRAY, Justice.

Petition for a writ of mandate to compel respondent to execute bonds of the Alameda County Flood Control and Water Conservation District.

Question Presented.

The validity of the bonds, dependent upon the constitutionality of the special act creating said district.

Record.

Respondent has demurred to the petition on the ground that the act creating the district is unconstitutional as being special legislation prohibited by the California Constitution. The pertinent facts set forth in the petition follow. The district is a body corporate and politic of the state, organized and existing under the "Alameda County Flood Control and Water Conservation District Act". Ch. 1275, Stats. 1949, p. 2240, Deering's Gen.Laws, Act 205, 1949 Supp., as amended, ch. 149, Stats.1953, p. 920. Pursuant to the act the district caused Zone No. 2 of said district to be formed (an area covering only a portion of the county—the district is county wide), and thereafter, on June 9, 1953, a special bond election was duly held in said zone. The electors by a two-thirds majority authorized the creation of a bonded indebtedness for said zone of \$6,954,000. August 11, 1953, the board of supervisors of the district pursuant to the provisions of section 14 of said act, by a vote of three to one, respondent voting no, ordered the execution, issuance, sale and delivery of "Alameda County Flood Control and Water Con-

servation District Zone No. 2 Bonds, Issue of 1953, Series A" in the principal sum of \$1,000,000. Respondent has refused to sign said bonds on the alleged ground of the unconstitutionality of the act. The petition states that flood control protection in said Zone No. 2 is urgent and necessary for the preservation of the public peace, health and safety, and that the district has no funds with which to carry on the needed work; that the Legislature declared in an amendment to said act the urgency of flood control work in said district and its necessity. It is then alleged that an urgent necessity exists for such work and that the estimated flood damage in the district last rainy season amounted to \$1,870,000; that at the time of the adoption of said act no law was available for the creation of such a district except by certain general laws which are unavailable and inapplicable to accomplish the special needs of the district.

Does the Act Violate Article IV, Section 25, Subdivision 33, California Constitution?

That section provides, in part: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable." Respondent contends that there are general laws applicable to the formation of a county district of this type: A general act, Stats.1931, ch. 641, p. 1369, Deering's Gen.Laws, Act 9178, as amended by Stats.1949, ch. 144, which provides for the formation in any county of a flood control and flood water conservation district; the general powers given boards of supervisors by Government Code sections 25680 to 25684 inclusive, especially section 25680; and by section 8110 of the Water Code.

Respondent relies primarily upon *Ventura County Harbor District v. Board of Supervisors*, 211 Cal. 271, 295 P. 6, which held unconstitutional the special act creating that harbor district on the ground that every purpose of the special law might be obtained under one, if not both, of two general laws dealing with harbor districts. However, that very case was considered in *American River Flood Control Dist. v. Sweet*, 214 Cal. 778, 7 P.2d 1030, where the

court upheld the constitutionality of the act creating that district, an act which is a prototype of the one considered here. There the respondent, as does the respondent here, relied upon the *Ventura County Harbor District* case. The court pointed out, 214 Cal. at page 780, 7 P.2d at page 1031: "However, it was recognized in that case, and necessarily so, that special legislation might coexist with a general law on the subject, and that it would be deemed a valid exercise of legislative power until it is demonstrated that a general law could be made applicable." In the *American River* case, after referring to certain general laws concerning the formation of levee and reclamation districts, the court said, 214 Cal. at page 780, 7 P.2d at page 1031: "Assuming that a district might be formed under the foregoing general laws * * * it cannot be said that the Legislature was without power to determine that the particular situation confronting it was not adequately provided for thereunder, for several reasons.

"First, the general law is permissive only. The initiation of proceedings for the formation of such districts under general law must depend on the voluntary petition of landowners in the district. The landowners in the district might never file, or might indefinitely delay the filing of, such a petition. Here the district is created by the special act. It has no alternative but to function and carry out the purposes of the act."

In *Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 169 P. 1028, the court upheld the constitutionality of the act creating the district. As to the contention that the act violated subdivision 33, the court stated, 177 Cal. at page 130, 169 P. at page 1032, that that and other contentions were fully met by the discussion and citations of authority in its opinion. In the *American River* case, *supra*, the court said that the reason the opinion in the *Hamilton* case did not pass specially upon the question of whether the act was obnoxious to subdivision 33 was that the court considered the contention "wholly lacking in merit in view of the twenty-four or more cases decided by this court, cited in the briefs, where special legislation such as the act

here in question was upheld." 214 Cal. at page 783, 7 P.2d at page 1032.

[1, 2] Respondent contends that neither the American River nor the Los Angeles case, *supra*, which are the only ones dealing specifically with flood control and water conservation districts created by special act, is authoritative now because at the time of their decision the general law, Deering's Act 9178, was not in existence. This brings us to a consideration of whether the general law is "fully applicable and complete on the subject * * *." Harbor Dist. case, *supra*, 211 Cal. at page 278, 295 P. at page 9. In considering the subject we must bear in mind that the Legislature is vested with a very wide discretion in exercising its power to classify (*Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co.*, 20 Cal.2d 684, 128 P.2d 529), and every presumption must be exercised in favor of the validity of the legislative classification. *Dribin v. Superior Court*, 37 Cal.2d 345, 231 P.2d 809, 24 A.L.R.2d 864. Since 1915 when the Los Angeles County Flood Control District was created the Legislature has created twenty-three flood control and water conservation districts. Of these twenty are county districts. As said in the American River case, *supra*, 214 Cal. at page 782, 7 P.2d at page 1032: "* * * it may be noted that since the early days of California down to the most recent decisions of this court, it has been held consistently, and without any departure, that districts formed for reclamation purposes, districts formed for protection from flood waters, levee districts, drainage districts, and the like may be created by special law. The petitioner's brief refers to some thirty-six of said special acts, beginning with levee district No. 1, Sutter County (St.1867-68, p. 316), and concluding with Orange county flood control district (St.1927, p. 1325)".

The differences between the general law and Act 205 are important.

First, as said in the American River case, *supra*, 214 Cal. at page 780, 7 P.2d at page 1031, in distinguishing the American River Flood Control District Act from the general laws then existing, "* * * the general law is permissive only. * * *

Here the district is created by the special act."

Secondly, Act 9178 does not authorize the financing of projects by a bond issue. Deering Acts 9178b and 9178c entitled Flood Control District Bond Validation Laws of 1933 and 1935, respectively, apply only to bonds *theretofore* issued. Thus under the general law district funds are limited to the amount of taxes which can be raised by direct levy in a particular year.

[3] Thirdly, Act 205 provides for bond issues not only by the district as a whole but also by zones. This court can take judicial notice of the geographical pattern of Alameda County. The northern portion is comprised of highly developed metropolitan cities. The southern portion is less developed in that respect. The act provides that the governing board of the district may establish zones within the district and institute zone projects for the specific benefit of such zone or zones. Each zone project may be carried on either separately or concurrently with other zone projects. Each zone project must be financed solely by bonds or assessments of the particular zone only, the proceeds to be used only for projects within the particular zone.

Fourthly, the act contains certain safeguards for the municipalities (which petitioner contends were included at the express request of the municipalities), which Act 9178 does not provide for.

(a) In the establishment of any zone the consent of any municipality any portion of whose territory is within the proposed zone must be obtained in the manner provided.

(b) The ad valorem taxes or assessments upon all property in the district to pay district general costs and to carry out any of the objects of the act common to the district may not exceed one cent on each \$100 assessed valuation.

(c) The area of any municipality can at any time be withdrawn from the district by a majority vote of the electors of such municipality.

The foregoing are only some of the provisions which are peculiar to Act 205. They are sufficient to demonstrate that the

Legislature was dealing with problems which were local and special in character. "A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district." In *re Madera Irrigation District*, 92 Cal. 296, 311, 28 P. 272, 274, 675, 14 L.R.A. 755.

It should be pointed out that although we have had a general law for the formation of irrigation districts since 1897, Stats. 1897, p. 254, one for the formation of levee districts since 1905, Stats. 1905, p. 327, and one for the formation of reclamation districts since 1872, former Pol.Code § 3446, now Water Code §§ 50300, 50301, there have been many special acts forming such districts thereafter which acts have been upheld by the courts. "The Constitution does not deprive the Legislature of the power to pass all special acts. It forbids special laws in all cases where a general law can be made applicable. Section 25, subd. 33, art. 4. It was said by the Supreme Court: 'The Legislature must, in the first instance, determine whether or not a general law can be made applicable in the particular case. The court will not interfere with its judgment on the subject, unless it clearly and beyond reasonable doubt appears that it adjudged contrary to the fact.'" *Argyle Dredging Co. v. Chambers*, 40 Cal.App. 332, 342, 181 P. 84, 88.

In *Reclamation Dist. No. 70 v. Sherman*, 11 Cal.App. 399, 105 P. 277, 281, where the court approved the legality of the act creating a special reclamation district, even though there was in existence a general

law providing for the formation of such districts, and where the contention was made that the special act was obnoxious to subdivision 33, among other portions of the Constitution, the court said: "'* * * It would require a clear showing upon the face of the law itself that a special act was not required before a court would interfere with the determination of a coordinate branch of the government upon this subject, and, generally, as is said in *People [ex rel. Graves] v. McFadden*, 81 Cal. 489, 22 P. 851, 15 Am.St.Rep. 66, the determination of such a matter "depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature."'"

In *Peterson v. Board of Supervisors*, 65 Cal.App. 670, at page 677, 225 P. 28, at page 31, the court said: "Neither is there any constitutional limitation to the creation of reclamation districts by special acts of the Legislature. This statement of the law has been definitely and firmly established in our jurisprudence by the many decisions of our courts having to do with this question."

In amending the act in question in 1953, Stats. 1953, ch. 149, p. 920, the Legislature declared the latter to be an urgency measure necessary for the immediate preservation of the public peace, health and safety. It pointed out that in the last rainy season damages in the area where bond elections are proposed amounted to an estimated \$1,870,000, and to make bond funds available as soon as possible to prevent further loss and damage to property and county roads it was necessary for the act to take effect immediately.

[4-8] Petitioner's briefs set up many facts which would show the necessity for a special district. They do not appear in the petition, and this being a hearing on demurrer we must disregard them. As said in *Los Angeles County Flood Control Dist. v. Hamilton*, supra, 177 Cal. 119, 125, 169 P. 1028, 1030, "Not only must the court view the act in the light of every presumption and intendment favorable to its constitutionality, but it must limit itself to a consideration of such facts as appear upon the face of the enactment, together with

such others as are matters of judicial cognizance." However, "A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." *Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co.*, supra, 20 Cal.2d 684, 693, 128 P.2d 529, 535; *Dribin v. Superior Court*, supra, 37 Cal.2d 345, 352, 231 P.2d 809, 24 A.L.R. 2d 864. The matters before mentioned which appear on the face of the act constitute facts which sustain the necessity for the special act as distinct from the general law. Particularly is this so in view of the fact that this court has no right to attempt to substitute its judgment for that of the Legislature. "Whether the work could best be done as a whole, or should be committed to the direction of separate districts, is, in reality, a question of engineering, rather than one of constitutional law. It is therefore a question for legislative determination." *Los Angeles County Flood Control Dist. v. Hamilton*, supra, 177 Cal. at page 127, 169 P. at page 1031.

Respondent also contends that the district could have been created under the provisions of sections 25680 to 25684 inclusive of the Government Code, which are based on former Political Code sections, one of which dates back to 1907. As said in *Los Angeles County Flood Control Dist. v. Hamilton*, supra, 177 Cal. 119, 131, 169 P. 1028, concerning constitutional objections there made, we think it sufficient to say that the foregoing discussion and citations of authority meet this contention. Moreover, these sections deal only with flood control relating to "streams and rivers" while the Alameda County act is far broader. As to section 8110 of the Water Code, which respondent seems to think adequate, what we have said concerning the Political Code sections applies to that section as well. In addition, section 8110 makes no provision for water conservation projects.

Article IV, Section 25, Subdivision 28, Constitution.

[9] This provides that the Legislature shall not pass local or special laws "Creating offices, or prescribing the powers and duties of officers in counties * * *." The Alameda County act provides that the

board of supervisors of that county are ex-officio the board of supervisors of the district. It further provides that the district attorney, other designated as well as all, county officers, their deputies, employees, etc., are ex-officio officers, deputies or employees of the district and shall perform the duties necessary to carry out the provisions of the act. Respondent, in support of his contention that subdivision 28 is violated by those provisions, cites *Farrell v. Board of Trustees*, 85 Cal. 408, 24 P. 868, dealing with the appointment of policemen; *Welsh v. Bramlet*, 98 Cal. 219, 33 P. 66, dealing with the appointment of an assistant district attorney; *City and County of San Francisco v. Broderick*, 125 Cal. 188, 57 P. 887, dealing with the office of chief deputy county clerk; *Denman v. Broderick*, 111 Cal. 96, 43 P. 516, dealing with an act making boards of supervisors and governing bodies of cities, ex-officio the board of election commissioners in their respective counties or cities; and *Payne v. Murphy*, 18 Cal.App. 446, 123 P. 350, dealing with compensation of certain officers. However, none of these cases is applicable, as the matter has been flatly determined in *Los Angeles County Flood Control Dist. v. Hamilton*, supra, 177 Cal. 119, 169 P. 1028. The Los Angeles act had provisions similar to those in the Alameda County act making boards of supervisors, county officers and employees ex-officio supervisors, officers and employees respectively of the district. "The act is also attacked on the ground that it violates subdivision 28 of section 25 of article 4 of the constitution of California, in that it creates offices by special legislation, and also imposes duties on county officers by special act. In answer to this objection, it is unnecessary to do more than cite the cases of *People [ex rel. Chapman] v. Sacramento Drainage Dist.*, [155 Cal. 373, 103 P. 207], and *Matter of Bonds of [South] San Joaquin Irr. Dist.*, 161 Cal. 345, 119 P. 198, where similar statutory provisions were under consideration." 177 Cal. at page 130, 169 P. at page 1032.

With the many complexities of the problems arising from the necessities of flood control and water conservation, the topo-

graphical and geographical differences in our many counties, the obvious differences between the general laws and the Alameda County act, and all the matters discussed herein, we cannot say that the Legislature with the broad discretion it has, improperly determined that the general laws were not adequate to meet the situation in Alameda County, nor that it is not a situation "where the exigency of the occasion imperatively calls for a special law." *City of Sacramento v. Swanston*, 29 Cal.App. 212, 216, 155 P. 101, 103.

It is ordered that a peremptory writ of mandate issue commanding respondent to sign and execute the bonds referred to in the petition and to perform all acts required of him relative to the signing, issuance and delivery of said bonds. Let the peremptory writ of mandate issue.

PETERS, P. J., and FRED B. WOOD, J., concur.



121 Cal.App.2d 407

LOS ANGELES COUNTY

v.

FORD (two cases).

Nos. 19708, 19709.

District Court of Appeal, Second District,
Division 1, California.

Nov. 23, 1953.

Mandamus proceedings were brought by the County of Los Angeles, a body politic and corporate, to compel the Chairman of the Board of Supervisors of the County of Los Angeles to execute contracts between Board and medical schools whereby medical schools were to render medical and teaching services in county hospital. The District Court of Appeal, Drapeau, J., held that contracts were not invalid on ground that they violated Civil Service provisions of county charter, or on ground that they

provided for an unlawful corporate practice of medicine by medical schools.

Peremptory writs issued.

1. Officers ⚡11.1

Contracts between county board of supervisors and medical schools whereby medical schools are to render medical and teaching services in county hospital, did not violate Civil Service provisions of county charter. *Welfare and Institutions Code*, § 2500.

2. Physicians and Surgeons ⚡4

Rule against corporate practice of medicine is designed to protect the public from possible abuses stemming from commercial exploitation of the practice of medicine.

3. Physicians and Surgeons ⚡6(1)

Contracts between county board of supervisors and medical schools whereby medical schools were to render medical and teaching services in county hospital, did not provide for unlawful corporate practice of medicine by medical schools. *Welfare and Institutions Code*, § 202.

Harold W. Kennedy, County Counsel,
and Gerald G. Kelly, Asst. County Counsel,
Los Angeles, for petitioner.

S. V. O. Prichard, Beverly Hills, for respondent.

Musick & Burrell, Anson B. Jackson, Jr.
and James E. Ludlam, Los Angeles, for
intervening College.

Asa V. Call, and Wright, Peeler & Garrett, Los Angeles, for intervening University.

DRAPEAU, Justice.

By the instant proceedings in mandamus, the County of Los Angeles seeks to compel respondent Ford, as chairman of the Board of Supervisors, to execute contracts pursuant to which the medical schools of the College of Medical Evangelists and the University of Southern California would render medical and teaching services in the County Hospital.

The Board of Supervisors approved each of the contracts in formal session and di-

rected its chairman to sign them. His refusal to do so is based upon the premise that the contracts are invalid, because: (1) they violate the civil service provisions of the county charter; and (2) they constitute an unlawful corporate practice of medicine by medical schools.

Among other things, the petition alleges that the petitioner has a mandatory duty to provide medical care for the indigent sick. Sec. 2500, Welfare & Institutions Code.

That, in order to do this, petitioner maintains the County Hospital which consists of a group of hospitals. Two of them are general hospitals, to wit: Los Angeles County General Hospital and Los Angeles Harbor General Hospital. These are operated as teaching institutions.

The purpose of this is to adequately staff the two general hospital facilities, and thereby attract internes and student trainees to serve in these institutions, and also to maintain a standard of medical care and treatment at an adequate level.

This is made possible by affiliations with universities and colleges having accredited medical schools, which provide medical specialists from their teaching staffs. These specialists provide effective on-the-job training and teaching facilities to those employees holding permanent civil service classification, i. e., "residents, internes, graduate nurses, student nurses, laboratory technicians, x-ray technicians, dietitians, medical social workers, physiotherapists and occupational therapists", thus enabling the hospital to keep abreast of modern medical techniques.

The medical teaching staffs of these private schools have also rendered medical care and services to indigents in the county hospital. This plan of affiliation between large public hospitals and private schools of medicine is in common practice throughout the United States.

These services have been rendered gratuitously by the teaching staffs of University of Southern California, the College of Medical Evangelists and the College of Osteopathic Physicians and Surgeons. Recently, the presidents of these three institutions gave notice to the Board of

Supervisors of Los Angeles County that they could no longer continue to do so. And that they would be forced to restrict or terminate these services unless petitioner would agree to pay a fair compensation therefor.

It is further alleged that said Board has determined that it is necessary to continue operating the Los Angeles County General Hospital as a teaching hospital in order to adequately care for the indigent sick. As a result, it instructed the Chief Administrative Officer of the County to negotiate contracts with the three named medical schools in order to assure the continuation of these services. A separate contract was negotiated with each medical school.

The proceedings here have reference to the contracts between the County of Los Angeles and the University of Southern California and the College of Medical Evangelists. As to these, the Board of Supervisors of said County, in formal session on March 24, 1953, gave its approval and directed the Chairman of the Board to sign them.

The preambles of such contracts set forth that the County operates, through its Department of Charities and under the administrative direction of its Superintendent of Charities, the Los Angeles County General Hospital; that the County desires to assure the continued operation of said hospital as a teaching hospital so that proper and adequate hospital care may be granted to County indigents and other patients lawfully admissible thereto; and that it can only maintain its hospital as a teaching hospital so long as it remains associated with qualified medical schools.

The parties hereto have stipulated respecting the time to be spent and the procedures to be followed by faculty members of the two medical schools (1) in teaching medical students; and (2) in rendering hospital services, i. e., care of patients and training of hospital employees.

In addition, the contracts between the respective parties provide that both the College and the University through their

medical schools shall conduct at the Hospital such medical research projects as shall be authorized and approved in advance by the Superintendent, and shall furnish clinical and scientific equipment of a certain aggregate minimum during the term of the contracts, the date of termination thereof being set as of June 30, 1957.

County agrees to pay a sum certain each month to the College and the University. And it is mutually agreed that by the terms of the contracts, (1) County has not granted or delegated any of its powers—statutory, implied, administrative, medical or otherwise; and (2) that the College, the University, the medical schools, doctors and medical students are independent contractors, and shall be responsible for the manner in which they perform the services required after they have been advised by the Superintendent what activities they shall perform.

[1] Respondent argues that Article IX of the Charter establishes in the County a system of civil service which is completely comprehensive and that it applies to *every* position "now existing or hereafter created" (Sec. 33) with certain specifically enumerated exceptions. And requires that *all* persons, except those in unclassified service, shall be employed through the instrumentality of civil service.

In support of his premise that the instant contracts violate Article IX of the Charter, respondent cites *Stockburger v. Riley*, 21 Cal.App.2d 165, 68 P.2d 741, and *State Compensation Insurance Fund v. Riley*, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503. Both of these cases hold that under the allegations therein made, the services involved were available under the State civil service system, and might not be obtained outside thereof.

However, they both concede in the following language that there are situations in which services may be obtained outside of civil service:

"* * * there still is recognized a field wherein the state may engage the services of one under special contract or agreement outside of civil ser-

vice, as an independent contractor." *Stockburger v. Riley*, supra, 21 Cal. App.2d 165, 167, 68 P.2d 741, 742.

"* * * There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is, not whether the person is an 'independent contractor' or an 'employee,' but whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service. * * *" *State Compensation Insurance Fund v. Riley*, supra, 9 Cal.2d 126, 135, 69 P.2d 985, 989.

However, in two later cases, i. e., *City and County of San Francisco v. Boyd*, 17 Cal.2d 606, 110 P.2d 1036, and *Kennedy v. Ross*, 28 Cal.2d 569, 170 P.2d 904, both of which involved civil service provisions of the San Francisco Charter similar to those here under consideration, the Supreme Court upheld contracts against attacks of the sort here made by respondent.

By the terms of the contract in the *Boyd* case between the City and County of San Francisco and one Purcell, a civil engineer, the latter was to furnish certain employees and his own services for a period of five years and for the consideration of \$100,000 "to aid in the solution of traffic and transit problems." [17 Cal.2d 606, 110 P.2d 1038.] It was there argued that the contract violated civil service provisions of the charter.

In the decision in that case, it is stated, 17 Cal.2d 606, 619, 110 P.2d 1036, 1043, as follows:

"A reading of the entire text of said several sections indicates clearly that it was the intention of the framers of the charter that civil service should apply only to persons *employed in permanent positions* in municipal departments to the end that public service should be free from political shifting and control resulting from changes in administration. If section 142 were to be given the literal application suggested by respondent, it would be impossible for the municipality to make

an independent contract with any person or corporation to render an extraordinary service or to make surveys with a view of legislation on behalf of the municipality.

"The proposed contractor is not to be placed in any position provided for by the charter. He is to be engaged under a contract to do a specific job and all of the assistants which he will employ from the typist in his office to his most highly paid engineer are to be instrumentalities of his own choosing and for whom he is to be responsible. They do not become city employees in the sense of that word, as used in reference to the classified service, but are to be employees of the engineer whose contract requires that he supply the city with estimates, plans, programs and reports, such as will enable the municipality to advance the public welfare by the improvement of conditions with respect to which his services will be rendered.

"* * * Merely because Purcell's appointees will render services for the city does not place such appointees in a 'position' or a 'department' or in an 'office'. 'Employees' under civil service occupy the relationship of servant to master and are, of course, subject to the control of the municipality but the position of the employees of the contractor will in no respect occupy a 'position' in a 'department' of the city as contemplated by the charter's civil service provisions. * * * the contractor is employed as an independent contractor * * *."

In *Kennedy v. Ross*, supra, 28 Cal.2d 569, 572, 170 P.2d 904, 907 the Supreme Court reached a similar conclusion, stating:

"The provisions of the charter do not foreclose the authorized agency from entering into contracts with individuals for the performance of professional services as independent contractors." See, also, *City of Oakland v. Williams*, 15 Cal.2d 542, 103 P.2d 168 and *Burum v. State Compensation*

Insurance Fund, 30 Cal.2d 575, 184 P.2d 505.

Likewise here, the faculty members of the medical schools, who are to render the teaching and medical services required by the contracts, are not employees in the usual or ordinary sense. As hereinabove mentioned, the contracts provide that the University and the College medical faculties, the doctors and the students are independent contractors, and shall be responsible for the manner in which they perform the required services "after they have been advised by the Superintendent what activities they shall perform."

By the terms of the instant agreements, the College and the University agree that in addition to teaching, and concurrently therewith, their faculty members will render medical care and service as designated by the Superintendent of the Hospital. "The medical care and services will include direct care of patients and supervision of the medical care rendered by resident physicians and internes of the Hospital * * * Medical treatment will be rendered by the doctors on the teaching staff of the schools to both in-patients and out-patients at the Hospital under the direction of the Superintendent."

Respondent claims that such medical care and services rendered to the patients by the faculty members of the respective medical schools constitutes unlawful corporate practice of medicine by said medical schools.

Without question the schools involved are qualified and accredited medical schools, and the faculty members thereof are regularly licensed physicians and surgeons.

[2] Basically, the rule against corporate practice of medicine is designed to protect the public from possible abuses stemming from commercial exploitation of the practice of medicine.

In *People ex rel. State Board of Medical Examiners v. Pacific Health Corp.*, 12 Cal. 2d 156, 160, 82 P.2d 429, 430, 119 A.L.R. 1284, the court makes a fundamental distinction between the health corporation

there in question and "philanthropic associations" such as "fraternal, religious, hospital, labor and similar benevolent organizations furnishing medical services to members" in the following language:

"In nearly all of them, the medical service is rendered to a limited and particular group as a result of co-operative association through membership in the fraternal or other association, or as a result of employment by some corporation which has an interest in the health of its employees. The public is not solicited to purchase the medical services of a panel of doctors; and the doctors are not employed or used to make profits for stockholders. In almost every case the institution is organized as a nonprofit corporation or association. Such activities are not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to nonprofit institutions. This view almost seems implicit in the decisions of the courts and it certainly has been the assumption of the public authorities, which have, as far as we are advised, never molested these organizations."

And in *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 810, 172 P.2d 4, 17, 167 A.L.R. 306, it was stated:

"One of the reasons behind the declaration of the earlier cases that it was against public policy for a corporation to engage in the practice of medicine was because the control of its activities was placed in the hands of laymen."

As heretofore stated, petitioner must care for the indigent sick.

Section 202 of Welfare & Institutions Code, prohibits the Board of Supervisors from contracting for the care of such per-

sons except in certain circumstances which include cases:

"(2) which require treatment or the use of facilities not immediately available in the county hospital".

In such event, the cited section permits the Board to secure "hospital service or any portion thereof from any public or private hospital, clinic, rest home, sanitarium or other *suitable facility* or from any corporation formed under section 9201 of the Corporations Code or under Chapter 11A or Part 2, Division 2, of the Insurance Code, and operating in the State.

"(b) As used in this section 'hospital service' includes medical, surgical, radiological, laboratory and nursing service and such other care, service or supplies as may be necessary for the treatment of the sick or injured. * * *

"(d) The county may also contract for medical treatment of persons admissible to the county hospital with any duly licensed physician and surgeon." (Emphasis added.)

It would appear that the language of the quoted section furnishes sufficient authority for entering into the contracts here in question. The real purpose of the contracts is to furnish to the County Hospital those necessary services and facilities without which it could not function as a teaching institution. These facilities include medical treatment of indigent patients in the County Hospital by individual members of the medical profession. Such service is actually furnished by medical practitioners who happen to be members of the teaching staff of the two medical schools, and in no sense by the medical schools of the College and the University.

The contracts here in question do not call upon the College, the University or their respective medical schools to practice medicine. The actual diagnosis and treatment of patients will be done by licensed physicians, to wit: faculty members. Perhaps that fact alone would not be conclusive, if the schools were soliciting the public or offering medical services to the public generally. In the instant cause, the schools have no legal or factual

contact with the public or with the hospital patients. As a result, they play no part in the relationship of doctor and patient.

[3] In the circumstances, accredited nonprofit educational institutions like University and College may enter into the contracts for care of the indigent sick without in any way violating the principles upon which the rule against corporate medical practice rests.

Let the peremptory writs issue as prayed for.

WHITE, P. J., and DORAN, J., concur.



121 Cal.App.2d 352

BUCK et al. v. HILL et al.
No. 15494.

District Court of Appeal, First District,
Division 1, California.

Nov. 19, 1953.

Hearing Denied Jan. 13, 1954.

Death action against bus company and its driver by widow and children of motorist killed in collision with oncoming bus in center lane of three lane highway. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., on motion for new trial, reduced judgment based on verdict for plaintiffs from \$200,000 to \$150,000, and defendants appealed from such reduced judgment. The District Court of Appeal, Bray, J., held that, where there was evidence from which jury could have determined that peril did not occur practically simultaneously with happening of accident and that defendant did have last clear chance after discovery of motorist's peril to avoid consequences thereof, giving of last clear chance instruction was proper.

Judgment affirmed.

1. Automobiles ⇨245(13)

In death action against bus company and its driver by widow and children of motorist killed in collision with oncoming bus in center lane of three lane highway, evidence raised question for jury as to negligence of company and driver in respect to bus moving into center lane after such lane was already occupied by motorist.

2. Negligence ⇨83.4

Where plaintiff, by his own negligence, gets himself into position of danger from which it is physically impossible for him to escape by exercise of ordinary care or from which he cannot escape because he is totally unaware of his danger, and defendant has actual knowledge, or in exercise of ordinary care should know, that plaintiff is in such situation and cannot escape therefrom, and defendant has last clear chance to avoid the accident by exercising ordinary care but fails to do so, doctrine of "last clear chance" is applicable.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

3. Negligence ⇨83.1

In determining applicability of doctrine of last clear chance, the District Court of Appeal would consider evidence most favorable to application of doctrine.

4. Negligence ⇨135(6)

Before the doctrine of last clear chance is applicable, there must be substantial evidence to show that defendant had a last clear chance to avoid the accident.

5. Automobiles ⇨227(3, 5)

The doctrine of last clear chance should not be applied to the ordinary case involving collisions between moving vehicles in which act creating peril occurs practically simultaneously with happening of accident and in which neither party can fairly be said to have had a last clear chance thereafter to avoid the consequences.

6. Negligence ⇨83.8

Under the doctrine of last clear chance, choice of avoiding accident must be a clear one rather than a possible one.

7. Negligence ⇐83.1

Question whether a last clear chance exists for purpose of applying such doctrine depends upon particular circumstances of case and whether evidence would support a finding that a prudent person would have done a particular act under the circumstances and that such an act clearly would have avoided the accident.

8. Negligence ⇐136(32)

If question of applicability of doctrine of last clear chance is one upon which reasonable minds might differ, question becomes one of fact which must be left to jury and not one of law for the court.

9. Automobiles ⇐246(58)

In death action against bus company and its driver by widow and children of motorist killed in collision with oncoming bus in center lane of three lane highway, where there was evidence from which jury could have determined that, although bus and automobile were approaching at great speeds, peril did not occur practically simultaneously with happening of accident and that bus company and its driver did have last clear chance after discovery of motorist's peril to avoid consequences thereof, giving of last clear chance instruction was proper. Vehicle Code, § 670.

Hancock, Elkington & Rothert, San Francisco, for appellants.

Warren Olney III, Berkeley, C. Ray Robinson, R. A. McCormick and William B. Boone, Merced, for respondents.

BRAY, Justice.

On motion for new trial, the judgment based on a verdict in favor of plaintiffs for \$200,000 was reduced to \$150,000. Defendants appeal from the reduced judgment.

Questions Presented.

1. Sufficiency of the evidence as to negligence of defendants and lack of contributory negligence.

2. Propriety of giving instruction on last clear chance.

Evidence.

Plaintiffs are the widow and children of George Simonds Buck, who was killed in a collision in the center lane of a three-lane highway between a Ford sedan driven by him and in which he was alone, and a Greyhound bus driven by defendant Hill. The weather was clear, the pavement dry, the hour about 5:10 p. m., and the road straight and level. Buck was driving south, the bus going north. The traffic lanes were 10 feet wide, the bus a little less than 8 feet wide. When the impact occurred the bus was in the center lane one foot to the right of the line dividing that lane from the southbound lane. The Ford then was on an arc diagonally crossing the center lane into the southbound lane. The left front corner of the bus hit the left front side of the Ford. The main conflicts in the evidence were as to which vehicle entered the center lane first, the speeds of the two cars, and whether Hill applied the bus' brakes lightly or heavily. While there seems to be no conflict in the testimony of the witnesses that the initial distance between the two vehicles in the center lane was 150 to 200 feet, the physical evidence of the tire marks of the two vehicles demonstrates that the distance was greater. Two witnesses for plaintiffs testified that the bus was entering the center lane when struck. Four witnesses testified that the bus had been in the center lane for some time prior to the collision. Hill testified that when Buck pulled out in the center lane Hill shoved the bus' brake pedal down flat and held it there until the impact. Then the air line and the steering knuckle broke. Certain witnesses for plaintiffs testified that the brakes were not firmly applied, although there were witnesses for defendants who said they were. Cars in the northbound lane at the bus' right prevented the bus from turning into that lane as the bus and the Ford approached each other. With one exception, all witnesses on the subject estimated the speed of the bus at approximately 40 miles an hour. The exception was a 14 year old boy who estimated it at 60 miles. All witnesses on the subject of Buck's speed estimated it between 80 and 85 miles an hour, including Hill. However, a representative of the plaintiff in intervention,

Liberty Mutual Insurance Co., testified Hill stated to him two days after the accident that Buck's speed was 55 miles an hour when it was 2000 to 2500 feet away.

1. Sufficiency of the Evidence.

[1] Obviously the testimony of the two witnesses who stated that the bus was just moving or had moved into the center lane after it was already occupied by the Ford, if believed by the jury, would be sufficient to establish defendants' negligence.

2. Last Clear Chance.

[2,3] The court gave an instruction on the last clear chance doctrine. No attack is made upon the form of the instruction, but defendants contend that there was no evidence to justify giving the instruction. The elements necessary to the application of the doctrine are (1) that plaintiff by his own negligence has got himself into a position of danger; (2) as a result thereof it is physically impossible for him to escape by the exercise of ordinary care, or he is totally unaware of his danger and for that reason cannot escape; (3) that defendant has actual knowledge that plaintiff is in such situation and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation; and (4) that defendant has the last *clear* chance to avoid the accident by exercising ordinary care and fails to do so. *Peterson v. Burkhalter*, 38 Cal.2d 107, 109, 237 P.2d 977. In determining the applicability of the doctrine we must necessarily consider the evidence most favorable to its application. The first and second elements are supported by the evidence of Buck's excessive speed and of his entry into the center lane after the bus was already therein. The third element is supported by Hill's own testimony that when he saw Buck pull out into the center lane from behind a pickup truck in the southbound lane he knew that Buck "was in trouble." At that time the two vehicles were approximately 150 to 200 feet apart. It was then that Hill applied his brakes. Defendants concede that the evidence supports these three elements. The fourth element, namely, that after knowing of Buck's perilous situation, Hill

had a *clear* chance to avoid the accident by the use of ordinary care, is the one in dispute and as to which the most serious question arises.

[4-7] In recent years the courts of California have shown a tendency towards liberality in the application of the last clear chance doctrine. (See "Recent Developments in California's Last Clear Chance Doctrine," 40 Cal.L.R. 404, 409.) *Galbraith v. Thompson*, 108 Cal.App.2d 617, 239 P.2d 468, states that the most recent decisions of the Supreme Court, *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 237 P.2d 977, and *Selinsky v. Olsen*, 38 Cal.2d 102, 237 P.2d 645, in which cases many of the cases cited by defendants are considered, show that the development of the law with respect to last clear chance continues in the direction of liberality and that "no technical distinctions will be permitted to keep the doctrine from the jury where the jury could find that defendant did not act as a prudent man after discovering the victim's peril." 108 Cal.App.2d at pages 622-623, 239 P.2d at page 472. However, it is still the law that there must be substantial evidence to show that defendant had a last *clear* chance to avoid the accident. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 294, 246 P.2d 663. That case stated that the last clear chance is ordinarily inapplicable to rapidly moving vehicles meeting at an intersection and is cited by defendants as analogous to the situation in our case, although here no intersection collision was involved. In the *Rodabaugh* case, the court quoted the rule from *Poncino v. Reid-Murdock & Co.*, 136 Cal.App.2d 223, 28 P.2d 932 (an intersection case): "While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which *the act creating the peril occurs practically simultaneously with the happening of the accident* and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. * * *" 39 Cal.2d at page 295, 246 P.2d at page 666; first emphasis added. Again, the chance of avoid-

ing the accident must be a *clear* one rather than a *possible* one. *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 237 P.2d 977. It was there held that it cannot be said as a matter of law that, under the circumstances of that case, the defendant with two seconds to avoid the accident did not have a clear chance to do so. While there are many cases in California considering the last clear chance doctrine, some holding that as a matter of law the evidence would not support a finding that the defendant had a last clear chance, others holding either as a matter of law he did or that there was evidence from which the jury could have found that he did, there is no clear definition as to what constitutes last clear chance. It depends upon the particular circumstances of the case, and whether the evidence would support a finding that a prudent person would have done a particular act under the circumstances, and that such an act clearly would have avoided the accident. So our task is to determine whether, taking the evidence and the reasonable inferences therefrom most strongly in favor of plaintiffs, there is such evidence here. Under the facts of this case, that question resolves itself into two aspects: (1) after realizing Buck's peril did defendant apply the brakes of the bus as hard as a prudent person would have done, and (2) if not, would such an application clearly have avoided the accident?

Hill testified that when Buck pulled into the center lane, they were 150 to 200 feet apart (other witnesses gave it as 180 to 200 feet), and Hill then knew Buck was "in trouble." Hill testified that after a reaction time which he estimated to be about four-fifths of a second, he started to put the brakes on and shoved the brake pedal down flat. Witnesses for the plaintiffs testified that the brakes were not applied hard, while witnesses for defendants testified they were. Hughes, a highway patrolman who arrived at the scene shortly after the accident, testified that the Ford left approximately 54 feet of heavy skid marks up to the point of impact. These marks led from the center of the center lane on an arc to the Ford's right to the point of impact

which was one foot inside the right line of said center lane. He testified that there were eight tire marks (as distinguished from skid marks and which were "no indication of a firm application of the brakes") of the bus for approximately 132 feet before the impact. Thus, there was evidence from which the jury could have determined that the brakes of the bus at no time were firmly applied.

This brings us to the second question, that of the reasonable probability of the effect of an immediate hard application of the brakes had it been made. Hill testified he was going 40 miles an hour. Section 670, Vehicle Code, provides a stopping distance of 148 feet for vehicles traveling at that rate. However, to avoid the accident it was not necessary for the bus to come to a complete stop. The Ford was angling out of the center lane (in what the officer called a "slight arc") when it was hit at its left front corner. Certainly at some point short of a complete stop by the bus, the Ford would have cleared the bus. Just where this point would be and whether the heavy application of the brakes of the bus would have slowed it enough to allow the Ford to clear is the problem here. The officer, on cross-examination by defendants, testified without objection that in his opinion the bus driver probably could have avoided the accident. "It is well settled that in determining the question of the sufficiency of the evidence to sustain a trial court's decision, the appellate court will consider all proper evidence embraced in the record, including incompetent evidence admitted without objection; * * *." *People v. One Ford V8 Coach*, 21 Cal.App. 2d 445, 448-449, 69 P.2d 473, 474; see also *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal. 2d 157, 195 P.2d 416; and *Smith v. Busniewski*, 115 Cal.App.2d 124, 251 P.2d 697. The Ford was only 16 feet long. A foot or two had already cleared the bus; thus the bus needed to be retarded only sufficiently to give the Ford another 16 feet at most and there would have been no collision. Both parties in their briefs indulge in almost slide-rule calculations, the one to prove that the bus driver had ample opportunity to avoid the accident, the other to

prove that he did not. We believe that the problem is not as complicated as all that. From the light tire marks of the bus and from the testimony of plaintiffs' witnesses, it appears that Hill after knowing the Ford's peril, and after Hill's reaction time had passed, *lightly* applied his brakes when he was approximately 132 feet from the point of impact. Whether a reasonably prudent person under the circumstances would have applied the brakes as Hill claims he did was a question for the jury. Had he applied them as he said he did, with full force, he would have brought his bus to a complete stop approximately 18 feet beyond the point of impact. Hill could not give his estimate of the bus' speed at the point of impact other than that it was going "somewhat slower" than 40 miles an hour. Going at 40 miles an hour Hill was covering approximately 60 feet per second. Thus, it took him at least two seconds *after* his reaction time had expired to meet the oncoming Ford. Giving him the normal reaction period of four-fifths of a second, which he stated he had, it is physically demonstrated that he had at least $2\frac{1}{5}$ seconds from the time he started to react to Buck's peril in which to act to avoid the accident. The time would actually be greater than that dependent upon how much he was slowed down by the light application of brakes. In Peterson v. Burkhalter, supra, 38 Cal.2d 107, 237 P.2d 977, the court in referring to Poncino v. Reid-Murdock & Co., 136 Cal. App. 223, 28 P.2d 932, stated that the latter case "does not stand for the proposition that, as a matter of law, a defendant with two seconds within which to avoid an accident had no chance to do so." 38 Cal.2d at page 112, 237 P.2d at page 980. "If he has the opportunity of avoiding the injury, he must at his peril exercise it." Girdner v. Union Oil Co., 216 Cal. 197, 203, 13 P.2d 915, 918. Nor can we say as a matter of law, having in mind the time element and the fact that in approximately 16 more feet the Ford would have cleared the bus, that in all reasonable probability a heavy application of the bus' brakes would not have afforded ample time for the Ford to get by the bus. In Hopkins v. Carter, 109 Cal.App.2d 912, 241 P.2d 1063,

the court held in applying the doctrine that whether among other things the defendant could have stopped his car within a given distance was for the jury to determine.

[8] As said in Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, 265 P. 517, "Like the body of the law of negligence, to which the doctrine [last clear chance] is appended, the test remains as that of ordinary care under all of the circumstances." 90 Cal.App. at page 121, 265 P. at page 519. "We cannot say as a matter of law that he did not, by exercising ordinary care, have the last clear chance to avert the collision—something more than a split second possible chance." Selinsky v. Olsen, supra, 38 Cal.2d 102, 106, 237 P.2d 645, 648. "Whether the doctrine of last clear chance is applicable depends entirely upon the existence or nonexistence of the elements necessary to bring it into operation, and whether such elements exist or do not exist is ordinarily a question of fact to be determined by the fact finder." Bailey v. Wilson, 16 Cal.App.2d 645, 647, 61 P.2d 68, 69. Again, like the body of the law of negligence, if the question is one upon which reasonable minds might differ, it is one of fact which must be left to the jury and not one of law for the court. See Collins v. California Street Cable R. R. Co., 91 Cal.App. 752, 755, 267 P. 731. Under the evidence, the jury could have found that defendant had a clear chance, as the law requires, rather than "a bare possible chance". See Poncino v. Reid-Murdock & Co., supra, 136 Cal.App. 223, 227, 28 P.2d 932, 934.

It must be pointed out that the calculations above set forth are not the kind which in Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 246 P.2d 663, the court held, in effect, to be too "nice." There defendant's total time for reaction and effective action was somewhere between $1\frac{1}{4}$ and $1\frac{3}{4}$ seconds, where here defendant after he had completely reacted and started to apply his brakes had more than two seconds for effective action.

Defendants contend that the doctrine should not apply to vehicles approaching each other at high rates of speed, citing as authority therefor Poncino v. Reid-

Murdock & Co., *supra*, 136 Cal.App. 223, 232, 28 P.2d 932; *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 532, 129 P.2d 503, and *Folger v. Richfield Oil Corp.*, 80 Cal.App.2d 655, 659, 182 P.2d 337. In none of these cases did the courts so hold. In the Poncino case which we hereinbefore pointed out was discussed in *Peterson v. Burkhalter*, *supra*, 38 Cal.2d 107, 237 P.2d 977, the court said that the doctrine had been applied in "certain exceptional cases involving collisions between moving vehicles". In the Johnson case where the collision was between a motorcycle and a train, and in the Folger case, which involved an intersection collision, the court used somewhat similar language. In *Daniels v. City & County of San Francisco*, 40 Cal.2d 614, 255 P.2d 785, the court was distinguishing its facts from those in other cases including the Poncino and Johnson cases, and said: "The relative time, speed and distance factors in the cases where the evidence was held insufficient as a matter of law to permit the application of the doctrine were quite different from those before us." 40 Cal.2d at page 614, 255 P.2d at page 791. In *Rodabaugh v. Tekus*, *supra*, 39 Cal.2d 290, 302, 246 P.2d 663, the dissenting opinion of Mr. Justice Carter points out that there are numerous decisions by the California Supreme Court applying the doctrine to moving vehicles.

While it is true, as contended by defendants, that no California case has applied the doctrine to a situation where moving vehicles were approaching each other at the speeds in this case, that fact, however, should not bar its application here. Its application is not determined by speed or lack of speed alone, but by the question of whether the elements of the doctrine are present. In the cases cited by defendants where the court refused to apply the doctrine, the circumstances were far different than in our case. Thus in *Mehling v. Zigman*, 116 Cal.App.2d 729, 254 P.2d 141, the defendant's tractor and attached vans had jackknifed and were stopped on the highway. The court held that there was no evidence that the tractor driver had any actual knowledge of the perilous posi-

tion of the Buick driver in time to have backed his equipment off the roadway. In *Schouten v. Crawford*, 118 Cal.App.2d 59, 257 P.2d 88, an intersection case, the court held the doctrine not applicable because defendant's car was only 25 to 30 feet from plaintiff's car when the defendant realized plaintiff's position of danger. "The accident then happened in a split second." 118 Cal.App.2d 59, 257 P.2d 92. In *Hazelett v. Miller*, 115 Cal.App.2d 801, at page 805, 252 P.2d 997, at page 999, also an intersection case, the court held, "The physical facts clearly indicate that plaintiff could not have stopped in the distance indicated, had he endeavored to do so. All of the substantial evidence indicates that both cars were approaching this intersection at a fast rate of speed; that the true situation was suddenly ascertained and appreciated; that the parties' reactions were instantaneous and that after a discovery of plaintiffs' perilous situation, neither party had a clear chance or opportunity to avoid the accident by exercising ordinary care."

[9] In *Rodabaugh v. Tekus*, *supra*, 39 Cal.2d 290, 246 P.2d 663, many of the cases cited by defendants in support of their arguments as well as other cases concerning the doctrine are discussed. *Hazelett v. Miller*, *supra*, 115 Cal.App.2d 801, 252 P.2d 997, refers to other cases. From the *Rodabaugh* and *Hazelett* and other cases it appears that the rule in California is that "the doctrine of last clear chance should not be applied in a case involving the collision of moving vehicles where the act creating the peril occurs practically simultaneously with the happening of the accident and where neither party can be said to have had a last clear chance thereafter to avoid the consequences * * *." *Hazelett v. Miller*, *supra*, 115 Cal.App.2d 801, 806, 252 P.2d 997, 1000. As pointed out herein, it appears from the evidence that although the bus and the Ford were approaching each other at great speeds, there was evidence from which the jury could have determined that the peril did not occur practically simultaneously with the happening of the accident, and defendants did have a last clear chance

after the discovery of Buck's peril to avoid the consequences. Hence, the giving of a last clear chance instruction was proper.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



121 Cal.App.2d 646

In re HARMON'S GUARDIANSHIP.

RASMUSSEN et al. v. HARMON et al.
Civ. 4718.

District Court of Appeal, Fourth District.
California.

Dec. 1, 1953.

Hearing Denied Jan. 27, 1954.

Grandparents' guardianship proceeding consolidated with parents' application for writ of habeas corpus to obtain custody of minor child involved. The Superior Court of San Bernardino County, R. Bruce Findlay, J., entered judgment and order in favor of parents, and grandparents appealed. The District Court of Appeal, Griffin, J., held that in absence of finding that minor child's natural parents were unfit persons to have custody of child, or finding that award of custody to natural parents would be against best interests of child, custody of minor child was properly awarded to parents, notwithstanding fact that child's grandparents were also fit parties to have custody of child and had assumed most of responsibility of caring for child prior to action.

Affirmed.

1. Habeas Corpus ⇨113(1)

In absence of appeal therefrom, District Court of Appeal cannot question authority of trial court to grant conditional writ of habeas corpus.

2. Guardian and Ward ⇨13(4)

First burden of petitioner in guardianship proceeding is to establish that appoint-

ment of guardian is necessary or convenient. Probate Code, §§ 1406, 1440.

3. Guardian and Ward ⇨13(8)

In absence of direct finding on question of necessity or convenience of appointment of guardian for minor child, District Court of Appeal would assume, in support of judgment awarding custody of child to its natural parents, that trial court had concluded that appointment of guardian was neither necessary nor convenient, where child's natural parents had not abandoned child. Probate Code, § 1440.

4. Guardian and Ward ⇨13(4)

Habeas Corpus ⇨85(1)

In guardianship proceeding consolidated with petition for writ of habeas corpus to obtain custody of minor child involved, evidence sustained finding that child's parents who had left child with its grandparents, while child's father was transferred to several different military installations, and child's grandparents who had cared for child during such period, were all fit and proper persons to have custody of minor child involved.

5. Parent and Child ⇨2(4)

Generally custody of minor child cannot be awarded to persons other than its natural parents in absence of finding that parents are not fit and proper persons to have custody of child.

6. Parent and Child ⇨2(1)

In absence of finding that minor child's natural parents were unfit persons to have custody of child, or finding that award of custody to natural parents would be against best interests of child, custody of minor child was properly awarded to parents, notwithstanding fact that child's grandparents were also fit parties to have custody of child, and had assumed most of responsibility of caring for child prior to action.

7. Courts ⇨91(1)

District Court of Appeal would not disregard holding by Supreme Court in similar case and anticipate its reversal on rehearing which had been granted, nor decide that all similar cases bearing on question would be overruled, until such action was actually taken.

James L. King, San Bernardino, for appellants.

Frank Marino, Claremont, and John Lewis King, San Bernardino, for respondents.

GRIFFIN, Justice.

Captain Warren A. Harmon and Bettilou Harmon are the parents of Toni Harmon, born June 20, 1943, in New Mexico. Mrs. Rasmussen, Bettilou's mother, and Dr. Rasmussen, her step-father, lived in Ontario, California. Captain Harmon went to Texas in line of duty with the U. S. Air Force. Mrs. Harmon came to Ontario with the baby daughter and remained there about one month. She later went to Texas to be with her husband and left the baby with Mrs. Rasmussen. No arrangements were made in reference to the care of the child but its father and mother sent checks each month thereafter to the grandmother, which checks averaged about \$30 per month for a period of around two years. They made occasional week-end trips to visit the child. Subsequently, the Harmons returned to Ontario and lived with the Rasmussens for four months. They subsequently moved to Claremont where, for the first time, they had the child in their home for a good portion of that period. The child was then about 3 or 4 years of age. Subsequently, they moved to Oakland and left the child with the Rasmussens and later the Rasmussens took it to its parents in Oakland, for schooling. About a month later, due to the child's illness, the Rasmussens returned it to their home in Ontario and it was cared for by them. The mother sent several \$25-denomination Government bonds, registered in the name of the child and its mother, to the Rasmussens, and also sent gifts, etc., on occasions. The Harmons were both employed during the period. They returned to Ontario on occasions to visit with the child who was then five years of age. Captain Harmon was transferred to Florida and his wife returned to Ontario, obtained an apartment and visited with and took the child with her on occasions when she was not working. Generally, however, she left its care with Mrs. Rasmussen, and apparently no definite arrangements were mentioned as to child care, and no further

payments were made to Mrs. Rasmussen. Mrs. Harmon moved about from place to place and later joined her husband in other places where he had been transferred, but left the child in care of Mrs. Rasmussen.

Finally, in June, 1952, the Harmons returned to Ontario. The Captain learned that he was being transferred to Okinawa. They suggested that they take the child with them and violent argument ensued between them and the Rasmussens. A bitter quarrel took place and on July 3, 1952, the Rasmussens filed this petition to be appointed guardians of the person of Toni, then aged 9 years, alleging that she had no guardian legally appointed by will or otherwise; that they were the grandparents of the minor; that for a number of years Toni had been under their care and resided with them; that the parents had knowingly and wilfully abandoned the child, having the ability to maintain it; that the Harmons were not fit and proper persons to have its custody; alleged that petitioners were fit and proper persons for this purpose; and that it was for the best interests and welfare of the child that the petitioners be appointed guardians.

Respondents answered and denied generally the allegations of the petition, and as an affirmative defense alleged that Captain Harmon was then stationed at Okinawa; that from time to time the child was left with Mrs. Rasmussen only for the purpose of convenience and mutual desires of all the parties; that they had no intention of abandoning the child; that the Rasmussens refused to give them, the natural parents, possession of it; that the Rasmussens taught the child to shun its parents; alleged that it was for the best interests of the child to be with its parents; and then alleged that the Harmons had, on July 14, 1952, filed a petition for a writ of habeas corpus seeking to restore Toni Harmon's liberty to petitioners; that the writ and order to show cause were issued and that such proceedings were still pending. They prayed that the Rasmussens' petition for appointment as guardians be denied and that custody of the child be given to the natural parents.

The petition for writ of habeas corpus and the petition for appointment of

guardians were heard at the same time. The trial court found that the minor did have as her guardians her natural parents; that it was untrue that the Harmons knowingly or wilfully abandoned the child or neglected it; that the natural mother and father were fit and proper persons to have its custody and also that the Rasmussens were fit and proper persons for that purpose; that it was untrue that it was for the best interests and welfare of said minor that the Rasmussens be appointed guardians; that it was true that it was for the best interests and welfare of the child that the natural parents have such custody, and denied the petition for the appointment of guardians.

The court then granted the writ of habeas corpus but attached to the order granting it certain conditions allowing the Rasmussens and Harmons alternate custody of the child each month until June, 1953, at which time the parents should have permanent custody.

[1] We cannot here question the authority of the trial court to grant a *conditional* writ of habeas corpus since no appeal from the order is before us nor is such an appeal allowable, *In re Bruegger*, 204 Cal. 169, 267 P. 101. At any rate, the conditions of the writ apparently have been fulfilled at this time and the child has been ultimately restored to the custody of its natural parents.

[2, 3] The first burden of a petitioner in a guardianship proceeding is to establish to the satisfaction of the court that the appointment of a guardian is "necessary or convenient". Section 1440, Probate Code. Although there is no direct finding on this question, in support of the judgment entered, we may well assume from the evidence and circumstances related that the trial court concluded that the appointment of a guardian was neither necessary nor convenient since the natural parents were living, had not abandoned the child, and were entitled to its custody under the order granting the writ of habeas corpus. Under these circumstances it would not be necessary for the trial court to make a determination of the remaining issues presented, and the order might well be sustained on this finding alone. *Guardianship of Kentera*, 41 Cal.2d 639, 262 P.2d 317;

Guardianship of Slood, 92 Cal.App.2d 296, 206 P.2d 862.

[4, 5] The trial court proceeded to hear and determine the issue as to whether the parties involved were fit and proper persons to have custody of the minor, and concluded that they were. The evidence fully supports this finding. It then concluded that it was for the best interests of the child that the custody be awarded to its natural parents and not to the Rasmussens. Under ordinary circumstances this was a factual question for the determination of the trial court and without a finding in favor of petitioners (the Rasmussens) on this issue, they could not prevail as against the natural parents. (Sec. 197 Civ.Code; *In re Gille*, 65 Cal.App. 617, 224 P. 784; *Stever v. Stever*, 6 Cal.2d 166, 56 P.2d 1229; *Roche v. Roche*, 25 Cal.2d 141, 152 P.2d 999; Section 1406 Probate Code; 13 Cal.Jur. pp. 153-155, Sec. 13.) Accordingly, the order could be supported under this finding.

It appears to be the contention of counsel for the Rasmussens that the trial court did not consider the question of the best interests of the minor but decided their rights upon a principle of law, i. e., that since it found that they and the Harmons were all fit persons to have the custody of the child, and not having specifically found that the natural parents were unfit, it was duty bound to find, as a matter of law, in favor of the natural parents under the authority of *Guardianship of Smith*, Cal., 255 P.2d 761, and *Roche v. Roche*, 25 Cal.2d 141, 152 P.2d 999.

[6] There is some suggestion in a memorandum of the trial judge indicating this conclusion. However, at the commencement of, and during the progress of the hearing, the trial judge announced: "My own opinion is, after all, the yardstick which we use to measure these things is the best interests of the child", and "the natural rights of parents". Under the authorities cited and such other cases as *Stewart v. Stewart*, 41 Cal.2d 447, 260 P.2d 44, with which this court is quite familiar, see Cal. App., 252 P.2d 740; *Guardianship of Slood*, 92 Cal.App.2d 296, 206 P.2d 862; *In re White*, 54 Cal.App.2d 637, 129 P.2d 706; and *Eddlemon v. Eddlemon*, 27 Cal.App.2d 343, 80 P.2d 1009, the trial court was also

justified in making the order denying the application.

[7] The case of Guardianship of Smith, *supra*, brought forth three strong dissenting opinions in reference to the operation of the rule under the facts of that case, and there was mention of similar dissenting opinions in other cases involving this point. It appears that a rehearing was granted in the Smith case. Petitioners here ask this court to disregard the holding of that case and anticipate that it will be reversed on the rehearing. We will not make this anticipation, nor decide that all cases bearing on this question will be overruled, until such action is actually taken. Regardless of the outcome of the decision in the Smith case, the trial court was justified in denying the petition for the appointment of the guardians under the circumstances here related.

Judgment and order affirmed.

BARNARD, P. J., concurs.

MUSSELL, J., being disqualified, does not participate herein.

Hearing denied. SCHAUER J., dissents.



121 Cal.App.2d 469

MELICKIAN v. HALSTEAD.

Civ. 19698.

District Court of Appeal, Second District,
Division 1, California.
Nov. 24, 1953.

Rehearing Denied Dec. 14, 1953.

Hearing Denied Jan. 20, 1954.

Action to impose a trust as to an undivided one-half interest in certain real estate, for an accounting in relation to income therefrom, for quieting of plaintiff's title thereto, and for sale of property by commissioner with equal division of proceeds. The Superior Court, Los Angeles County, Daniel N. Stevens J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal,

Doran, J., held that evidence sustained findings that plaintiff made down payment on property involved, although title was taken in name of defendant's testator, under oral agreement that half interest in property would belong to plaintiff, that such obligation was never repudiated by defendant's testator, and that note and trust deed evidencing testator's indebtedness to plaintiff were intended to, and did, comprise evidence only as to contribution by plaintiff.

Affirmed.

1. Trusts ⇐89(3)

In action to impose trust as to undivided one-half interest in certain realty, and for ancillary relief, evidence sustained finding that plaintiff made down-payment on property under oral agreement that half interest in property would belong to plaintiff, that such agreement was never repudiated by defendant's testator, in whose name title was taken, and that note and trust deed executed at time of purchase were intended to, and did, comprise evidence only as to contribution by plaintiff. Civ.Code, § 2224.

2. Appeal and Error ⇐996

Where trial court was presented with questions of fact concerning relations and intentions of parties purchasing real estate, as shown by surrounding circumstances, and trial court's conclusions on such questions were supported by substantial evidence, District Court of Appeal was without power to substitute its deductions for those of trial court. Civ.Code, § 2224.

3. Trusts ⇐63½

Statute of frauds cannot prevail as defense to action to establish trust as to interest in realty in favor of person paying purchase price of realty involved, title to which was taken in name of other person.

4. Witnesses ⇐133

Dead man's statute does not prohibit receiving testimony of oral statements of plaintiff and decedent in an action to establish trust.

Robert E. Ford, Los Angeles, Jacob Chaitkin, Pasadena, for appellant.

Allen M. Williams, Montrose, for respondent.

DORAN, Justice.

The complaint herein seeks to impose a trust as to an undivided one-half interest in certain real estate, an accounting in relation to income therefrom, the quieting of plaintiff's title, and the sale of the property by a commissioner with an equal division of the proceeds.

It appears that in 1940 Mr. and Mrs. Melickian made the acquaintance of William E. and Essie Halstead, an elderly couple who were operating a restaurant on rented premises in Montrose. The parties became good friends and so remained until the death of Mrs. Halstead (September, 1950), and Mr. Halstead (August, 1951). From time to time various favors were rendered the Halsteads by the Melickians; on two occasions money was given to the Halsteads, \$125 at one time, and \$100 on another occasion, payment of which was never requested or made. The defendant conceded that Melickian "had done a great deal for my family".

The record discloses that beginning in 1943 Mr. Melickian frequently suggested that it would be prudent for the Halsteads to purchase the restaurant property, and in that connection said: "Well, Ed (Halstead), if you ever do decide to buy it and want me to go in with you as a partner, you just let me know—this property is well worth what they will sell it for". In May of 1946 Mr. Halstead informed plaintiff that the property was for sale and that the real estate broker would give Halstead the first chance to buy it, and said: "I remember, Ara, what you had told me and as it's our livelihood, if you still meant what you said, I'd like to go in with you as a partner". To this Mr. Melickian replied: "I told you I would and I will. You go ahead and attend to the details".

Halstead had only \$500 and Melickian wrote out a check for \$2,100 to make the necessary down payment. At that time it was planned to buy the property in the names of Halstead, Melickian, and their wives. A few days later Mr. Halstead

stated that "he didn't want Mr. Boyer (the seller's agent) to know that we were purchasing it with him"; that the title would be taken in the Halsteads' name alone; that a second trust deed would be given Melickian, "and that later, after the escrow had been closed, that he would settle the details and the partnership". All negotiations were handled by Halstead and Ara Melickian did not question the arrangement,—“I had absolute confidence in him”. The record discloses various items of evidence tending to prove that the parties all recognized plaintiff's undivided interest in the property purchased, and that the documents executed did not represent the true situation. On one occasion Mrs. Halstead mentioned that "we ought to straighten out the partnership before we go too long", to which plaintiff responded: "Any time you are ready, we will". And in 1949, Halstead and Melickian discussed the fact that "the partnership assignment" of the property should be made. On still another occasion Melickian said to Halstead: "don't worry about me, because the property (a one-half interest) after you are gone is all I want". There were also statements by Halstead to other persons to the effect that Melickian owned an interest in the property.

In reference to the promissory note and trust deed in favor of plaintiff, the record contains evidence in support of respondent's statement that "Throughout the entire period the parties ignored the existence of the note. No demand was ever made by Melickian for payment of principal or interest, nor was a penny ever paid thereon". The appellant's brief apparently places much reliance upon the existence of this note and trust deed.

The trial court rendered a decision in favor of the plaintiff, finding that "there existed between plaintiff Ara Melickian and said William Edmund Halstead and Essie W. Halstead a close, personal friendship, cooperative business relationship, and generally a relationship of mutual trust and confidence". The court found that Melickian had parted with the \$2,100 upon the understanding and oral agreement that a

half interest in the property would belong to plaintiff; that such obligation was never repudiated by the Halsteads; and that the note and trust deed were intended to and did "comprise evidence only as to the contribution by Melickian".

The judgment declared that defendant administrator "holds title as trustee for plaintiff Ara Melickian to the extent of an undivided one-half interest with respect to this certain parcel of real property". The property was therefore ordered sold by a Commissioner, the net proceeds to be divided between the parties. The defendant was ordered to account to plaintiff for one-half of all income.

[1,2] Appellant's contention that the findings, conclusions and judgment of the trial court are not warranted by the evidence is without merit. As hereinbefore indicated, a review of the record discloses substantial evidence in support of the findings. The trial court was presented with questions of fact concerning the relations and intentions of the parties as shown by surrounding circumstances, including the conduct and words of those interested. Since the conclusions reached are thus supported, the well established rule prevents further appellate review of such questions of fact. Under these circumstances a reviewing court is without power to substitute its deductions for those of the trial court.

As stated in respondent's brief, the facts herein, while not identical, "are similar to the facts in the case of *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 140 P.2d 31: a confidential relationship in fact, the acquisition of real property upon a promise to reconvey, death of the promisor without request for conveyance or conveyance being made, and the refusal of the administrator to recognize plaintiff's interest in the property. * * * In the *Steinberger* case as well as in the instant case the constructive trust did not arise until the transferee died".

[3,4] The appellant's other contentions are likewise untenable. Plaintiff is not

seeking and has not been granted "dual relief",—payment of the note and a one-half interest in the property. In reference to the Statute of Frauds, it may be said that if such a defense could prevail in a case of this nature, then no trust could ever be established if its provisions were contrary to the terms of a writing. Such a doctrine, which would do away with resulting and constructive trusts, is not the law. Nor does the so-called "dead man's statute" prohibit receiving testimony of the oral statements of plaintiff and decedent in an action to establish a trust. *Humes v. Humes*, 56 Cal.App.2d 126, 133 P.2d 39.

Plaintiff's failure to deny execution or validity of the note and trust deed, set up as a defense in the answer, mentioned by appellant, in no way changes the situation here existing. There is no claim that the instruments were forgeries or that they were not duly executed. However, as shown by substantial evidence supporting the trial court's finding, such documents did not truly represent the transaction. As has been often said, "The law looks to the substance rather than the form of a transaction."

It is said in the trial court's memorandum opinion, "Defendant appears to urge that the recognition of plaintiff's right to a constructive trust would be inequitable. The equities of the case are, however, in my opinion, entirely on the side of the plaintiff". It can hardly be questioned that the record contains evidence justifying the above conclusion on the part of the trial judge. Civil Code, Section 2224 is here applicable: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." The action was not barred by laches or any statute of limitations.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

MAJOR-BLAKENEY CORP.**v.****JENKINS et al.****Civ. 19224.****District Court of Appeal, Second District,
Division 2, California.****Nov. 18, 1953.****Rehearing Denied Dec. 7, 1953.****Hearing Denied Jan. 13, 1954.**

Action by purchaser under two escrow contracts for declaration of rights and duties under first agreement and for declaration that purchaser had complied with terms of second contract. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment quieting title to realty and money advanced as down payments under escrows in vendors and entered order denying motion for new trial, and purchaser appealed. The District Court of Appeal, Fox, J., held, inter alia, that where in regard to one escrow contract purchaser failed to deposit amount due by date required by contract and contract made time of the essence, vendors justifiably terminated purchaser's rights under contract but that evidence was insufficient to support findings that purchaser was grossly negligent in regard to making payment on time and that vendors would not be unjustly enriched in retaining down payment under such contract and hence purchaser would be entitled to relief from forfeiture.

Judgment reversed with directions, purported appeal from order dismissed.

1. Vendor and Purchaser ⇨93

Where escrow contract for sale of realty made time of the essence, provided for cancellation upon failure of purchaser to deposit balance due on or before January 1, 1950, and authorized retention of \$1,500 deposit upon failure of purchaser to make timely payment, upon failure of purchaser to comply with terms of contract on January 3, 1950, January 1 and 2 both being holidays, vendors justifiably terminated purchaser's rights under contract.

2. Declaratory Judgment ⇨347

In action for declaration of rights and duties of parties under an escrow contract,

where evidence was that cancellation notice was sent upon failure of purchaser to make timely payment and that although a vendor was repeatedly requested to reopen escrow he remained noncommittal, evidence established that there was no waiver of any terms of escrow contract and that at no time did vendors or their agent give purchaser valid reason to believe that its rights under escrow would be restored.

3. Vendor and Purchaser ⇨170

Where escrow contract made time of the essence and provided for cancellation thereof upon failure of purchaser to deposit balance due on or before January 1, 1950, and upon failure of purchaser to make timely payment of balance due vendors lawfully availed themselves of default, vendors were not required to specify any objection to purchaser's tender of January 19, 1950, since contract was then no longer in force. Code Civ.Proc. § 2076.

4. Vendor and Purchaser ⇨335

Where breach of purchaser under realty sale contract is neither willful, fraudulent nor grossly negligent, purchaser may be given relief in a situation where retention by vendor of installment paid under contract would result in a forfeiture. Civ.Code, § 3275.

5. Vendor and Purchaser ⇨335

Where remedy of specific performance is not possible and restitution offers the only effective relief to a defaulting purchaser, relief may be granted if the purchaser is able to prove that his down payment exceeds the damages to the vendor produced by purchaser's default. Civ.Code, § 3275.

6. Vendor and Purchaser ⇨341(3)

The burden rests upon the defaulting purchaser who is seeking restitution under realty sale contract to prove how much of purchaser's down payment exceeds the vendor's damages. Civ.Code, § 3275.

7. Declaratory Judgment ⇨347

In action by purchaser who had been sent notice of cancellation under escrow contract making time of the essence for declaration of rights and duties of parties under such contract, evidence was insuffi-

cient to support conclusion that purchaser was grossly negligent in failing to make payment of balance due on time and was insufficient to support findings that retail market value of realty at time of default was \$5,000 and that vendors would not be unjustly enriched in retaining \$1,500 down payment and hence purchaser would be entitled to relief from forfeiture. Civ.Code, §§ 3275, 3307.

8. Damages ⇨81

Escrow contract provision that on purchaser's default vendors could retain down payment which was approximately 30% of purchase price, could not be enforced as a valid clause providing for liquidated damages. Civ.Code, §§ 3275, 3307.

9. Vendor and Purchaser ⇨330

In cases involving sales of realty, the value of the realty to the vendor is to be determined as of date of breach of the agreement to purchase the realty. Civ. Code, § 3307.

10. Vendor and Purchaser ⇨330

For purposes of computing vendor's damages upon purchaser's breach of realty sale contract, the value of the realty to vendor on date of breach is the best price obtainable from a purchaser ready, willing and able to buy at that time. Civ.Code, § 3307.

11. Vendor and Purchaser ⇨159, 187

Where from conduct and dealings of parties it was obvious that conditions in escrow contract for sale of realty as to strict time of performance had been waived, neither party could thereafter put the other in default without full performance on his part accompanied by a notice to the other to perform within a reasonable time.

12. Vendor and Purchaser ⇨180

Vendors under escrow contract for sale of realty had right to have trust deeds to be given by purchaser pursuant to such agreement regularly executed and they were not required to accept instruments bearing a seeming irregularity which might affect merchantability among persons non-conversant with fact that absence of cor-

porate seal from a trust deed is not fatal to its validity. Corporations Code, § 801(b).

13. Corporations ⇨432(4)

A deed bearing the seal of the corporation is presumptive evidence of the authority of its officers to execute it.

14. Corporations ⇨432(5)

Where seal is absent from a corporate deed, the burden of proof is upon party relying on the deed to establish the authority of corporate agents or officers executing it.

15. Appeal and Error ⇨991

In action by purchaser under escrow contract for sale of realty for declaration that purchaser had complied with terms of escrow contract, where evidence was that contract conditions as to strict time of performance had been waived, question whether vendors had given purchaser reasonable time to perform after serving notice of intention to terminate contract was fact question for trial court to determine from all circumstances of case.

16. Contracts ⇨22(3)

Contract principle that a contract is complete when letter of acceptance is posted has no application in a case where physical delivery at a given place, by a designated date, is contemplated.

17. Vendor and Purchaser ⇨101

Where parties by their conduct waived conditions as to strict time of performance under escrow contract for sale of realty, thereafter escrow holder informed purchaser that escrow could proceed toward closing upon return of trust deeds properly executed and remittance of \$500, vendors on June 28, mailed purchaser notice that escrow would be cancelled unless purchaser performed on or before close of business day July 5, and purchaser failed to deposit required instruments and money by such date, contract was terminated without further action, although letter containing documents and money was posted on July 5.

18. Declaratory Judgment ⇨347

In action by purchaser under escrow contract for sale of realty for declaration that purchaser had complied with terms

of such escrow and that vendors had committed breach thereof, evidence was insufficient to establish that down payment under contract exceeded vendors' damages. Civ.Code, §§ 3275, 3307.

19. Vendor and Purchaser ⇨335

In action by purchaser under escrow contract for sale of realty for declaration that purchaser had complied with terms of such escrow, in determining whether purchaser whose rights under contract had been cancelled was entitled to restitution of down payment or part thereof, court was entitled to take into consideration fact that realty was off market for almost a year, that no interest had been paid, and that added taxes had fallen due. Civ.Code, §§ 3275, 3307.

20. Money Received ⇨1

The gravamen of a quasi contractual action grounded on unjust enrichment is the equitable principle that a person should not be allowed to enrich himself at the expense of another and such an action presupposes the acceptance and retention of a benefit by one party with full appreciation of the facts under circumstances making it inequitable for the benefit to be retained without payment of the reasonable value thereof.

21. Money Received ⇨1

When no benefit has been received, the law will not raise an obligation to make restitution or imply a contract to pay.

22. Improvements ⇨4(1)

Absent other equities, a party is not entitled to reimbursement for improvements voluntarily made on another's realty in absence of an express or implied contract to pay.

23. Money Received ⇨3

A person who, incidentally to performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.

24. Money Received ⇨3

A realty owner who conceivably acquires some incidental benefit from an adjoining realty owner's improvements made pursuant to the latter's private develop-

ment plans is not required to account for benefits so received.

25. Money Received ⇨18(3)

In action by purchaser under two escrow agreements for benefit conferred upon vendors, who exercised their right to terminate interests of purchaser under contracts, by virtue of improvements made by purchaser on adjacent realty as part of its building program, where there was evidence that expenditures made and obligations paid were done exclusively in furtherance of purchaser's own interest and to discharge commitments for which it alone was responsible, evidence sustained conclusion that there was neither unjust enrichment nor conscious acceptance by vendors of any benefits for which a promise to pay might be implied.

Randolph J. Soker, Los Angeles, for appellant.

Moidel, Moidel, Moidel & Smith, Los Angeles, for respondents.

FOX, Justice.

This litigation grows out of two escrows for the purchase and sale of certain unimproved realty.

In May of 1949, two of the officers of plaintiff corporation, Mr. Major and Mr. Blakeney, personally purchased from defendants 52 lots located in Tract 4983, in which tract defendants also owned other lots. The 52 lots were subsequently transferred to plaintiff corporation, which was engaged in a program of building homes on 47 of these lots and in installing improvements incident to this program. In July, 1949, plaintiff commenced the construction of sewers and street grading improvements in connection with its development program. On September 6, 1949, plaintiff and defendants signed two sets of escrow instructions with respect to the purchase by plaintiff of an additional 114½ lots in Tract No. 4983. Escrow No. 1 was for the sale of 10 lots to plaintiff for \$6,700 with a \$1,500 deposit, which was paid to defendants in due course. The balance of \$5,200 was to be deposited in escrow "on or before Jan. 1, 1950." In the event the

latter deposit should not be made within the specified time, the escrow holder was instructed to cancel the escrow without further authorization, the seller to retain the \$1,500 down payment.

Escrow No. 2 covered 104½ lots. The total price was \$56,275, of which \$1,000 was paid to the sellers outside of escrow. An additional \$4,850 was required to be deposited in the escrow by Feb. 1, 1950. The balance was to be evidenced by two notes secured by trust deeds on the property, one of which was to be a second deed of trust, subject to first deeds of trust securing certain construction loans. These instructions provided that the escrow holder cancel the escrow without further notice to the buyer if it failed to deposit \$4,850 on or before Feb. 1, 1950.

Plaintiff had entered into an arrangement with one Arnold North to obtain the financing to enable it to meet its obligations under the above escrow. On Dec. 31, 1949, Mr. North advised plaintiff he was withdrawing and would not supply any money. Plaintiff notified Paul Walker, who had been defendants' agent in the transaction, that it would be unable to meet its payment of \$5,200 due on Escrow No. 1 on January 1, 1950, and asked for about 20 days' grace. Upon plaintiff's failure to make the required deposit the escrow holder sent plaintiff a notice that it had cancelled the escrow pursuant to its instructions.

Thereafter, plaintiff requested defendant Leroy Jenkins to reopen Escrow No. 1, but got no affirmative reply. On January 19, 1950, it tendered to the escrow holder a check for \$10,050, authorizing it to credit \$5,200 to plaintiff's account in Escrow No. 1, and the sum of \$4,850 to plaintiff's account in Escrow No. 2 provided Escrow No. 1 was reopened. The escrow holder stated it had no authority to reopen Escrow No. 1. On February 2, 1950, the sum of \$4,850 was deposited on behalf of plaintiff in Escrow No. 2, along with deeds of trust securing two notes. Plaintiff failed to affix its corporate seal to these instruments, but promised it would do so. At about this time, a controversy arose over a demand made by plaintiff upon defendants to execute amended instructions in Escrow No.

2 by inserting a recital in one of the deeds of trust subordinating it to a first deed of trust securing construction loans. Defendants at first objected to this request, but on May 2, 1950, they executed and deposited in Escrow No. 2 all instruments required of them. On the same day the escrow holder notified plaintiff of this fact by letter and informed plaintiff that the deeds of trust and notes it had executed on Feb. 1, 1950, were being returned in order that its corporate seal might be affixed to all the documents. The letter also stated that as soon as the documents were returned properly executed, together with a remittance of \$500 for expenses and estimated tax prorations, the escrow could proceed toward closing. Neither money nor trust deeds having been deposited, the sellers, on June 28, 1950, caused the escrow holder to mail plaintiff a notice to perform on or before the close of the business day of July 5, 1950, or the escrow would be "ipso facto cancelled." Plaintiff failed to deposit in escrow the required instruments and expense money by July 5th, but mailed the same to the escrow holder on that date, the letter arriving on July 6, 1950. Defendants refused to accept this late performance.

On about July 18, 1950, defendants consummated a deal with a Mr. Mulligan, whereby 152 lots in Tract 4893, including all of the lots in Escrows No. 1 and No. 2, as well as others, were transferred to a nominee of Mr. Mulligan at a price of \$500 per lot. Plaintiff introduced evidence that in September, 1950, a corporation offered to buy outright from it all the lots included in either or both Escrows Nos. 1 and 2 at \$700 per lot or to develop them in a joint building venture with plaintiff. Plaintiff asserted that the deal fell through when defendants notified the potential buyer that plaintiff had no interest in the land. Plaintiff stated that it did not know prior to September 25, 1950, that defendants had transferred the property to other parties.

By its first cause of action, plaintiff seeks a declaration of the rights and duties of the parties under Escrow No. 1. The sixth cause of action is based on a quasi contractual theory of recovery—that by its in-

stallation of certain street and other improvements in its development of adjacent property as a part of its building program, plaintiff conferred a benefit in the amount of \$8,131.13 on the ten lots in Escrow No. 1 and on a group of other lots owned by defendants but not included in either of these escrows. The second, third, fourth and fifth causes of action relate to Escrow No. 2. In the second cause of action, plaintiff seeks a declaration that it had complied with the terms of Escrow No. 2 and that defendants committed a breach thereof. In the three other causes of action plaintiff seeks (a) damages for loss of anticipated profits and recovery of expenses; (b) damages for defendants' disparagement of its equitable title; and (c) exemplary and punitive damages for defendants' malice and bad faith in connection with this transaction.

Judgment below was entered quieting title in defendants to the property in dispute and to the money advanced by plaintiff as down payments in the respective escrows. Plaintiff attacks the findings as being unsupported by the evidence, and challenges the conclusions and judgment as being contrary to the law.

Escrow No. 1.

[1-3] Plaintiff's contention that it had fully complied with its contract with respect to the ten lots in Escrow No. 1 on January 19, 1950, or at the latest by February 2, 1950, is without factual support. By its terms, the contract made time of the essence, provided for cancellation upon failure of the buyer to deposit the full amount on or before January 1, 1950, and authorized the retention of the \$1,500 deposit previously made by the buyer. Upon the failure of plaintiff to comply with its terms on January 3, 1950 (January 1 and 2 both being holidays), and time being of the essence, defendants justifiably terminated plaintiff's rights under the contract on January 6, 1950. *Krobotzsch v. Middleton*, 72 Cal.App.2d 804, 812, 165 P.2d 729; *Keelan*

v. Belmont Co., 73 Cal.App.2d 6, 10, 165 P.2d 930; *Wilson v. Security-First Nat'l Bank*, 84 Cal.App.2d 427, 430, 190 P.2d 975; *Pitt v. Mallalieu*, 85 Cal.App.2d 77, 86, 192 P.2d 24. The record clearly establishes that there was no waiver of any of the terms of the contract and at no time did defendants, or their agent, give plaintiff valid reason to believe its rights under the escrow would be restored. Although defendant Leroy Jenkins was repeatedly requested to reopen the escrow, plaintiff's witness, Mr. Blakeney, testified that Jenkins "was very stolid about it and noncommittal, although he refused to go ahead with them he never stated other than those notices which he caused the bank to give us." Defendants thus lawfully availed themselves of plaintiff's default and their own rightful termination of the contract to convey the property, of which plaintiff was never in possession, to a third party. Since the contract was no longer in force, defendants were not required to specify any objection to plaintiff's tender of January 19, 1950, section 2076, Code of Civil Procedure, being inapplicable to these facts.

[4-6] Plaintiff further contends, however, that it is entitled to relief against total forfeiture of its down payment under section 3275 of the Civil Code.¹ This claim is meritorious. A vendee under a land sale contract, whose breach is neither willful, fraudulent nor grossly negligent, may be given relief in a situation where the retention by the vendor of installments paid under the contract would result in a forfeiture. *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367. Where the remedy of specific performance is not possible and restitution offers the only effective relief to a defaulting vendee, relief may be granted if the vendee is able to prove that his down payment exceeds the damages to the vendor produced by his default. *Barkis v. Scott*, supra, and cases there cited; see *Baffa v. Johnson*, 35 Cal.2d 36, 39, 216 P.2d 13. In *Freedman v. Rector, etc.*, 37 Cal.2d 16,

1. Section 3275 reads: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be re-

lieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

20, 230 P.2d 629, 631, 31 A.L.R.2d 1, relying upon sections 1670, 1671, and 3369 of the Civil Code, the court stated that even a wilfully defaulting vendee may be relieved from a forfeiture, since "the damage provisions of the Civil Code together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of section 3275." The burden rests upon the defaulting vendee seeking restitution to prove how much of his down payment exceeds the vendor's damages. *Baffa v. Johnson*, supra.

[7-9] In the instant case, the court disallowed plaintiff's claim to relief from a forfeiture on the basis of its conclusion "that plaintiff was grossly negligent" and upon its findings that the reasonable market value of the property on January 3 or 6, 1950, was \$5,000 and that defendants would therefore not be unjustly enriched in retaining the \$1,500. However, an analysis of the testimony clearly establishes that there is no evidentiary support for either of these propositions. It is clear that the provision of the contract providing that on plaintiff's default, defendants could retain the down payment of \$1,500, which was approximately 30 percent of the purchase price, cannot be enforced as a valid clause providing for liquidated damages. *Freedman v. Rector*, etc., supra, 37 Cal.2d at page 23, 230 P.2d 629, 633. Where, as in the case of Escrow No. 1, the down payment is large in relation to the total sales price, and "the evidence establishes that it would not be impracticable or extremely difficult to fix the actual damage" Civil Code, § 1671, such a provision may not be enforced as one for liquidated damages [citation]." *Freedman v. Rector*, etc., supra. The vendor's right to retain such a payment, therefore, must depend upon the showing made on the issue of the vendor's damage by the party charged with the burden of establishing an unjust enrichment—namely, by a defaulting vendee seeking a refund of his payments in excess of the vendor's damages. In the absence of

a showing of special damages by the vendor, section 3307 of the Civil Code² fixes a seller's recovery upon the buyer's breach of a land sale contract as the excess of the amount due him under the contract over the value of the property to him;—in other words, he is entitled to the "benefit of the bargain." In cases involving sales of realty, the accepted rule is that the value of the property to the seller is to be determined as of the date of the breach of the agreement to purchase the property. *Royer v. Carter*, 37 Cal.2d 544, 549, 233 P.2d 539; *Drew v. Pedlar*, 87 Cal. 443, 450-451, 25 P. 749; *Employees' Participating Ass'n v. Pine*, 91 Cal.App.2d 299, 301, 204 P.2d 965.

[10] The breach of the agreement affecting Escrow No. 1 occurred on or about January 3, 1950. The only direct evidence in support of the trial court's finding that the ten lots encompassed in Escrow No. 1 had a value on that date of \$5,000 comes from Mr. Walker, defendants' agent in effecting the sale, and Mr. Mulligan, the subsequent purchaser. The testimony of both of these witnesses was that on July 6, 1950, six months after the breach, the lots in question were worth only \$500 each. However, such evidence of value six months after the breach cannot counter-vail as against the undisputed evidence that on the date of its breach, the vendee was still intent on proceeding with the contract, and that two weeks later it actually deposited the entire balance of the purchase price of \$6,700. Certainly, for the purposes of computing a seller's damages upon a vendee's breach of contract, the value of the property to the seller on the date of breach is the best price obtainable from a purchaser ready, willing and able to buy at that time. The evidence is unequivocal that on January 19, 1950, defendants could have had \$6,700 if they had elected to reopen Escrow No. 1. There is no evidence of fluctuation in the value of the property during the two weeks between plaintiff's default and his tender of the full sales price. It was patently error, therefore, in

2. Section 3307 reads: "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the

amount which would have been due to the seller, under the contract, over the value of the property to him."

the face of these irrefutable facts, to find the property was worth \$5,000 on January 3, 1950, on testimony relating to its value six months later. While defendants may have sustained some damages as a result of plaintiff's breach, it is apparent that, on the record before us, the court permitted the enforcement of a stringent forfeiture against a vendee who, though two weeks late, was willing, able and anxious to take the land and pay, in cash, the full contract price. See *Easton v. Cressey*, 100 Cal. 75, 78, 34 P. 622. The policy of the law is now too firmly opposed to the exaction of penalties to suffer plaintiff's loss of its full \$1,500 when this amount appears to be wholly disproportionate to the detriment sustained by defendants on Escrow No. 1. Civ.Code, § 3307; *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367; *Freedman v. Rector*, etc., 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R. 2d 1.

Nor is plaintiff precluded from the application of Civil Code section 3275 by the court's determination that it was grossly negligent, a conclusion which is completely unwarranted. The record clearly shows that plaintiff was relying for funds on a commitment made by Arnold North, and had no reason to expect they would not be forthcoming. Mr. North withdrew from the transaction on December 31, 1949, just three days before plaintiff was required to perform. Plaintiff thereupon acted with sincerity and diligence in attempting to keep the contract alive and procuring the requisite money on January 19, 1950. The language of the courts in *Barkis v. Scott*, 34 Cal.2d 116, 123, 208 P.2d 367, 372, in disavowing a similar finding by the trial court, is particularly apposite to plaintiff's conduct herein: "It does not evidence that 'entire want of care which would raise a presumption of the conscious indifference to consequences' necessary to constitute gross negligence [citations]."

For the foregoing reasons, we conclude that the court erred in permitting defendants to retain the entire down payment of \$1,500, rather than in applying the equitable principles above discussed to give plaintiff the measure of relief warranted by the circumstances.

Escrow No. 2.

The instructions in this escrow related to the sale of 104½ lots for a total price of \$56,275, of which \$1,000 was paid outside of escrow, plaintiff being obligated to deposit the additional sum of \$4,850 on February 1, 1950. It was provided that the balance was to be evidenced by two notes for \$15,651 and \$34,774, each of which was to be secured by a deed of trust on the property running to defendants. The instructions further recited that the deed of trust securing the note for \$15,651 was to be a second deed of trust, subordinate to first deeds of trust securing construction loans on 37 of the lots covered by Escrow No. 2. Taxes were to be prorated between the parties as of December 1, 1949. The instructions authorized the escrow holder to cancel the escrow without further notice (and the seller to retain the \$1,000 deposit) upon the buyer's failure to deposit \$4,850 on February 1, 1950; and, in the event the escrow was not closed by March 1, 1950, either party could make a written demand for the return of money or instruments deposited.

[11-14] From the conduct and dealings of the parties subsequent to February, 1950, it is obvious that the conditions as to strict time of performance had been waived, and neither could thereafter put the other party in default without full performance on his part accompanied by a notice to the other to perform within a reasonable time. *Kerr v. Reed*, 187 Cal. 409, 414, 202 P. 142; *Lemle v. Barry*, 181 Cal. 6, 183 P. 148. It is not here necessary to determine whether defendants' refusal to amend the escrow instructions and insert in the note for \$15,651, and the deed of trust securing it, the recitals requested by plaintiff was unjustified, since any possible nonperformance by defendants was cured by their execution of and deposit in escrow of the required instruments on May 2, 1950. On this same date, the escrow holder wrote to plaintiff enclosing a copy in duplicate of the amendment to the escrow instructions signed by defendants, and the deeds of trust which plaintiff had executed without affixing its corporate seal and which it had promised to affix as early as February, 1950. This

letter stated that upon return of a signed copy of the escrow amendment and of the deeds of trust bearing the corporate seal, together with \$500 to cover estimated tax proration and expenses, a title search would be ordered and the escrow closed as soon as possible. Plaintiff argues that the return of the trust deeds for purposes of affixing the corporate seal was uncalled for, since it is recognized that a corporation's "failure to affix a seal does not affect the validity of any instrument." Corp.Code, § 801(b). While this is perfectly true, nevertheless defendants had a right to have such documents regularly executed. They were not required to accept an instrument bearing a seeming irregularity which might affect its merchantability among persons nonconversant with the fact that the absence of a corporate seal from a trust deed was not fatal to its validity. Furthermore, a deed bearing the seal of the corporation is presumptive evidence of the authority of its officers to execute it. *Fickeisen v. Peebler*, 98 Cal.App.2d 320, 219 P.2d 864; *Landis Brothers Co. v. Lawrence*, 104 Cal.App. 499, 286 P. 177. Where a seal is absent from a corporate deed, the burden of proof is upon the party relying on the deed to establish the authority of the corporate agents or officers executing it. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 P. 580; *Barney v. Pforr*, 117 Cal. 56, 48 P. 987; *Fischer v. Lukens*, 41 Cal.App. 358, 182 P. 967; 32 C.J.S., Evidence, § 735, p. 651. Defendants were justified in wishing to be fully protected in the event of future litigation and seeking to regularize the formalities of the transaction by the simple expedient of procuring the corporate seal to be affixed in advance of any controversy. However, plaintiff made no response of any kind to this letter—it neither complied nor objected, at a time when defendants had already tendered full performance and the consummation of the transaction awaited only plaintiff's action.

[15,16] Confronted with approximately seven weeks of inaction on plaintiff's part, defendants could not be expected to prolong the impasse indefinitely. They thereupon exercised their right of putting plaintiff in default by serving notice on

June 29 of an intended termination of the contract unless plaintiff performed by July 5, 1950. The trial court found that this was a reasonable time to perform the acts required, which was a question of fact for the trial court to determine from all the circumstances of the case. *Hoppin v. Munsey*, 185 Cal. 678, 198 P. 398. In view of the fact that only the affixing of the corporate seal to several documents and the deposit of \$500 was involved, it cannot be said that the time allowed was unreasonable as a matter of law. Plaintiff argues that in any event it did, on July 5, 1950, affix its corporate seal to the documents and deliver them on the same day, together with \$500, to the escrow holder. It contends that it effected such delivery by the act of posting the money and instruments on that day addressed to the escrow holder. However, the only authorities it cites hold that a contract is complete when a letter of acceptance is posted. This elementary contract principle has no application in a case where physical delivery *at* a given place, by a designated date, is contemplated.

[17] Plaintiff cannot successfully contend that defendants were in default by refusing to accept a late tender, nor that their subsequent conveyance to another buyer constituted a breach of contract. Upon its failure to make payment at the appointed time after notice from defendants, plaintiff "was in default, and no further affirmative act by defendants was necessary to terminate the contract." *Pitt v. Mallalieu*, 85 Cal.App.2d 77, 81, 192 P.2d 24; *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 173, 159 P. 420.

[18,19] So far as concerns Escrow No. 2, plaintiff has failed to establish that its down payment of \$1,000 exceeds defendants' damages under the contract of sale of land for \$56,275. There was substantial evidence to support the court's finding that at the time of the breach, the value of the property did not exceed \$52,275. *Shurtleff v. Marcus Land etc. Co.*, 59 Cal.App. 520, 523, 211 P. 244. Furthermore the court was entitled to take into consideration the fact that the land was off the market for almost a year, that no interest had been paid, that added taxes fell due, and similar factors.

It cannot be said that defendants were unjustly enriched by pocketing the \$1,000 down payment in Escrow No. 2. See *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13; *Barkis v. Scott*, 34 Cal.2d 116, 122, 208 P.2d 367; *Zellner v. Reeve*, 94 Cal.App.2d Supp. 978, 982, 211 P.2d 395.

In the light of the views here stated with respect to the propriety of defendants' conveyance upon plaintiff's nonperformance at the required time, the trial court correctly determined that the third, fourth and fifth causes of action pleaded were without merit.

Quasi Contractual Recovery

We pass now to a consideration of plaintiff's claim, alleged in part in its first cause of action and more elaborately and specifically expressed in its sixth cause of action, that it has conferred a benefit on defendants in excess of \$8,000 by virtue of improvements it made to property belonging to defendants. Approximately \$4,000 of this amount purports to be based on substantial permanent improvements made with respect to the 10 lots in Escrow No. 1. The balance is claimed for alleged benefits bestowed on other lots owned by defendants, not included in either Escrows No. 1 or No. 2, in the form of improvements plaintiff was required to make to obtain the approval of the city of Los Angeles on an adjacent home-construction program in which it was engaged.

The evidence shows that in May, 1949, plaintiff corporation's predecessors in interest (Mr. Major and Mr. Blakeney, then operating as partners or joint venturers) purchased from defendants 52 lots located in Blocks 33, 34, 35 and 36 of Tract No. 4983. At that time, no agreement had as yet been made regarding the purchase of the lots in Escrows No. 1 or No. 2. Plaintiff proceeded to build dwelling houses on 47 of these lots. In the course of developing this construction project plaintiff began, in about July, 1949, the installation of certain improvements on or abutting streets such as Hobart Blvd., Harvard Blvd., La-Salle Ave., 212th Street, and Denker Ave., which either traversed or ran along the perimeter of the above described property.

The improvements on the streets named, which Mr. Major testified were not fully completed until March, 1950, included tacking into the main sewer outfall trunk, the installation of utilities, manholes, "Y" connections and curbing, and filling, grading and paving. This was required of the plaintiff developer by the city of Los Angeles, in whose favor plaintiff was required to execute a bond for the work. The improvements thus installed by plaintiff in conjunction with its building program passed or fronted several groups of lots (totalling about 26 lots) owned by defendants, as well as lots not owned by either plaintiff or defendants. The sewer installations and paving on Denker Ave., also commenced about July, 1949, abutted the ten lots included in Escrow No. 1. Mr. Major testified that in August, 1949, Mr. Jenkins had signed a memorandum covering the sale of these ten lots and the others in Escrow No. 2, but that the memorandum had been destroyed. Mr. Jenkins testified that there was no agreement prior to September 6, 1949, the date of the escrow instructions, and the court found in accordance with this testimony. The court further found, in essence, that the improvements abutting the property in Escrow No. 1 were made in July, 1949, by the developers of an adjacent tract of land, and that the capital outlay for these improvements, made in July, 1949, was made without any reliance or inducement by defendants that the lots in Escrow No. 1 would be sold to plaintiff. It also found that defendants were not liable to pay for any improvements installed by plaintiff affecting the land involved in its sixth cause of action, nor were any payments made by plaintiff in protection of its interests and to relieve itself from legal liability under its bond (to the city of Los Angeles) chargeable to defendants.

Plaintiff has made a comprehensive attack on these findings as being contrary to the evidence and contends the court failed to follow applicable principles in denying to it quasi contractual recovery based on unjust enrichment. In so contending, plaintiff emphasizes, out of a mass of conflicting evidence, testimony favorable to itself, with which this court can-

not be concerned. For an examination of the entire record discloses that the findings and conclusion made on this issue are amply sustained by the evidence and the reasonable inferences to be drawn therefrom.

[20,21] It is fundamental, of course, that the gravamen of a quasi contractual action grounded on unjust enrichment is the equitable principle that a person should not be allowed to enrich himself at the expense of another. *Lazzarevich v. Lazzarevich*, 88 Cal.App.2d 708, 200 P.2d 49; *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337; 17 C.J.S., Contracts, § 6, pp. 322-325; Woodward, *The Law of Quasi Contracts*, p. 9. It presupposes the acceptance and retention of a benefit by one party with full appreciation of the facts, under circumstances making it inequitable for the benefit to be retained without payment of the reasonable value thereof. 17 C.J.S., Contracts, § 6, p. 322 et seq. Where no benefit has been received, the law will not raise an obligation to make restitution or imply a contract to pay. See *Rotea v. Izuel*, 14 Cal.2d 605, 611, 95 P.2d 927, 125 A.L.R. 1424; *Rowell v. Crow*, 93 Cal.App. 2d 500, 503, 209 P.2d 149. The record is barren of proof that defendants in any fashion received any enhancement in the reasonable market value as a result of the character of improvements installed by plaintiff; nor is there proof that defendants derived any extra profit traceable to this source. On the contrary, the record shows that defendants received no more than they would have gotten if the transaction with plaintiff had materialized without interruption.

[22-24] Furthermore, there is another aspect of this matter which is of extreme significance in the context here present. The evidence and its reasonable inferences demonstrate that the improvements were undertaken as a part of plaintiff's own building program, that they were initiated without reference to any agreement with defendants concerning the properties here in dispute, that defendants at no time remotely suggested they would pay for or contribute to these improvements made adjacent to or abutting other properties they chanced to

own. The whole situation negatives the idea that defendants were expected to participate financially, and any benefit that could possibly have flowed to defendants was incidental to plans and obligations to which plaintiff alone had committed itself. The general rule applicable, absent other equities, is that a party is not entitled to reimbursement for improvements voluntarily made to another's land in the absence of an express or implied contract to pay. *Callnon v. Callnon*, 7 Cal.App.2d 676, 680, 46 P.2d 988; *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 A. 540; *Meeker v. Oszust*, 307 Mass. 366, 30 N.E.2d 246; *Dudzick v. Lewis*, 175 Tenn. 246, 133 S.W.2d 496. A related principle, particularly applicable to the instant case, is adopted by the Restatement of Restitution, sec. 106, in the following language: "A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution." The courts of many jurisdictions support this proposition. *Raynor v. Drew*, 72 Cal. 307, 13 P. 866; *United States v. Pac. R. Co.*, 120 U.S. 227, 7 S.Ct. 490, 30 L.Ed. 634; *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 A. 150; *Stern v. Haas*, 54 N.D. 346, 209 N.W. 784. A property owner who conceivably acquires some incidental benefit from an adjoining landowner's improvements made pursuant to the latter's private development plans is not required to account for the benefits so received.

[25] The evidence already summarized fully sustains the court's view that there was here present neither unjust enrichment of defendants nor their conscious acceptance of any benefits for which a promise to pay might be implied. The expenditures made and obligations paid were done exclusively in furtherance of plaintiff's own interest and to discharge commitments for which it alone was responsible. Since defendants were not liable in any way under the bond executed by plaintiff, there is no rule of law which would entitle plaintiff to a right of contribution or subrogation as against defendants in the circumstances here present.

Plaintiff dwells at length upon other findings relating to the second, third, fourth, fifth and sixth causes of action, which it asserts are unsupported by the evidence. However, since the findings already discussed were supported by the evidence and fully sustain the judgment with respect to these causes of action, it becomes immaterial whether other findings objected to are sustained by the evidence or not. *Kellerman v. Maier*, 116 Cal. 416, 422, 48 P. 377; *Hatton v. Gregg*, 4 Cal.App. 542, 546, 88 P. 594; *Sands v. Eagle Oil & Ref'ng Co.*, 83 Cal.App.2d 312, 321, 188 P.2d 782.

The judgment is correct as to all causes of action except the first. It is, however, reversed with directions to retry only the issue of defendants' damages under the first cause of action and determine what sum, if any, should be offset against plaintiff's \$1,500 deposit. The purported appeal from the order granting motion to dismiss notice of intention to move for a new trial is dismissed. Each party to bear its own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



121 Cal.App.2d 415

HOLLYWOOD WHOLESALE ELECTRIC CO.

v.

JOHN BASKIN, Inc. et al.

Civ. 19578.

District Court of Appeal, Second District,
Division 3, California.

Nov. 23, 1953.

Hearing Denied Jan. 20, 1954.

Action, on labor and material bond and on bond for release of money payable to contractor, by materialman against contractor, as principal, and surety company for reasonable value of electrical materials furnished for and used in construction of school buildings. The Superior Court of

Los Angeles County, Henry M. Willis, J., entered judgment adverse to materialman, and materialman appealed. The District Court of Appeal, Vallée, J., held that, where each of subcontractor's orders concerning school project constituted, when filled, distinct obligations owed to materialman, to whom subcontractor owed balance on open account, which included older indebtedness arising from other projects, and not all of subcontractor's payments were designated as applicable to any particular account, but materialman applied undesignated payments to the older items in the account, subcontractor's undesignated payments did not reduce debt owed by him to materialman on school project.

Reversed.

1. Payment ⇐65(6)

Where plaintiff has proven creation of debt within period of statute of limitations, defendant has burden of proving payment.

2. Payment ⇐68

Defense of payment is affirmative and is never established by mere proof that claimant has received money, but proof must establish that money so received can be applied in discharge of debt or obligation sued upon.

3. Payment ⇐41(1)

Where every invoiced account between materialman and subcontractor matured on date of presentation of invoice, and invoice began to run thirty days after maturity, interest accrued on every invoiced account differed in amount from that of the others, and, therefore, every such invoiced account constituted a distinct charge or "obligation" within statute providing rules for application of performance in case where debtor, under several obligations to another, does an act by way of performance which is equally applicable to two or more of such obligations. Civ.Code, § 1479.

See publication Words and Phrases, for other judicial constructions and definitions of "Obligation".

4. Payment ⇐41(1)

Mere showing of payment by contractors to subcontractor and payment by subcontractor to subcontractor's supplier

is not sufficient to establish that one payment was traceable to the other for purpose of establishing that subcontractor's payment was to be applied on materials supplied to subcontractor under his contract with contractor rather than to debt owed by subcontractor for materials supplied on other projects. Civ.Code, § 1479.

5. Payment ⇨39(1)

In absence of anything appearing as to source upon which subcontractor makes payment to materialman to whom subcontractor is indebted on account of several obligations and in absence of any direction as to application, such payment may be applied by materialman to any of the obligations. Civ.Code, § 1479.

6. Payment ⇨39(1), 43

Where there is a running account, creditor may apply debtor's payment to any item, and general credits, on such accounts, stand as payments on oldest items of such accounts unless some other application is clearly indicated. Civ.Code, § 1479.

7. Payment ⇨68

Burden of proving particular application of a payment by either the debtor or creditor is upon party claiming that such application was made. Civ.Code, § 1479.

8. Payment ⇨68

In action, on labor and material bond and on bond for release of money payable to contractor, by materialman against contractor, as principal, and surety company for reasonable value of electrical materials furnished for and used in construction of school buildings, materialman had burden of proving that he had applied subcontractor's payments to obligations other than those involved in school project. Civ.Code, § 1479.

9. Payment ⇨75

In action, on labor and material bond and on bond for release of money payable to contractor, by materialman against contractor, as principal, and surety company for reasonable value of electrical materials furnished for and used in construction of school buildings, evidence was sufficient to establish that materialman had applied subcontractor's undesignated payments to ob-

ligations owed materialmen by subcontractor other than those owed under school project. Civ.Code, § 1479.

10. Payments ⇨43

Generally, in case of running account containing various items of debt on one side and of credit on other occurring at different times, where no special application of payments has been made by either debtor or creditor, court will apply payments in discharge of items of debit antecedently due in order of time in which they stand in account, and each payment will be applied in extinguishment of earliest items of debt until such payment is exhausted. Civ. Code, § 1479.

11. Payment ⇨47(1)

Contractor, as principal, and his surety on labor and material bond, being parties secondarily liable for materials furnished by materialman and used in school project, could not control application of a payment by either subcontractor or materialman, and court would apply payment according to formula prescribed by law rather than in manner which would exonerate contractor and surety. Civ.Code, § 1479.

12. Evidence ⇨20(1)

It is common knowledge that wages constitute a considerable portion of costs of installation.

13. Payment ⇨44

Where each of subcontractor's orders concerning school project constituted, when filled, distinct obligations owed to materialman, to whom subcontractor owed balance on open account, which included older indebtedness arising from other projects, and not all of subcontractor's payments were designated as applicable to any particular account, but materialman applied undesignated payments to the older items in the account, subcontractor's undesignated payments did not reduce debt owed by him to materialman on school project. Government Code, § 4200; Civ.Code, § 1479; Business and Professions Code, §§ 7108, 7120.

Forster & Gemmill and John G. Gemmill,
Los Angeles, for appellant.

Glen Behymer, Los Angeles, amicus curiae, in behalf of appellant.

Wallace & Cashin and W. W. Wallace, Los Angeles, for respondents.

VALLEE, Justice.

Appeal by plaintiff from an adverse judgment in an action on a labor and material bond.

The action is against Jack Baskin, Inc., as principal, and Seaboard Surety Company, as surety, on a labor and material bond executed and filed as required by section 4200 of the Government Code, to recover the reasonable value of electrical materials alleged to have been furnished for and used in the construction of school buildings at the Colfax Avenue School site in Los Angeles. In the alternative, plaintiff sought recovery on a second bond filed by Baskin with the school board under the provisions of section 1184d of the Code of Civil Procedure, to secure a release of the moneys payable to it as contractor for the construction of the school buildings after plaintiff had filed its claim with the school board.

On June 19, 1953, Baskin entered into a contract with Los Angeles City School District for the construction of buildings at the Colfax school site. In accordance with the requirements of section 4200 of the Government Code, Baskin, as principal, and Seaboard, as surety, executed and filed a labor and material bond. On the same day Baskin entered into a contract with one W. C. Scruggs, doing business as Scruggs Electrical Company, for the furnishing and installation of the electrical materials in the construction of the Colfax school, for the sum of \$14,850.

Plaintiff was engaged in business as a supplier of electrical materials and had done business with Scruggs for many years. Scruggs testified he ordered the greater portion of the electrical equipment used in the performance of the subcontract from plaintiff. On June 28, 1950, the date of the first purchase of material by Scruggs from plaintiff for use in the Colfax job, Scruggs was indebted to plaintiff in the amount of \$14,758.33 for materials previously furnished by plaintiff to Scruggs for other

jobs. Thereafter and until May 2, 1951, plaintiff sold and delivered to Scruggs various electrical materials to be used in the Colfax job and for other jobs.

Each order placed by Scruggs was entered by plaintiff on a five-part multi-copy invoice form on which was listed a description of the materials embraced in the order and the name of the job for which the materials were ordered and delivered, "Colfax Avenue School," or "Colfax School." One copy of the multi-copy form went to plaintiff's shipping department. Two copies were delivered with the material, one of which was left with the material, and the other was returned to plaintiff with the signature of the party receiving the material at the job site. One copy was sent to the customer as a billing, and the other retained by plaintiff. Two truck drivers of plaintiff testified they had made deliveries for plaintiff to Scruggs at the Colfax School. Plaintiff introduced in evidence the copies of the multi-copy form returned to plaintiff with the signatures of the parties receiving the materials at the job site pertaining to the Colfax job. Scruggs identified twelve different signatures on twelve separate delivery receipts as those of his employees. Scruggs testified: he received invoices through the mail from plaintiff concerning each order he had placed with it for the job; with the exception of a few odds and ends all the material invoiced to him for the Colfax school job actually was used on that job; a few small scrap pieces were not used on the job and were credited into his warehouse.

Plaintiff posted the dollar amount of every order placed by Scruggs on general ledger sheets designated "W. C. Scruggs." These entries included orders for the Colfax job as well as orders for other jobs placed by Scruggs during the same period. Every entry of a charge on the ledger sheets contained the date and invoice number of the invoice covering the particular charge. Plaintiff credited Scruggs for materials that he returned on the general ledger sheets. Every credit entry contained a credit memorandum number, which in turn listed the particular job to which the credit was applicable. The general ledger

up to December 29, 1950, was a composite of all the various job accounts and obligations. Monthly statements were sent by plaintiff to Scruggs. The statements were typed at the same time the ledger sheets were prepared by sliding the statement form over the ledger card. They were identical. The original copy of the statement was mailed to Scruggs and the ledger sheet was retained in plaintiff's file.

During the period of performance of the Colfax contract, and particularly from June 28, 1950, to December 29, 1950, several payments were made by Scruggs to plaintiff. They were as follows:

July 31, 1950.....	\$ 2,280.13
August 17, 1950.....	2,000.00
August 31, 1950.....	2,000.00
September 15, 1950.....	2,690.75
September 29, 1950.....	3,131.52
November 14, 1950.....	2,428.78
November 24, 1950.....	2,406.02
	\$16,937.20

The November 24 payment was designated for application, and applied by plaintiff, on obligations other than those related to the Colfax job. Except for this one earmarked payment, Scruggs did not request plaintiff to apply any of the other payments to any specific job. The payment of July 31 bore the notation "April Statement"; the payment of August 17, the notation "On Account May"; the payment of September 15, the notation "On A/C"; the payment of September 29 bore no notation. None of the checks representing the other payments bore any notation other than "On Account." Every payment was recorded on the general ledger sheets.

As of December 29, 1950, plaintiff broke down the sum total of the obligations owing by Scruggs, including the then balance on the Colfax job, segregating them to the various jobs to which they were applicable. This was accomplished through the use of the multi-form invoices. All of the invoices from the Scruggs file were pulled and sorted by jobs. Plaintiff set up a separate ledger sheet for each job then either in progress or current, and transferred the appropriate amount to each job.

Immediately prior to the establishment of separate ledger sheets for each job, the general ledger sheet showed a running balance of \$34,603.04; this was an increase of \$19,844.71 from the balance of \$14,758.33 of June 28, 1950. As of December 29, the total value of materials delivered to the Colfax job was \$7,992.68, which sum was transferred to the ledger sheet for that specific job. Therefore, during the six months' period, Scruggs had become additionally indebted to plaintiff for the difference of \$11,852.03 (\$19,844.71-\$7,992.68) on account of jobs other than the Colfax obligation.

When plaintiff broke down the obligations according to jobs, it prepared a summary statement showing the monthly purchases for each job, and applied credits of cash and collateral (a \$6,000 note) to the accounts oldest in time of maturity. It also prepared a ledger recap showing the debits and credits for certain periods. On May 10, 1950, there was an accrued open balance of \$20,414.20 owing by Scruggs to plaintiff. The recap showed that cash payments of June 21 and 28, totaling \$8,311.80, not in dispute; and the payments, which are in dispute, of July 31, \$2,280.13, August 17, \$2,000, August 31, \$2,000, September 15, \$2,690.75, and September 29, \$3,131.52,—erased this debit to zero.

In segregating the various accounts, plaintiff in effect applied the payments made by Scruggs listed above to the oldest obligations,—that is, the obligations owed by Scruggs to plaintiff on the date when plaintiff commenced to furnish materials for the Colfax job.

After December 29, 1950, all purchases made for the Colfax job and all payments made on that job by Scruggs were entered on the ledger sheet for that specific job.

Plaintiff ceased furnishing electrical materials to Scruggs on May 2, 1951. Prior to May 17, 1951, defendant Baskin completed performance of its contract. On May 17, the Board of Education declared the contract completed and the buildings accepted. Plaintiff demanded of defendants Baskin and Seaboard the payment of

the balance due for materials furnished to Scruggs for the Colfax job. Defendants refused to pay.

Plaintiff alleged it furnished Scruggs electrical materials for use in and used in the construction of the Colfax job of the value of \$9,836.70; that no part thereof had been paid except the sum of \$1,699.99; by the terms of sale Scruggs agreed to pay for the materials on or before the tenth of each month following the month of delivery, plus interest thereon at the rate of 8% a year on amounts due and unpaid for more than thirty days; by the terms of the labor and material bond filed by defendants, the court was to fix a reasonable attorney's fee in case suit was brought on the bond. The prayer was for \$8,136.71, together with interest and attorneys' fees.

Defendants alleged that all materials sold by plaintiff to Scruggs, which were used in the construction of the Colfax school, had been paid for by Scruggs. Defendants introduced in evidence three cancelled checks, showing payment by Baskin to Scruggs of the following amounts on the following dates:

September 9, 1950.....	\$3,000.00
October 10, 1950.....	\$2,000.00
November 9, 1950.....	\$3,048.65

A fourth check for \$1,500 made jointly to Scruggs and plaintiff, was given by Baskin to Scruggs on December 31, 1950. Plaintiff received it on January 22, 1951, and credited it to Scruggs on the Colfax job. Plaintiff conceded that it was given and received as a payment on that account.

Scruggs testified that the Baskin checks of September 9, October 10, and November 9 were received by him on account of his contract for the electrical work on the Colfax job. However, the record is void of any evidence that plaintiff knew Scruggs had received any payments from Baskin other than the check of December 31, 1950. Defendants did not produce Scruggs' bank statement to support their contention that the payments by Scruggs to plaintiff had their source in payments from Baskin to Scruggs.

The court found: Scruggs purchased from plaintiff certain electrical materials used by Scruggs in the performance of his contract, which materials were "called for by the plans and specifications and used in the construction of the building erected by defendant Jack Baskin, Inc. for the School District"; Scruggs paid plaintiff the reasonable value of all of the materials used by Scruggs in the construction of the school; plaintiff sold materials to Scruggs on one open account and the materials were charged on this open account; Scruggs was indebted to plaintiff on one obligation only, the open account; all payments made by Scruggs to plaintiff were credited on the open account; materials not used and returned by Scruggs were credited on the open account; there was no application by either Scruggs or plaintiff as to any payment of money made by Scruggs to plaintiff, but all of said payments were credited to the open account.

The court also found that Baskin paid Scruggs the full selling price and Scruggs paid plaintiff the full selling price for the materials used in the construction of the building, and that plaintiff had been fully paid for all of the materials. Judgment was for defendants. Plaintiff appeals.

Plaintiff's principal ground for reversal is that the finding that plaintiff had been fully paid for all of the materials it furnished and which were used by Scruggs in the Colfax job is not supported by the evidence. We have concluded the contention must be sustained.

[1,2] Where the plaintiff has proven the creation of a debt within the period of the statute of limitations, the burden is on the defendant to prove payment. 20 Cal.Jur. 952, § 30. The defense of payment is affirmative and is never established by mere proof that the claimant has received money. The proof must go further and establish that the money so received can be applied in discharge of the debt or obligation sued upon. Bay Lumber Co. v. Pickering, 120 Cal.App. 163, 169, 7 P.2d 371.

Defendants base their defense of payment on the premise that the moneys received by plaintiff from Scruggs had their source in the payments from defendant Baskin to Scruggs; therefore, they say the moneys given plaintiff by Scruggs were in settlement of the Colfax school account and plaintiff had been paid in full on this account. Plaintiff does not deny the payments from Baskin to Scruggs; but because Scruggs did not designate to which obligations he wanted the payments of September 15, September 29, and November 14, made by him to plaintiff, applied, it contends that section 1479 of the Civil Code compels application of such payments to those obligations that had arisen prior to June 28, and not to the Colfax school account.

Section 1479 of the Civil Code provides: "Where a debtor under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"One. (*Application by debtor.*) If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"Two. (*Application by creditor.*) If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; * * *.

"Three. (*Application in absence of designation.*) If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

"1. Of interest due at the time of the performance.

"2. Of principal due at that time.

"3. Of the obligation earliest in date of maturity. * * *"

Defendants claim that Scruggs had only one obligation to plaintiff—his open account—and that the monthly statements mailed to Scruggs reflected only one open account; therefore, section 1479 is not applicable. They rely on *Hammond Lumber Co. v. Henry*, 87 Cal.App. 231, 261 P. 1027, 1028.

In *Hammond Lumber Co. v. Henry*, the defendant was a general contractor and builder and at different times had bought building material from the plaintiff. It was the custom of the defendant and the plaintiff to keep a separate account for each building. The plaintiff brought an action pleading three counts: the first, for goods sold and delivered; the second, on an open book account; the third, on an account stated between the parties. The defendant contended that the credits had been improperly applied. It appeared that the plaintiff had applied payments as directed by the defendant at the time of payment, and also thereafter made a number of transfers of credits from one job to another at the defendant's request; but finally refused to make any further transfers of credits as requested by the defendant. The court commented that the record was such it could not "determine what amount was due respondent [plaintiff] at any time—no basis for any calculation at all", and held, 87 Cal.App. at page 235, 261 P. at page 1028: "If it be conceded that appellant had the right to direct the application of the moneys paid to respondent to any particular job, certainly, after such application had been rightly made, as directed by appellant, he would have no right or authority to thereafter direct a different application of the same funds." The court, by way of dicta, went on to say that section 1479(1) had no application to the facts for the reason that the defendant was indebted to the plaintiff on but one obligation for lumber and building material of all kinds, sold and delivered to him, and not upon several obligations; that the accounts were kept separate merely for convenience and constituted one debt which the defendant was primarily obligated to pay. *Pacific Acceptance Corp. v. Bank of Italy*, 59 Cal.App. 76, 209 P. 1024, cited by

the court as authority for the statement that there was one obligation, does not support it. In *Pacific Acceptance Corp. v. Bank of Italy*, there was but one obligation, a promissory note, not a running account. However, the court in *Hammond Lumber Co. v. Henry*, further said that if, in making the various payments, the defendant "had stated to respondent [plaintiff] that the money came from a certain owner of a certain building, or was the money of another person against whom a lien might be filed, then the situation would be entirely different, but no such statements appear in the record." The case has no application here. This is not an action by plaintiff against Scruggs. If it were it would make no difference how plaintiff had applied the payments made by Scruggs,

Scruggs would still owe plaintiff whatever balance was unpaid on all jobs. The situation is entirely different in an action on a bond for labor and material furnished for and used in a specific building.

The courts recognize the individuality of each debit or charge item in a running account as separate and distinct obligations. One of the early cases is *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N.W. 74, 75, where the court held that where the creditor had received money from the debtor, the payment "[b]eing paid on account generally, it would be legally applied upon the oldest items of account". See *Standard Oil Co. v. Day*, 161 Minn. 281, 201 N.W. 410, 411-13, 41 A.L.R. 1291,¹ cited and quoted from with approval in *S. W. Towle Lumber Co. v. Anderson*, 208 Cal.

1. In *Standard Oil Co. v. Day*, 161 Minn. 281, 201 N.W. 410, the court said (201 N.W. 412): "The authorities that hold contrary to our view do so upon the theory that such moneys are impressed with an equity in favor of the surety that entitles it to have the money applied in payment of liabilities incurred by the contractor under the contract. If such an equity exists as against a creditor, who has a current account arising out of the contract and also an account incident to some other and prior transaction, that prevents the creditor and his debtor agreeing that moneys which the creditor has received from payments under a particular contract shall be applied upon such prior indebtedness, it would seem that upon the same logic and reason, if this same creditor's claim consisted exclusively of the old account, he could not safely accept such moneys, with knowledge of their source, upon the old account. The money should still be subject to such equity in favor of the surety, and, if the rule is followed to its logical conclusion, the surety in case of loss could recover payment from the general creditor. This leads to an instability in commercial business that does not have our approval. The creditor should not, in the collection of his money, be burdened with the responsibility of having to know the status of his debtor's accounts, nor the status of the obligation of the surety of the debtor. The surety, in modern business, should be, and usually is, quite able to care for itself. It selects those for whom it becomes surety. Most contractors and subcontractors must necessarily use some of their money that they receive

in payment of obligations, not incurred in the particular contract from which their money is received. When they receive their money unconditionally it is their own and they may do with it as they please. If a creditor must stop, before he accepts payments from his debtor, and make the impertinent inquiry as to his standing with his surety, the unsatisfactory results are obvious.

"Such a position not only gives undue regard to the surety, but is in utter disregard of the right to make private contracts and the obligation thereof. Suppose his tailor is delivering a suit of clothes which he has made for the subcontractor, and the latter tenders payment in funds which the tailor knows came from the work covered by a surety bond, must the tailor refuse it, or take it clothed with an equity that, perchance, later permits the surety to take it away from him? A surety is not entitled to such judicial mercies. The tailor has business perils of his own. The business of sureties is inherently one of constant peril, and their imperative watchfulness for their general protection makes it less burdensome for them to guard against the emergency here under consideration, and our view tends more to the stability of ordinary business. We think our previous holdings on this subject are sound, and that we have adopted the better rule. We hold that such funds are not under such circumstances impressed with an equity in favor of the surety. In the consideration of this matter we have considered the original contractor in the same situation as his surety for the purpose of this case."

371, 375, 281 P. 500; *Duncan v. Thomas*, 81 Cal. 56, 58, 22 P. 297; *Bay Lumber Co. v. Eaton*, 119 Cal.App. 362, 366, 6 P.2d 289; *Bay Lumber Co. v. Pickering*, 120 Cal.App. 163, 166, 7 P.2d 371; *Madera Sugar Pine Co. v. Adams*, 68 Cal.App. 111, 228 P. 544; *Andrew v. Bishop*, 132 Me. 447, 172 A. 752, 100 A.L.R. 121; *Utah State Building Commission, for Use and Benefit of Mountain States Supply Co. v. Great American Indem. Co.*, 105 Utah 11, 140 P.2d 763, 767-71; *F. H. McGraw & Co. v. Milcor Steel Co.*, 2 Cir., 149 F.2d 301, 304-307; *Liese v. Hentze*, 326 Ill. 633, 158 N.E. 428, 430; *Trauth v. Voss*, 231 Ky. 544, 21 S.W.2d 832; *Watson v. Murphy*, 36 Ariz. 377, 285 P. 1037, 1039; 20 Cal.Jur. 939, § 23. In *Madera Sugar Pine Co. v. Adams*, supra, 68 Cal.App. 111, 228 P. 544, the facts were similar to those in the case at bar. The plaintiff entered all charges for materials in a single general account of the contractor, designating therein the particular job for which each item was furnished. Payments made by the contractor were credited to this account generally, without applying the same to any particular job. The action was brought against the owner to foreclose a material lien. The court held that if the plaintiff had produced his book account in court it would have enabled the court to apply the payments in accordance with the provisions of section 1479 of the Civil Code. In *Bay Lumber Co. v. Eaton*, supra, 119 Cal.App. 362, at page 366, 6 P.2d 289, at page 291, on similar facts, the court said: "At the time of receiving payments, there being no direction from anyone as to how the payments should be applied, the plaintiff applied the several payments to the accounts which were earliest in maturity, in strict accordance with the provisions of section 1479 of the Civil Code, and strictly in accordance with the opinion of this court in the case of *Madera Sugar Pine Co. v. Adams*, 68 Cal.App. 111, 228 P. 544. There is nothing in the case of *Hammond Lumber Co. v. Fanta*, 179 Cal. 652, 178 P. 503, which conflicts with the holding of this court in the *Madera Sugar Pine* case. The case of *Hammond Lumber Co. v. Fanta*, supra, shows distinctly that the owner of the premises indicated to the

lumber company by the assignments of payments specified in the contract that the moneys should be applied upon the payments mentioned in the assignment, and that the lumber company had full knowledge thereof; and, as cited in the case of *Hammond Lumber Co. v. Henry*, 87 Cal. App. 231, 261 P. 1027, the appellants might have given notice to the plaintiff or taken proceedings such as to convey notice to the plaintiff as to the application of the funds. But as no direction was given either to the contractor, and no knowledge conveyed to the plaintiff concerning the payments, the section of the Civil Code which we have cited is controlling. The fact that the plaintiff knew that there were different sources from which the contractor Eaton might receive money is not equivalent to notice or knowledge that the contractor had received any particular payment from any particular source."

[3] Plaintiff kept a general ledger sheet on which it entered the date, invoice number, and the dollar amount of every order placed by Scruggs. The dollar amount was shown as a charge. As such, every debit or charge represented a single obligation running from Scruggs to plaintiff. Within a few days after the delivery of materials, for both the Colfax school job and others, plaintiff would send to Scruggs an invoice entitled "This Is Your Invoice," describing the materials that had been delivered, as reflected on the delivery receipt of the five-part multi-copy forms. At the bottom of every invoice there was a notice of terms of sale: "Invoiced account due on presentation. Cash discount of ——— will apply on this invoice if paid by the 10th of the month following date of delivery. Due net thereafter. Interest at 8% per annum charged on accounts 30 days overdue." Every invoiced account matured on the date of presentation of the invoice. Interest began to run thirty days after maturity. Accordingly, the interest accrued on every invoiced account differed in amount from that of the others. Thus every order placed by Scruggs was a distinct charge or obligation. The materials delivered by plaintiff for other jobs prior to the time it began

to furnish materials for the Colfax job created obligations that were earlier in date of maturity than the invoice accounts for the Colfax job.

Defendants claim Baskin gave Scruggs \$9,548.65 and that from this sum Scruggs paid plaintiff in full on the Colfax school account. Plaintiff, in reply, contends that it did not know the source of the funds received by it from Scruggs except the payment received January 22, 1951, for \$1500, and that Scruggs did not designate the application of the payments included in the \$9,548.65 except that of January 22. It further contends that under section 1479 of the Civil Code it had the right to apply the moneys to the extinction of any obligation then due. The court ruled that the payments should have been applied in discharge of the Colfax school account.

The check by which Scruggs made the payment of July 31, for \$2,280.13, was marked "April Statement" and the one of August 17, for \$2,000, was earmarked "On Account May." The August 31 payment was not designated for application to any particular account. All three of these payments were made prior to the first payment by Baskin to Scruggs, September 9, and, therefore, could not have had their source in payments from Baskin to Scruggs.

On September 15, six days after Scruggs received \$3,000 from Baskin, he (Scruggs) gave plaintiff a check for \$2,690.75, marked "On A/C." Plaintiff applied this payment to obligations that had arisen prior to June 28. The court applied it to the Colfax school account. In so doing, it disregarded the application made by plaintiff, and it ignored the injunction contained in section 1479(3) of the Civil Code which requires the court to apply the payment to the obligations earliest in date of maturity.

On September 29, Scruggs made another payment to plaintiff in the amount of \$3,131.52 although he did not receive his second payment from Baskin until October 10. It was impossible for more than \$309.25 of this September 29 payment to have had as its source money paid by Baskin to Scruggs ($\$3,000 - \$2,690.75 = \$309.25$), yet the court applied the entire sum of \$3,131.52 to the

Colfax school account. As of September 29, the value of the materials delivered by plaintiff to Scruggs for the Colfax school job was \$4,314.20. By applying the September 15 and September 29 payments, totaling \$5,822.27, to the Colfax school account, the court: a) credited to that obligation \$2,822.27 more than Scruggs had on September 29 received from Baskin; b) credited to the Colfax school account \$1,508.07 more than Scruggs owed on that job; c) disregarded the application made by plaintiff-creditor of the payments; and d) ignored the requirement of section 1479 of the Civil Code as to application of these payments to older obligations.

[4] The record shows a payment of \$2,000 from Baskin to Scruggs on October 10, but no further payment from Scruggs to plaintiff until November 14. In view of the remoteness of these transactions, it cannot be said that the Baskin to Scruggs payment was the source of the Scruggs to plaintiff payment. The mere showing of payment is not sufficient evidence for a conclusion that one is traceable to the other.

On November 9, Baskin gave Scruggs a check for \$3,048.65. On November 14, five days later, Scruggs paid plaintiff \$2,428.78. As of November 14, Scruggs owed plaintiff on the Colfax job, without the crediting of any payments, \$6,857.98. The payments of September 15, \$2,690.75, September 29, \$3,131.52, and November 14, \$2,428.78, totaled \$8,251.05. The court credited the Scruggs' Colfax school obligation with this \$8,251.05, which was \$1,393.07 more than Scruggs then owed on that account.

If any part of the payment of September 29 could be applied to the Colfax job, the most that could be credited to that job is the total of the following: September 15, \$2,690.75, September 29, \$309.25, and November 14, \$2,428.78. These three payments total \$5,428.78. This is \$1,429.20 less than the accrued amount of the Colfax school account as of November 14, and it is \$2,707.93 less than plaintiff's total claim after crediting the earmarked payment from Baskin to Scruggs and plaintiff of January 22, 1951.

As of December 29, 1950, plaintiff established a separate ledger sheet for the Col-

fax school job. On and after December 29, Scruggs made purchases amounting to \$1,-768.86. An earmarked payment from Baskin to Scruggs and plaintiff was made in January, 1951, for \$1,500. Under the theory adopted by the court, the largest amount of payments prior to December 29, 1950, that could be applied to the Colfax school obligation would be \$5,428.78, which would leave as of December 29, 1950, a balance owing of \$2,563.90 ($\$7,992.68 - \$5,428.78 = \$2,563.90$). When this is added to the \$1,-768.86 incurred on and after December 29, and the \$1,500 is deducted, a figure of \$2,-832.76 is found to be the balance.

[5-11] In the absence of anything appearing as to the source of the fund from which a subcontractor makes a payment to a materialman, to whom he is indebted on account of several obligations, without any direction as to application, the payment may be applied by the materialman to any obligation. *S. W. Towle Lumber Co. v. Anderson*, 208 Cal. 371, 375, 281 P. 500; *Bay Lumber Co. v. Pickering*, 120 Cal.App. 163, 166, 7 P.2d 371; *Bay Lumber Co. v. Eaton*, 119 Cal.App. 362, 366, 6 P.2d 289. Where there is a running account, the creditor may apply a payment to any item. General credits on open accounts stand as payments on the oldest items of such accounts unless some other application be clearly indicated. *Electrical Supply Co. v. Eugene Freeman, Inc.*, 178 La. 741, 152 So. 510, 512; *Titus v. Electric Supply Co.*, 172 Okl. 408, 45 P.2d 515, 517; 70 C.J.S., Payment, § 59, page 265. The burden of proving a particular application of a payment by either the debtor or creditor is on the party claiming that such application was made. *Madera Sugar Pine Co. v. Adams*, 68 Cal.App. 111, 115, 228 P. 544; 20 Cal.Jur. 944, § 26. The burden was on plaintiff to prove he applied the payments to obligations other than the one in suit. Plaintiff introduced in evidence the general ledger sheet, a summary statement, and the ledger recap. The summary statement broke the running account down by jobs and showed the purchases made each month. The exhibits revealed the application of the payments, and the general ledger sheets also showed the running balance. Plaintiff sufficiently proved the ap-

plication of the payments to other obligations. *Madera Sugar Pine Co. v. Adams*, 68 Cal.App. 111, 115, 228 P. 544; *Bay Lumber Co. v. Eaton*, 119 Cal.App. 362, 366, 6 P.2d 289. But even if the court could have properly found that neither Scruggs nor plaintiff designated the application of the payments, or that plaintiff had not made the application within a reasonable time after performance, the court was required by section 1479(3) of the Civil Code to apply the payments to the obligations earliest in date of maturity,—that is, the charges that had arisen prior to June 28 on other jobs and which were due and owing at the time of performance. The general rule is that in the case of a running account, where there are various items of debt on one side and various items of credit on the other occurring at different times, and no special application of payments has been made by either the debtor or the creditor, the court will apply the payments in discharge of the items of debit antecedently due in the order of time in which they stand in the account. Each item of payment is applied in extinguishment of the earliest items of debt until the payment is exhausted. 70 C.J.S., Payment, § 72b, page 276. See cases cited. Defendants, as principal and surety on the labor and material bond, being the parties secondarily liable for the materials furnished by plaintiff and used in the Colfax school job, “cannot control the application of a payment by either the debtor or creditor, and where neither party applies the payment to a specific debt the court is not required to apply it so as to exonerate such third persons”; but rather the court is required to apply it according to the formula prescribed by law. *Bank of America Nat. Trust & Savings Ass’n v. Kelsey*, 6 Cal.App.2d 346, 352, 44 P.2d 617.

The cases of *Johnston v. Groom*, 99 Cal. App. 462, 278 P. 935, and *Hart, Schaffner & Marx v. Vaughn*, 17 Cal.App.2d 516, 62 P.2d 377, are cited by defendants to support the proposition that plaintiff credited all the payments on the open account and that in breaking down the account according to jobs and applying the money to the oldest obligations, it in effect changed the application of the payments. In both of these

cases the opinions clearly indicate that the debtor specifically designated the application of the payments to certain jobs and indebtednesses. Where the creditor has received money under those conditions, the application cannot be changed so as to injuriously affect the rights of third parties. In the present case, Scruggs did not designate the application of the payments to specific jobs. Plaintiff credited the payments to the running account. General credits on open accounts stand as payments on the oldest items of such accounts. When plaintiff broke down the general ledger sheets according to jobs, it merely posted the payments to the obligations earliest in date of maturity.

[12, 13] Sections 7108 and 7120 of the Business and Professions Code are not applicable to the issues. Defendants claim that those sections create the presumption that Scruggs gave plaintiff the money he received from Baskin. Sections 7108 and 7120 state the grounds for disciplinary action against a contractor or subcontractor who diverts funds or property received for the prosecution or completion of a specific construction project or operation for any other construction project or operation, obligation or purpose, and against a contractor who wilfully or deliberately fails to pay any moneys when due for materials or services rendered in connection with his operations as a contractor. The present suit is not an action by the registrar of contractors against Scruggs. Under the terms of his contract, Scruggs was to receive \$14,850 for the furnishing and installation of electrical materials. The cost of labor was included. However, defendants argue that under the so-called presumption the entire sum of \$9,548.65 which Baskin paid to Scruggs was given to plaintiff for the electrical materials furnished for the Col-fax job. In addition to this \$9,548.65, they say, in effect, that Scruggs paid plaintiff \$2,795.64, or a total of \$12,354.29. This leaves only the small balance of \$2,505.71 of the contract price to be used for labor. It is common knowledge that wages constitute a considerable portion of the costs of installation. There is no evidence from which it may be inferred that Scruggs di-

verted any funds. For aught that appears, he may have devoted all of the funds he received from Baskin to the payment of labor and other materials in the performance of his contract with Baskin.

We conclude that the finding that plaintiff had been paid in full is not supported by the evidence.

Reversed.

SHINN, P. J., concurs.

PARKER WOOD, J., did not participate.



121 Cal.App.2d 633

STARR v. STARR.

Civ. Nos. 8190, 8258.

District Court of Appeal, Third District,
California.

Nov. 30, 1953.

Hearing Denied Jan. 27, 1954.

Action against plaintiff's divorced husband, residing in Pennsylvania, to recover sums in addition to monthly sums awarded plaintiff by the divorce decree, rendered by a Nevada court, for support of the parties' minor child. From orders of the Superior Court, Sonoma County, Donald Geary, J., directing defendant to pay plaintiff a larger sum per month for the child's support and awarding plaintiff attorney's fees and costs, defendant appealed. The District Court of Appeal, Peek, J., held that a foreign state court's decree for a minor child's support, if subject to modification or annulment in such state, may be modified or annulled in any state having jurisdiction over the subject-matter, including the state of the child's residence, and that the orders were not invalid as abridging defendant's privileges or immunities as a citizen of the United States, as they imposed no greater burden on him, as a nonresident of the state, than that imposed on residents thereof.

Orders affirmed.

1. Divorce ⇨332

The state, wherein minor child of parents divorced by decree of court of another state is actually living, has jurisdiction to act to protect child's welfare, as by awarding mother sums in addition to those awarded by such decree for child's support.

2. Infants ⇨18

A state's jurisdiction to regulate custody and support of infants found within its territory does not depend on their parents' domicile, but has its origin in protection due to incompetent or helpless persons.

3. Divorce ⇨332

A decree respecting custody and support of divorced parents' minor child, if subject to modification or annulment in state wherein rendered, may be modified or annulled in any state having jurisdiction over subject-matter, including state of child's residence, as such decree has no constitutional claim to more conclusive or final effect in state of forum than in state wherein rendered.

4. Constitutional Law ⇨206(1), 305

A Superior Court's orders, increasing amounts awarded divorced wife for support of minor child residing with her in California, by a Nevada divorce decree, were not invalid as entered without due process and abridging privileges and immunities of divorced husband, residing in Pennsylvania, as a citizen of United States, as orders imposed no greater burden on him as non-resident than that imposed on residents of state. Civ.Code, §§ 138, 196; U.S.C.A.Const. Amend. 14.

Sugarman & Bernheim, San Francisco, for appellant.

Thomas Pierce Rogers, San Francisco, for respondent.

PEEK, Justice.

This is an appeal by the defendant from three orders of the trial court: (1) For support of the minor child of the parties pendente lite and attorney's fees; (2) for attorney's fees on appeal; and (3) for support of the child pending appeal. Since

the appeals were predicated upon the same grounds the parties have stipulated that they should be treated as one appeal.

The pertinent facts (and they are not contradicted) are that in 1949 the plaintiff secured a decree of divorce from the defendant in the State of Nevada. Under the terms of that decree she was awarded the custody of the minor child of the parties, then aged approximately five years and the defendant was ordered to contribute the sum of \$25 per month for the support of the child. Thereafter the plaintiff and the child became domiciled in Sonoma County of this state and ever since have resided in that county. On February 23, 1951 the plaintiff filed an action in the Superior Court of said county entitled "Complaint for Child Support" in which she sought additional sums for the support of said child. The defendant father was personally served with a copy of the complaint and the order to show cause why he should not be ordered to pay a reasonable sum for the support of the child, attorney's fees and court costs. The complaint alleged the previous divorce and custodial decree of the Nevada court; that the child and plaintiff were residents of this state; that the defendant was a resident of the State of Pennsylvania, and that by reason of the changed circumstances of the child and of the parties additional sums should be awarded for her support. The defendant appeared specially and moved that the action be dismissed upon the ground that he was not subject to the jurisdiction of the courts of this state in that he was not a resident thereof. A further ground which was argued at that time, that is, his immunity from service by reason of the provisions of the Soldiers and Sailors Relief Act, 50 U.S.C.A.Appendix, § 501 et seq., is not raised on appeal. After oral argument on his motion and the submission thereof, the court denied the same and ordered the defendant to pay the sum of \$75 per month to plaintiff for the support of said child. Attorney's fees were also awarded as were plaintiff's costs. Upon defendant taking this appeal a further order was made ordering defendant to pay addi-

tional sums as attorney's fees and costs. It is from these orders that defendant now appeals.

Two contentions are raised, (1) that the complaint does not allege facts sufficient to state a cause of action in that it seeks to modify a decree of another state for child support—the defendant not being a resident of the State of California, and (2) that the orders were improper and are in violation of the Fourteenth Amendment of the Constitution of the United States in that they were entered without due process and abridged the privileges and immunities of a citizen of the United States.

In support of his contention defendant states that although he has found no case directly in point in this state the case of *Yarborough v. Yarborough*, 290 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269, controls the question so raised. In that case the order settling the obligation of the father to support his daughter was in accordance with a Georgia statute providing that in case of total divorce the court could make permanent provision for the support of a minor child and thus fix the extent of the father's obligation of support. No such provision is involved in the present proceeding. The Nevada statutes in this regard (Section 9462 N.C.L. as amended in 1947) are substantially the same as Civil Code, § 138 of this state, which gives a continuing jurisdiction to modify or vacate a prior award of support. In other words, the holding in the *Yarborough* case, dependent as it is upon the peculiar Georgia statute, does not preclude either the continuing or the concurrent jurisdiction of two or more courts.

[1-3] As stated in the case of *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739, 749: "In the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction." The court further cited with approval the opinion of Mr. Justice Cardozo in the case of *Finlay v. Finlay*, 240 N.Y.

429, 148 N.E. 624, wherein it was held that "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless." In summary, our Supreme Court, in the *Sampsell* case, held that "if the decrees of California courts with respect to child custody are subject to modification or annulment in this state, they are likewise subject to modification or annulment in any state having jurisdiction over the subject matter, for such a decree 'has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered.'" *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133.

If in purely custodial proceedings there is no reason why the state of the child's residence lacks jurisdiction to protect its welfare, and if the original decree has no constitutional claim to conclusiveness, then this court can perceive of no reason for a different rule in matters of support.

[4] We find nothing in support of appellant's second contention to warrant this court in interfering with the order of the trial court. His contention in this regard is simply that the Superior Court of Sonoma County has imposed upon him a burden which neither the legislature nor the courts of this state had jurisdiction to impose.

The order of the trial court herein increasing the amount originally awarded to the mother for the care of the child has in no way abridged defendant's privileges or immunities as a citizen of the United States. Such order has imposed no greater burden upon him as a non-resident than that imposed upon residents of this state. No parent has a "fundamental right" not to be called upon to support his off-spring. (20 Cal.Jur. p. 415, § 14; Civil Code, § 196.)

The orders are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

121 Cal.App.2d 479

WILKERSON et al. v. THOMAS.

Civ. 19579.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1953.

Action to quiet title to an undivided one-half interest in certain realty. The Superior Court of Ventura County, Charles F. Blackstock, J., entered judgment from which defendant appealed. The District Court of Appeal, Fox, J., held that evidence warranted conclusion that defendant had not, as cotenant in possession, obtained title by adverse possession to an additional undivided one-fourth interest in the realty.

Judgment affirmed.

1. Deeds ⇨93

The governing purpose in construing a deed is to ascertain, from a consideration of the entire document, the intention of the parties as expressed in the deed itself.

2. Deeds ⇨136

Construction of deed, which recited that it granted a whole and undivided one-half interest in real property described as a whole and undivided one-half interest in certain property, to mean that the conveyance was of an undivided one-half interest, was a reasonable construction, especially in view of parol evidence disclosing intent of grantor and grantee at time of delivery that an undivided one-half interest in the property should vest in the grantee.

3. Deeds ⇨109

In quiet title action, wherein controversy existed over whether certain deed conveyed an undivided one-half interest or an undivided one-fourth interest in realty, evidence warranted conclusion that intent at time of delivery was that deed was to convey an undivided one-half interest.

4. Reformation of Instruments ⇨32

Three year statute of limitations applicable to actions to correct a deed on the ground of mistake was not applicable to action involving merely the construction of the terms of an ambiguous deed in order to determine the intent of the parties. Code Civ.Proc. § 338, subd. 4.

5. Action ⇨38(2)**Reformation of Instruments** ⇨32

A complaint to quiet title, in which there is joined, as incidental thereto, an action such as fraud, mistake or reformation, or cancellation of an instrument, constitutes but a single cause of action, and thus an action whose basic purpose was to quiet title, was not controlled by three year period of limitations applicable to actions for correction of deed on ground of mistake. Code Civ.Proc. § 338, subd. 4.

6. Limitation of Actions ⇨44(2)**Tenancy In Common** ⇨13

Under statute providing that no action for recovery of real property can be maintained unless the plaintiff or his predecessor was seized or possessed of the property within five years before commencement of the action, when plaintiff's claim was based on deed to undivided one-half interest in the property, the exclusive occupancy by cotenant was deemed permissive and a possession for the benefit of the plaintiff, in absence of a notice of hostile claim, and plaintiff's seisin and possession could be destroyed, for purpose of presenting the bar of the five year limitation period, only by showing that a title by adverse possession was acquired by cotenant. Code Civ.Proc. §§ 318, 338, subd. 4.

7. Tenancy In Common ⇨15(10)

In action to quiet title to an undivided one-half interest in certain realty, wherein defendant claimed an undivided three-fourths interest by virtue of acquisition of an additional one-fourth interest by adverse possession, evidence warranted finding that defendant had not obtained title by adverse possession to the undivided one-fourth interest constituting a part of the undivided one-half interest of plaintiff as defendant's cotenant. Code Civ.Proc. §§ 318, 338, subd. 4.

8. Adverse Possession ⇨112

A person asserting title by adverse possession must show a possession by actual occupation under such circumstances as to constitute reasonable notice to the owner, that the possession was hostile to the owner's title, that he claimed the property as his own under color of title or claim of

right, that possession was continuous and uninterrupted for five years, and that he paid all taxes levied and assessed upon the property during that period. Code Civ. Proc. §§ 318, 338, subd. 4.

9. Tenancy in Common ⇨15(7)

The exclusive occupancy by cotenant is deemed permissive, and it does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the cotenant is hostile to him.

10. Tenancy in Common ⇨15(10)

Possession by a renter from a cotenant, in the absence of a showing to the contrary, is presumed to be held under all the cotenants.

11. Tenancy in Common ⇨15(7, 10)

Before title may be acquired by adverse possession as between cotenants, the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, that he intends to oust the latter of his interest in the common property, and such evidence must be stronger than that which would be required to establish a title by adverse possession in a stranger.

12. Tenancy in Common ⇨15(11)

Where plaintiff and defendant each owned an undivided one-half interest in realty, defendant's subsequent recordation of quitclaim deed to her, pursuant to decree of probate court entered upon reopening of probate proceedings of defendant's ancestor, of an additional one-fourth interest in the realty, was not, as a matter of law, and independent of any other facts, notice to plaintiff of the adverse character of defendant's possession.

13. Tenancy in Common ⇨15(10)

The burden of proving every essential fact of claim of adverse possession against a cotenant rests upon the tenant in possession.

14. Tenancy in Common ⇨15(10)

In action to quiet title to undivided one-half interest in certain property in which defendant owned the other undivided one-half interest, wherein defendant claim-

ed an additional one-fourth undivided interest by reason of alleged adverse possession, evidence warranted finding that defendant had not, by acts of ownership of the most open, notorious and unequivocal character, imparted notice to plaintiff of defendant's hostile claim to an additional undivided one-fourth interest.

15. Tenancy in Common ⇨15(10), 38(5)

A cotenant out of possession was entitled to rely on the presumption of continuing amicable possession of cotenant in possession, and when cotenant out of possession acted promptly upon ascertainment of the invasion of her rights by cotenant in possession, laches could not be attributed to cotenant out of possession with respect to her action to quiet title to the undivided one-half interest owned by her.

16. Equity ⇨72(1)

Time is not the only element of the doctrine of laches, but there must also be such a delay in asserting one's rights as rounds to the disadvantage of the other party.

17. Appeal and Error ⇨949

The question of laches is addressed primarily to the sound discretion of the trier of facts, and in the absence of a palpable abuse of such discretion, the finding of the trial court, as the trier of facts, will not be disturbed.

Kendall & Howell, Bakersfield, for appellant.

Edward C. Maxwell and Robert B. Maxwell, Oxnard, for respondent.

FOX, Justice.

Defendant appeals from a judgment quieting title in plaintiff to an undivided one-half interest in certain property located in Ventura County.

The property here in controversy was originally patented by the United States Government in 1918 to Charles B. Winninger, who was the brother of Mrs. Blanche Wilkerson, hereafter referred to as the plaintiff. The evidence discloses that at about the time Mr. Winninger received his patent, he came to an agreement

with H. C. Wilkerson, plaintiff's since-deceased husband, by the terms of which both were to hold an undivided half interest in the land which Winninger was to work and from the proceeds of which he was to pay all the taxes. Winninger's action was motivated by the assistance Wilkerson had rendered Winninger in procuring the patent. To effectuate this arrangement, Winninger executed and delivered to Wilkerson a grant deed purporting to convey the property which is the subject of this action. The deed recites in part that Winninger

"* * * does hereby grant to H. C. Wilkerson * * * a whole and undivided one-half interest in that real property * * * described as follows:

"A whole and undivided one half interest in the northeast quarter of Section twenty-two in Township eight north of Range nineteen west of San Bernardino Meridian, California * * *."

Plaintiff and her daughter, Mrs. Norton, then 15 years old, both testified that they were present when Winninger delivered this deed to Wilkerson, at which time he asserted that he was giving Wilkerson an undivided one-half interest in the property.

Subsequent to the making of this grant to Wilkerson, Winninger was married to Harriet B. Winninger. Thereafter, Winninger conveyed a one-half interest in the real property here involved to a third party, who immediately reconveyed it to Charles B. Winninger and Harriet B. Winninger, his wife, as joint tenants. Harriet B. Winninger was the mother of Florence Thomas, hereafter called defendant, by an earlier marriage. In December, 1924, Harriet wrote to Wilkerson to inform him that her husband was placing a mortgage on his half of the property because he required treatment due to ill health.

Winninger died in May, 1925, and full title to the one-half interest in the joint tenancy property thereby passed to Harriet. In August, 1925, Harriet quitclaimed all her interest in the said property to defendant, who recorded this quitclaim deed. Beginning in 1926, defendant paid all taxes

on the entire acreage, which she rented out and from which she alone received the rentals. During the years 1926-1934, the property was assessed on the rolls, and set forth in the tax bills received and paid by defendant, as a one-half interest in defendant and a one-half interest in H. C. Wilkerson. However, in 1933, the estate of Charles B. Winninger was reopened and an additional one-fourth interest in the said property was conveyed by probate decree to Harriet, who, in December, 1933, purported to convey this additional one-fourth interest to defendant. Defendant recorded this latter deed in 1933, whereupon the property was reassessed in 1934 on the basis of three-fourths to the defendant and one-quarter to H. C. Wilkerson. From 1935 to the time of the trial, defendant continued to pay all the taxes and to receive all the income from the entire property. Defendant made no improvements on the property beyond the maintenance of the fences. There is no evidence that plaintiff had knowledge of the recording of the second deed.

In 1943 H. C. Wilkerson died, following which his estate was set aside to plaintiff in a proceeding in which no reference was made as to any interest in the property involved in the instant case. Plaintiff testified that "at least ten years ago" she had received a letter from defendant containing an offer to buy her fourth of the property. Plaintiff replied that she had no fourth, but a half interest, and did not wish to sell. She received no reply to this letter. Plaintiff testified that she had never had any conversation with defendant in which the latter informed her that she was claiming a three-fourths interest in the property. Defendant testified that she never wrote to plaintiff to advise her of any claim she was making to a three-fourths interest.

Sometime in 1947 or 1948 plaintiff's daughter, Mrs. Norton, visited defendant in plaintiff's behalf to discuss a division of the land and to adjust the respective interests of the parties. During the conversation, defendant asserted that she was claiming a three-fourths interest in the property. Following abortive correspond-

ence between attorneys for the respective parties, plaintiff applied for a reopening of the estate of H. C. Wilkerson, and after being appointed as administratrix therein, thereupon brought this action.

Plaintiff's complaint is stated in two causes of action, the second of which is in the conventional form of a quiet title action. The first cause of action alleges Winninger's execution of the deed to Wilkerson for the purpose of conveying an undivided one-half interest to Wilkerson, and, in effect, pleads for a judicial declaration that plaintiff is entitled to such interest through a construction of the ambiguous language of the instrument. Defendant answered the quiet title action by way of general denial, and raised the special defenses of laches and the statute of limitations. She also pleaded, by way of cross-complaint, adverse possession and payment of taxes for more than five years on three-fourths of the property.

Upon the facts already recited, the court found that, by mistake of the person who drew the deed, the grant deed from Winninger to Wilkerson contained the following ambiguous description: "A whole and undivided one-half interest in that real property * * * described as follows: A whole and undivided one-half interest in the northeast quarter of Section 22 * *; that it was the intention of Winninger to grant an undivided one-half interest in the property described, and that he did in fact by such deed convey an undivided one-half interest in this property, of which plaintiff is now the owner. The court further found that plaintiff's action was neither barred by any statute of limitations nor by laches; that plaintiff and defendant were cotenants; that defendant's possession of the land was permissive and not hostile; and that defendant's possession and payment of taxes did not constitute adverse possession of a three-fourths interest by defendant. The judgment entered decreed that plaintiff and defendant each owned an undivided one-half interest in fee of the entire acreage patented to Charles B. Winninger.

[1] Defendant's initial contention is that plaintiff's first cause of action, being one to correct the deed on the ground of

mistake, is barred by Code of Civil Procedure section 338, subdivision 4, which provides that an action for relief on the ground of mistake must be brought within three years. This argument is not here tenable. It may be remarked, at the outset, that the court was confronted with a grant deed couched in language which, by its rather bizarre and equivocal terms, required interpretation as to whether it was designed to convey an undivided one-half or an undivided one-fourth interest to H. C. Wilkerson. This ambiguity was engendered by the repetition of the cumbersome phrase "a whole and undivided one-half interest" both in the descriptive portion and in the granting clause of the deed. The governing purpose in construing a deed is to ascertain, from a consideration of the entire document, the intention of the parties as expressed in the deed itself. *Slavich v. Hamilton*, 201 Cal. 299, 304, 257 P. 60; *Shultz v. Beers*, 111 Cal.App.2d 820, 822, 245 P.2d 334.

[2-4] The determination of the court that the deed in question was a conveyance of an undivided one-half interest is a reasonable construction of the language of the instrument. See *Central Pac. R. Co. of Calif. v. Beal*, 47 Cal. 151. This is buttressed by the fact that parol evidence was received to explain the ambiguous terms and to enable the court to arrive at the true intent of the parties. *Slavich v. Hamilton*, *supra*; *Boyer v. Murphy*, 202 Cal. 23, 259 P. 38; *Sprague v. Edwards*, 48 Cal. 239; *Brannan v. Mesick*, 10 Cal. 95. The evidence before the court clearly establishes that at the time of the delivery of the deed it was intended that an undivided one-half interest should vest in Wilkerson. Events such as the fact that Winninger placed only one-half of the property in joint tenancy with his wife, and other conduct and declarations convincingly demonstrate Winninger's recognition of Wilkerson's common ownership with him of one-half the land. See *Hay v. Allen*, 112 Cal.App.2d 676, 682, 247 P.2d 94; *Jones v. Wilterding*, 100 Cal. App.2d 210, 212, 223 P.2d 91. Since in this case it was not necessary to reform the deed or to correct a mistake but merely to construe the terms of the deed in order to de-

termine the intent of the parties, it is obvious that the three-year statute of limitations here pleaded, Code Civ.Proc. sec. 338, subd. 4, has no application.

[5] The same result also follows when the case is approached from its other aspect. An examination of plaintiff's complaint discloses that it is, in essence, an action to quiet title, to which has been joined an ancillary cause of action requiring the court to declare the meaning of a deed ambiguous on its face. It has been consistently held that a complaint to quiet title, in which, incidental thereto, there is joined an action such as fraud, mistake or reformation, or cancellation of an instrument, constitutes but a single cause of action. *Thompson v. Moore*, 8 Cal.2d 367, 370, 65 P.2d 800, 109 A.L.R. 1027; *Stephan v. Obersmith*, 48 Cal.App.2d 199, 202, 119 P.2d 388; *Hanlon v. Western Loan & Bldg. Co.*, 46 Cal.App.2d 580, 604, 116 P.2d 465. The rationale underlying this proposition derives from the fact that a plaintiff's cause of action is simply the obligation sought to be enforced against the defendant. *Frost v. Witter*, 132 Cal. 421, 426, 64 P. 705; *Klopstock v. Superior Court*, 17 Cal.2d 13, 20, 108 P.2d 906, 135 A.L.R. 318. Necessarily, the conduct or circumstance which gives rise to the cause of action is not to be confused with the cause of action itself. *Turner v. Milstein*, 103 Cal.App.2d 651, 657, 230 P.2d 25. It is therefore manifest that plaintiff's instant action, whose basic purpose is to quiet title in land, is not controlled by the limitations embodied in Code of Civil Procedure section 338, subd. 4. *Murphy v. Crowley*, 140 Cal. 141, 144-145, 73 P. 820; *Newport v. Hatton*, 195 Cal. 132, 144, 231 P. 987.

[6] There is likewise no merit in defendant's argument that plaintiff's case is defeated by the limitations of section 318 of the Code of Civil Procedure, which provides that "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action." Since plaintiff's claim is based on

a deed which conveyed to her an undivided one-half interest in the property, she held title to such an estate, and was in possession thereof as well, under the established rule that exclusive occupancy by a cotenant is deemed permissive, the possession of one cotenant being regarded as possession for the other in the absence of notice of a hostile claim. *West v. Evans*, 29 Cal.2d 414, 418, 175 P.2d 219; *Nelson v. Sweitzer*, 22 Cal.App.2d 382, 386, 71 P.2d 85; *Wood v. Henley*, 88 Cal.App. 441, 263 P. 870. Therefore, plaintiff's seisin and possession could be destroyed for purposes of involving the bar of section 318 as between cotenants only by showing that a title by adverse possession was acquired by defendant. *McKelvey v. Rodriguez*, 57 Cal.App.2d 214, 223, 134 P.2d 870; *Westphal v. Arnoux*, 51 Cal.App. 532, 534, 197 P. 395; *Crane v. French*, 39 Cal.App.2d 642, 648, 104 P.2d 53; 16 Cal.Jur. 434, 435.

[7] Defendant urges that she had clearly established her right to the undivided one-fourth interest here in dispute by adverse possession. She attacks the court's finding that plaintiff and defendant were cotenants, that the exclusive possession and payment of taxes by defendant was permissive and constituted possession by plaintiff, and that an undivided three-fourths interest in the property has not been held and possessed by defendant adversely to the legal title of the plaintiff. In support of her claim that she has met the requirements for the establishment of adverse possession as outlined in section 323 of the Code of Civil Procedure, defendant alludes to the fact that her claim is founded upon two recorded deeds, that the land in question is dry farming and grazing land which she has rented out, the revenue from which she has used to pay all the taxes for more than 20 years, and that she has maintained the fences on the property. She also asserts that the recordation of her deeds claiming a three-quarter interest in the property, and the change in the tax rolls to reflect this was notice of her adverse claims to plaintiff. Finally, she maintains that plaintiff's own testimony relating to a letter received from defendant containing an offer to buy plaintiff's one-fourth interest was evidence of

plaintiff's knowledge of defendant's claim to a three-fourths interest. However, this concatenation of events, culled from the matrix of testimony before the court, is utterly insufficient to overcome the finding against the establishment of a title by adverse possession in favor of one tenant in common against another.

[8] A person claiming title to property by adverse possession must establish five indispensable elements with respect to his occupancy of the property. These have been epitomized in the case of *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219, as follows: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) Possession must be hostile to the owner's title. (3) The holder must claim the property as his own, under color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The possessor must pay all taxes levied and assessed upon the property during the period. The decisive question here involved is whether defendant has been in adverse possession under such facts and circumstances as would reasonably impute to plaintiff notice of the hostile claim.

[9] "The exclusive occupancy by a cotenant is deemed permissive; it does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the cotenant is hostile to him [citations]." *West v. Evans*, supra, 29 Cal.2d at page 418, 175 P.2d at page 221. The factual situation in the *West* case bears a significant parallel to the case at bar. In the *West* case, a widow held a three-quarter interest in her home, while the children of her marriage were cotenants with a one-quarter interest. In 1927, the widow executed a deed to plaintiff, an adopted son with whom she was living, purporting to convey to him the entire fee. The deed was recorded and plaintiff had paid all taxes since 1927. The other cotenants had left the home prior to 1927. Plaintiff remained on the property until his marriage in 1937, while the widow continued her occupancy until her death in 1944. Plaintiff brought a suit to quiet his title to the property, contending his recordation of the deed naming him as grantee

constituted constructive notice to the other cotenants that he was claiming adversely to them. It was held that adverse possession against the other tenants was not established because plaintiff never took actual, exclusive possession. The widow had continued to reside on the premises and there was no indication of any change in possession to the public generally or the other cotenants. It was further stated that plaintiff could not rely on his recordation of the deed as giving notice to the cotenants of his claim of ownership, for such recordation "is not, as a matter of law and independent of any other fact, notice to his cotenant of the adverse character of the grantee's possession." The court distinguished *Johns v. Scobie*, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404 (also relied on by defendant herein), in which claimant recorded a deed to the entire fee and gained title by adverse possession, by pointing out that there was exclusive possession by the claimant who, at the time he recorded the deed, knew nothing of the existence of the other cotenants.

[10, 11] In the instant case, it is undisputed that from the commencement of the cotenancy, it was agreed that Winner was to work the property and pay the taxes from any revenue received. When defendant succeeded to Winner's interest she did not enter upon occupancy of the property but rented it. Possession by a renter, in the absence of a showing to the contrary, is presumed to be held under all the cotenants. *Klumpke v. Henley*, 24 Cal.App. 35, 39, 40, 140 P. 289, 313. A cotenant out of possession is entitled to assume that the permissive possession of his cotenant continues to be amicable until he is charged with some form of notice that such possession has become hostile. *Faubel v. McFarland*, 144 Cal. 717, 78 P. 261; *Miller v. Myers*, 46 Cal. 535. Before title may be acquired by adverse possession as between cotenants, the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, that he intends to oust the latter of his interest in the common property. *Akley v. Bassett*, 189 Cal. 625, 641, 209 P. 576; *Winterburn v. Chambers*, 91 Cal. 170, 180,

27 P. 658; *Unger v. Mooney*, 63 Cal. 586, 592; *White v. McManus*, 69 Cal.App. 50, 59, 230 P. 472. Such evidence must be stronger than that which would be required to establish a title by adverse possession in a stranger. *Winterburn v. Chambers*, supra; *Tabler v. Peverill*, 4 Cal.App. 671, 677, 88 P. 994; 1 Am.Jur. Adverse Possession, p. 821.

[12-14] The conduct and declarations of the defendant in the record before us fall far short of satisfying the rules last stated. Defendant does not claim that the decree of the probate court, awarding an additional one-fourth interest in the property to Mrs. Winninger, is binding on plaintiff herein. *Howe v. Brock*, 86 Cal.App.2d 271, 194 P.2d 762; *Wilson v. Superior Court*, 101 Cal.App.2d 592, 225 P.2d 1002. Defendant's recordation of the quitclaim deed to her of this one-fourth interest was not, as a matter of law, and independent of any other fact, notice to plaintiff of the adverse character of defendant's possession. *West v. Evans*, 29 Cal.2d 414, 175 P.2d 219. Similarly, the fact of the change in the tax assessments did not serve as constructive notice, particularly when by long-standing arrangement defendant alone received the tax bills and paid all the taxes from the income of the property. The findings of the court are supported by the fact that defendant took no more actual possession of the farm after the recording of the deed than she had previous thereto; that she continued to lease the farm and pay the taxes as before, and by the absence of any evidence that she publicly and notoriously departed from the manner in which she held or used the tract of land, in such a way as would put plaintiff on notice of an adverse claim. Defendant's isolated offer on one occasion to buy what was described as plaintiff's "one-fourth of the property" is not such an unequivocal act of repudiation or ouster as would require the finding of a communication to plaintiff of a clearly indicated intent on defendant's part to claim a three-quarter interest in the estate as her own. The burden of proving every essential fact of the claim to adverse possession against a cotenant rests upon the tenant in possession. *Sheehan v. All Persons etc.*, 80 Cal.App. 393, 401, 252 P. 337;

Christy v. Spring Valley Water Works, 97 Cal. 21, 26, 31 P. 1110; *Thomas v. Ash*, Tex.Civ.App., 199 S.W. 670, 673. See *Cory v. Hotchkiss*, 31 Cal.App. 443, 444, 160 P. 841. The evidence introduced by defendant is deficient in that it fails to establish the existence of circumstances of such significance as would impart notice to plaintiff of her hostile claim.

[15-17] Defendant's final contention is that plaintiff is barred by laches from maintaining the present action. It has already been pointed out that prior to about 1948, when defendant flatly informed Mrs. Norton of the extent of her claimed interest, there had been no acts or conduct of such an unequivocal exclusionary character as would impart notice to plaintiff that defendant was claiming an undivided three-fourths interest in the land in controversy. Until notice of the hostile nature of defendant's possession could be attributed to her, plaintiff was entitled to rely on the presumption of defendant's continuing amicable possession as a cotenant seised of an undivided one-half interest. The law does not fasten upon a cotenant out of possession the burden of surveillance of public records to insure that his cotenant is not acquiring adverse rights. *Hulvey v. Hulvey*, 92 Va. 182, 23 S.E. 233; see *West v. Evans*, 29 Cal.2d 418, 175 P.2d 219. Since plaintiff acted promptly upon ascertainment of the invasion of her rights, laches may not be attributed to her. Furthermore, time is only one element of laches. The doctrine of laches has been defined not merely as a delay in asserting one's rights, but such a delay as redounds to the disadvantage of another. *Gibson v. Mitchell*, 9 Cal.2d 718, 725-726, 72 P.2d 740; *Sibert v. Shaver*, 111 Cal.App.2d 833, 840, 245 P. 2d 514; *Long v. Long*, 76 Cal.App.2d 716, 722, 173 P.2d 840. Here there has been no significant change in the status of the parties, no material prejudice has been suffered or damage sustained by defendant, nor have the rights of third parties supervened so as to make it inequitable for plaintiff to assert her rights. Defendant's argument that by the lapse of time she was deprived of the possibility of producing witnesses present at the time of the delivery of the deed or concerned with its draft-

ing is a specious one. Any prejudice she might conceivably have sustained stems primarily from her own failure to take forthright remedial action. Despite the ambiguity on the face of the deed, defendant herself never presumed to claim an interest greater than an undivided one-half prior to 1933, nor did she at any time in all the ensuing years take direct legal action to clarify its meaning, nor did she during the trial identify witnesses she possibly might have called in her behalf. The onus of seeking a judicial determination of rights under the deed was not upon plaintiff herein in the absence of any notice that the long-accepted construction given to the deed by the cotenants and their predecessors in interest was being challenged. In short, the question of laches was addressed primarily to the sound discretion of the trier of the facts, and in the absence of a palpable abuse of discretion, the finding of the trial court will not be disturbed. *Williams v. Marshall*, 37 Cal.2d 445, 455, 235 P.2d 372; *Bodkin v. Silveira*, 49 Cal.App. 2d 1, 12, 120 P.2d 910. The record discloses substantial evidence to support the court's rejection of laches.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



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PEOPLE v. TURNER et al.

Cr. A. 3026.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 24, 1953.

Defendants were convicted of neglecting and refusing to send their three children to public school. The Municipal Court, Los Angeles Judicial District, Roger Alton Pfaff, J., rendered judgment, and defendants appealed. The Appellate Department of the Superior Court, Patrosso, J., held that statute requiring parents to place their children in public schools or, in the alternative, a private school meeting

certain prescribed conditions, or that children be instructed, by private tutor or other person possessing qualifications, in manner prescribed by statute, did not unconstitutionally deprive parents of right to determine how and where their children should be educated.

Affirmed.

1. Indictment and Information ⇨111(I)

It is not necessary to negative, in criminal charge, an exception or proviso which is not a part of definition or description of offense.

2. Indictment and Information ⇨111(I)

Failure of complaint, for neglecting and refusing to send children to a public school, to allege that children were not within any of classes exempted from requirement of attendance at public school by provisions of statute did not prevent complaint from charging public offense. Education Code, §§ 16601, 16621, 16624, 16625.

3. Schools and School Districts ⇨160

Statute which, without qualification or exception, required parents to place their children in public schools, would be unconstitutional.

4. Schools and School Districts ⇨8, 160

Statute requiring parents to place their children in public schools or, in the alternative, a private school meeting certain prescribed conditions, or that children be instructed, by private tutor or other person possessing qualifications, in manner prescribed by statute, did not unconstitutionally deprive parents of right to determine how and where their children should be educated. Education Code, § 16625.

5. Schools and School Districts ⇨160

Compulsory Education Law permitting home instruction only by persons possessing valid state credentials was not unconstitutionally discriminatory notwithstanding fact that it did not require teachers in exempted private schools to hold such credentials. Education Code, § 16625.

6. Schools and School Districts ⇨160

Quoted term, in Compulsory Education Law exempting students in "private schools," did not comprehend a parent or

private tutor instructing at home. Education Code, §§ 16624, 16625.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Private Schools".

7. Schools and School Districts 160

Proof of proper instruction and study would be no defense to prosecution for neglecting and refusing to send children to public school. Education Code, § 16601.

James C. Ingebretsen, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., Dan J. Whiteside, Deputy City Atty., Los Angeles, for respondent.

PATROSSO, Judge.

Defendants were convicted of violating section 16601 of the Education Code in that they neglected and refused to send their three children to a public school, and each was sentenced to pay a fine of \$10 on each of three counts. The section in question reads as follows: "Each parent, guardian, or other person having control or charge of any child between the ages of eight and 16 years, not exempted under the provisions of this chapter, shall send the child to the public full-time day school for the full time for which the public schools of the city, city and county, or school district in which the child resides are in session."

Section 16621 of the same code provides: "The classes of children described in this article shall be exempted by the proper school authorities from the requirements of attendance upon a public full-time day school." And this in turn is followed by six sections specifying the persons exempted from the provisions of Section 16601, with only two of which we are concerned, i. e., 16624 and 16625, which reads as follows: "16624. Children who are being instructed in a private full-time day school by persons capable of teaching shall be exempted. Such school shall be taught in the English language and shall offer instruction in the several branches of study

required to be taught in the public schools of the State.

The attendance of the pupils shall be kept by private school authorities in a register, and the record of attendance shall indicate clearly every absence of the pupil from school for a half day or more during each day that school is maintained during the year." "16625. Children not attending a private full-time day school, and who are being instructed in study and recitation for at least three hours a day for 170 days each calendar year by a private tutor or other person, in the several branches of study required to be taught in the public schools of this State and in the English language shall be exempted. The tutor or other person shall hold a valid State credential for the grade taught. The instruction shall be offered between the hours of 8 o'clock a. m. and 4 o'clock p. m."

[1,2] Defendants first contend that the complaint here does not charge a public offense for the reason that it does not allege that the children were not within any of the classes exempted from the requirement of attendance at public school by the provisions of sections 16622 to 16627. We do not agree. As said by this court in *People v. Fowler*, 32 Cal.App.2d Supp. 737, 742, 84 P.2d 326, 329, the general rule is that "it is not necessary in a criminal charge to negative an exception or proviso which is not a part of the definition or description of the offense. [Citing cases.] Of every complaint which does not negative such a proviso or exception, it is possible to say [as do the defendants here] that all the facts alleged in it may be true and still the defendant may be entirely innocent of crime. But such complaints are, nevertheless, held sufficient by the authorities just referred to and many others which could be cited." Here the exemptions from, or exceptions to, section 16601, found in the subsequent sections to which reference has been made, do not constitute part of the definition or description of the offense, which is the failure of parents to send their children to a public school.

[3,4] Defendants' main contention, however, is that the statute in question is unconstitutional in that it deprives parents

of the right to determine how and where their children may be educated. There can be no doubt that if the statute, without qualification or exception required parents to place their children in public schools, it would be unconstitutional. *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468. The statute here, however, unlike that involved in the case cited, does not so provide. It recognizes the right of parents not to place their children in public schools if they elect to have them educated in a private school or through the medium of a private tutor or other person possessing certain specified qualifications. We see no basis therefore upon which to predicate a holding of unconstitutionality unless such a holding is compelled because the statute denies the right of parents to educate their children unless such parents possess the qualifications prescribed therein. Contrary to the contention of the defendant, we see nothing in the *Pierce* case so declaring or intimating. On the contrary, Mr. Justice McReynolds, the author of the opinion in that case, was at pains to observe, 268 U.S. 534, 45 S.Ct. 573, 69 L.Ed. 1077, 39 A.L.R. 475: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; *to require that all children of proper age attend some school*, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." [Emphasis added.]

The question here, therefore, may be narrowed down as to whether or not it is within the competency of the State to require parents to place their children in public schools or, in the alternative, a private school meeting certain prescribed conditions, or that the children be instructed by a private tutor or other person possessing qualifications and in the manner prescribed by section 16625. We believe that the answer must be in the affirmative. Without unduly extending this opinion by a detailed reference to the many cases dealing with statutes of this character, most of which

are collated in the annotations in 14 A.L.R. 2d 1364, 39 A.L.R. 477, 41 L.R.A., N.S., 95, we think the reasons for this conclusion are well stated in *State v. Hoyt*, 1929, 84 N.H. 38, 146 A. 170, where the court upheld the constitutionality of a statute which required that children be educated either in a public school or an approved private school. In rejecting the claim that the statute was invalid in so far as it prohibited instruction in the home by the parents or a private tutor, the court, after quoting the language of Mr. Justice McReynolds, in *Pierce v. Society*, set forth above, says, 146 A. 171: "The defendants' claim that the federal guaranty of liberty enables them to set at defiance any attempt of the state to prescribe the means for ascertaining the sufficiency of educational facilities furnished and to be furnished as a substitute for the public school, goes far beyond anything that has been decided to be the law. The declaration in *Pierce v. Society*, 268 U.S. 510, 534, 45 S.Ct. 571, 573 (69 L.Ed. 1070, 39 A.L.R. 468), that 'no question is raised' as to certain matters, is understood to mean, or at least to suggest, that power relating thereto remains in the state. In any event, it must mean that lack of such power is neither declared, nor indicated.

"The matters so enumerated include all that are involved in this litigation. The power 'reasonably to regulate,' to require attendance, good character of teachers, studies to be taught, and those to be prohibited, all look to laying down rules for future conduct. As the statute does not exceed the exercise of these powers, it is held to be constitutional.

"In the adjustment of the parent's right to choose the manner of his children's education, and the impinging right of the state to insist that certain education be furnished and supervised, the rule of reasonable conduct upon the part of each towards the other is to be applied. The state must bear the burden of reasonable supervision, and the parent must offer educational facilities which do not require unreasonable supervision.

"If the parent undertakes to make use of units of education so small, or facilities of such doubtful quality, that supervision

thereof would impose an unreasonable burden upon the state, he offends against the reasonable provisions for schools which can be supervised without unreasonable expense. The state may require, not only that educational facilities be supplied, but also that they be so supplied that the facts in relation thereto can be ascertained, and proper direction thereof maintained, without unreasonable cost to the state. Anything less than this would take from the state all-efficient authority to regulate the education of the prospective voting population."

It is not without significance that, although it has been said that "only eleven of the forty-eight states permit by statute that instruction may be given at home by their parent or tutor," and "such home instruction moreover is specifically conditioned except in two states" (Parental Right in Educational Law, Loughery, Catholic University of America Press, 1952), we have been unable to find a single case in which it has been held that so-called compulsory attendance statutes are rendered unconstitutional and void merely by reason of a failure to recognize home instruction as an alternative to attendance in the public schools.

[5] Nor do we see any merit in the claim of defendants that the statute under consideration is unreasonable or arbitrary in that, while exempting private schools, it does not require teachers therein to "hold a valid state credential for the grade taught," but a private tutor or other person in order to be exempted under section 16625 must possess such a certificate. If, as we have seen, the state might have refused to grant an exemption in the case of children being instructed at home by their parents or a private tutor without rendering the statute vulnerable to the charge of unconstitutionality, we see no reason why objection can be raised to a statute which, while granting an exemption in such cases, conditions the same by requiring such parents or tutors to possess certain qualifications even if these be stricter than those required of teachers in private schools. In the light of this, defendants may not be heard to assert that they have been discriminated against because the legislature conditioned the exemption granted to private instruc-

tion outside of a public or private school by requiring persons so undertaking to teach outside of such schools to possess qualifications different from those prescribed for teachers in private schools. Were it otherwise, however, it may not be said that there is not a reasonable basis for the distinction in question. The most obvious reason for such difference in treatment is that pointed out in *Hoyt v. State*, supra, namely, the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct individual children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools. Also the legislature might reasonably have concluded that teachers in private schools would be under direct supervision of their school authorities at all times, and that the interests of the persons conducting the same would compel the maintenance of the required standard of instruction by competent instructors for otherwise the school would fail to qualify for the exemption granted thereby, and without pupils it could not continue to exist.

[6] We likewise fail to find any merit in defendants' claim that they come within the classification of a "private school" within the meaning of section 16624 and hence are exempted from the operation of the statute. The contrary was held in *State v. Counort*, 1912, 69 Wash. 361, 124 P. 910, 911, 41 L.R.A., N.S., 95; *State v. Will*, 1916, 99 Kan. 167, 160 P. 1025; *State v. Hoyt*, supra. Moreover, a mere reading of sections 16624 and 16625 clearly indicates that the legislature intended to distinguish between private schools, upon the one hand, and home instruction by a private tutor or other person, on the other. If a "private school" as that term is used in section 16624 necessarily comprehends a parent or private tutor instructing at home, there was no necessity to make specific provision exempting the latter. We are not unmindful of the fact that a different conclusion was reached in *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213, 14 A.L.R.2d 1364. The statute there, however, unlike our own, while exempting private and parochial schools, did not grant such exemption to instruction

at home or by private tutor. Thus it did not upon its face indicate a legislative intent to distinguish between the two. Aside from this, the opinion is far from persuasive. In a thoughtful article discussing this case, in 18 *University of Chicago Law Review*, page 105, it is said: "The majority's construction of the statute is unsupported not only by ordinary connotations of the term 'private school' but also by the legislative history of the compulsory attendance law. The original act did provide for home instruction, but subsequent amendments clearly indicate an intent to repeal this exception to the public school attendance provision."

For like reasons, we find ourselves unable to agree with the similar holding in *State v. Peterman*, 1904, 32 Ind.App. 665, 70 N.E. 550, upon which the holding in the *Levisen* case is predicated.

[7] Thus we are brought to the final contention of the defendants that inasmuch as they claim that the instruction given to their children is as good or better than that obtainable in a public or private school or through the medium of a person possessing the qualifications set forth in section 16625, the purpose of the statute, which is said to be simply to require an adequate education and not one conducted in a particular manner or place, has been fully satisfied. The complete answer to this is also to be found in the *Hoyt* case, from which we again take the liberty of quoting, 146 A. at page 172: "The claim [is] that furnishing equivalent book-learning is an answer to a charge of failing to cause a child to attend school. The statute makes no such exception to the duty imposed. The only substitute for the public school is an approved private school. P.L. c. 118, § 1.

"If the defendants' allegations that 'said child was taught by a private tutor in his

own home' could be construed to set forth attendance at a private school (see *State v. Counort*, 69 Wash. 361, 124 P. 910, 41 L.R. A., N.S., 95), there is no allegation that the enterprise has been designated as a private school 'to be treated as approved within the meaning of this title.' P.L. c. 116, § 11, par. XXVIII. Not having been approved as required by the statute, it is not 'an approved private school.' P.L. c. 118, § 1.

"Decisions from other jurisdictions, which are based upon statutes making the attainment of certain proficiency by the child, or furnishing a certain amount of instruction, an excuse for nonattendance at the public school (*Commonwealth v. Roberts*, 159 Mass. 372, 34 N.E. 402; *Bevan v. Shears* (1911) 2 K.B. 936), are not applicable here, because our statute makes no such exception. * * *

"Varying the statement a little, the argument is advanced that the only object of the statute is to compel a certain amount of proper instruction and study, and that proof thereof is an answer to the charge in any event. This claim fails to take into account the true nature of the charge. While the ultimate object of the statute is the education of the child, means to assure the attainment of that end may be adopted by the state, and may be enforced by the imposition of penalties for violating the regulations made. As stated earlier in this opinion, the state is entitled to establish a system whereby it can be known, by reasonable means, that the required teaching is being done."

The judgment and order denying motion for a new trial are affirmed. The appeals from the other orders are dismissed.

SHAW, P. J., and BISHOP, J., concur.

TERRY v. CITY OF BERKELEY et al.

S. F. 18585.

Supreme Court of California.

In Bank.

Nov. 25, 1953.

Rehearing Denied Dec. 23, 1953.

Retired mounted patrolman brought action against city to recover additional pension. The Superior Court, Alameda County, Thomas J. Ledwich, J., entered judgment for patrolman, and city appealed. The Supreme Court, Shenk, J., held that where city ordinance fixed amount of pension to be paid pensioner as a "pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement", and patrolman, who retired because of physical disability incurred in line of duty, held rank of mounted patrolman and received salary of \$185 a month for three years immediately prior to his retirement, and thereafter salary was increased to \$334.80 a month, pension was to be based on salary of \$334.80 a month rather than on salary of \$185 a month, since the three year period referred to in ordinance defined only rank held and not salary earned.

Judgment affirmed.

Prior opinion 254 P.2d 933.

1. Municipal Corporations ⇨120

Ambiguity and uncertainty in a city ordinance requires, under accepted rules, a construction which will, if reasonably possible, accomplish the objects and purposes of the ordinance.

2. Municipal Corporations ⇨220(9)

Generally, pension provision in city ordinance shall be liberally construed in favor of the applicant.

3. Municipal Corporations ⇨187(7)

Where city ordinance fixed amount of pension to be paid pensioner as a "pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement", and patrolman, who retired because of physical disability in-

curred in line of duty, held rank of mounted patrolman and received salary of \$185 a month for three years immediately prior to his retirement, and thereafter salary was increased to \$334.80 a month, pension was to be based on salary of \$334.80 a month rather than on salary of \$185 a month, since the three year period referred to in ordinance defined only rank held and not salary earned.

4. Municipal Corporations ⇨220(9)

Pension payments under city ordinance are in effect deferred compensation, to which pensioner becomes entitled on fulfillment of terms of contract, and which may not be changed to pensioner's detriment by subsequent amendment of ordinance.

5. Municipal Corporations ⇨187(7)

Where, at time retired patrolman became entitled to pension under city ordinance, pension was to be based on amount of salary paid at time of payment of pension, rather than at time of retirement, amendment of ordinance to provide for pension equal to one-half of average monthly rate of salary which pensioner shall have received during the three years immediately preceding date of retirement did not affect retirement benefits of retired patrolman, since the amendment was not retroactive.

Fred C. Hutchinson, City Atty., and Robert T. Anderson, Dep. City Atty., Berkeley, for appellants.

Cornish & Cornish, Francis T. Cornish, Howard W. Wayne, Berkeley, and Robert H. Kroninger, Oakland, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff in an action by a retired police officer for declaratory relief and for an accumulated amount alleged to be due him from a pension fund pursuant to an ordinance of the defendant city of Berkeley.

The plaintiff was a member of the Police Department of the city of Berkeley from August, 1925, to May 1, 1940, when he was

retired because of physical disability incurred in the line of duty. At the time of his retirement and for more than three years immediately prior thereto he held the rank of "Mounted Patrolman" and received the salary attached to that rank of \$185 per month. At that time Berkeley Ordinance No. 2250-N.S. provided that under the conditions applicable to the plaintiff's retirement a pension would be paid during the period of his disability. Section 13 of the ordinance fixed the amount of the pension in the following language: "* * * he shall be paid from the Fund during the period of his disability a pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement * * *." Accordingly, the plaintiff's pension was determined to be \$92.50 a month at the time of his retirement, and payments of that amount were made to him. Shortly after his retirement the salary attached to the rank of mounted patrolman was increased and additional periodic increases later became effective. Finally, in February, 1951, subsequent to the commencement of this action, the salary was increased to \$334.80 per month. The amounts received by the plaintiff have remained at \$92.50 a month. He asserts that he is and has been entitled to one-half of the fluctuating salary attached to the rank he held rather than to one-half the monthly amount paid to him during the three years immediately prior to his retirement. The trial court agreed with the interpretation of Section 13 asserted by the plaintiff and awarded to him the sum of \$3,095.74, the difference between \$92.50 and one-half of the salary attached to the rank of mounted patrolman for the years within the period of the statute of limitations and the elapsed time since the filing of the complaint. In addition the court awarded in his favor the declaratory relief sought by the plaintiff as to future payments.

The question involves the construction of Section 13 prior to its amendment as hereinafter indicated. More precisely the question is the proper application of the term "salary" as used in that section. The

plaintiff contends that at any particular time it is the salary then attached to the rank held for the three years immediately prior to retirement. The defendants contend that it is a fixed amount, the equivalent of the salary actually earned during the three year period.

The plaintiff's basic contention is that the three year period defines only the rank held and not the salary earned. It finds support in the language of the ordinance itself which refers to the "average salary" as that "attached to the rank or ranks held during the three years." The plaintiff argues that had the framers of the ordinance intended that the pension be fixed by the average salary earned during the three year period they would have so indicated by describing the "average salary" as that which "was attached to the rank or ranks held during the three years", rather than by using the phrase "the average salary attached" which indicates a presently existing salary. He contends that the framers were aware of such a distinction as evidenced by the language they employed in Section 10 to establish a pension ascertainable by reference to a fixed salary independent of salary fluctuations within ranks. That section provides: "Upon the death of any person receiving a pension * * * a pension equal to one-third of the average salary upon which said pension * * * was based" shall be awarded to certain survivors.

The plaintiff relies upon *Casserly v. City of Oakland*, 1936, 6 Cal.2d 64, 56 P.2d 237, wherein a provision of the charter of the City of Oakland provided that a pension should be "equal to one-half of the salary attached to the rank held" at the date of retirement. The court held that this provision provided for a fluctuating pension, which increased or decreased as the salaries paid to active employees increased or decreased. The language employed in the present case differs from that in the *Casserly* case only in the addition and substitution of the underlined words in the following quotation of the charter provision in the latter case: "equal to one-half of the *average* salary attached to the rank

or ranks held during the three years immediately preceding the date of retirement." The plaintiff contends that the additional language merely changes the method of determining the "rank" on which pension payments are to be based. While the particular rank in the Casserly case was determined by reference to the rank held at retirement, in the present case it is determined by reference to the rank or ranks held for three years prior to retirement. As the salary of the rank in the Casserly case fluctuated the pensioner's benefits were also held to fluctuate. As the average salary of the rank or ranks held in the present case fluctuates, the plaintiff argues that his benefits should also fluctuate unless the Casserly case is to be disregarded. The court there held, 6 Cal.2d at page 66, 56 P.2d at page 238, "the salary attached to the rank at the time the payments fall due, and not the salary at the time the pension was awarded, measures its amount."

In *Klench v. Board of Pension Fund Com'rs*, 1926, 79 Cal.App. 171, 249 P. 46, 47, a statute provided that a retired police officer was entitled "during his lifetime, [to] a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held on such police force at the date of such retirement". The following language from that case is quoted in the Casserly case, 6 Cal.2d at pages 66-67, 56 P.2d at page 238: "* * * it is our belief that the word 'salary' * * * was intended to refer to the rank of the retired police officer and not to the time at which he was retired. In other words, the section as phrased seems clearly enough to indicate that what the Legislature intended thereby to declare was that, on being retired under said act, a member of the police department should be paid a pension based upon the salary which may be paid to police officers of the rank held by him at the time of the retirement of such officer." To the same effect, see *Whitehead v. Davie*, 189 Cal. 715, 209 P. 1008; *Jones v. Cooney*, 82 Cal.App. 265, 255 P. 536; *Aitken v. Roche*, 48 Cal.App. 753, 755, 192 P. 464; *Rumetsch v. Davie*, 47 Cal.App. 512, 514, 190 P. 1075.

[1-3] The defendants contend that the Casserly and other similar cases are not applicable to the facts of the present case because of the difference in the language employed. But they fail to point out a material variation pertinent to the issue here under consideration. True, the provisions of the ordinance might be susceptible to more than one interpretation. But ambiguity and uncertainty in this type of legislation requires, under accepted rules, a construction which will, if reasonably possible, accomplish the objects and purposes of the legislation. "It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant." *Gibson v. City of San Diego*, 25 Cal.2d 930, 935, 156 P.2d 737, 740; see also *Lyons v. Hoover*, 41 Cal.2d 145, 258 P.2d 4; *McKeag v. Board of Pension Com'rs*, 21 Cal.2d 386, 390, 132 P.2d 198.

To accomplish the result sought by the defendants required an amendment to Section 13. This was brought about in 1944, more than four years after the plaintiff retired. The pertinent portions of the section as amended provide for "a pension equal to one-half of the average monthly rate of salary which such member shall have received during the three years immediately preceding the date of retirement * * *." Also in 1944 Section 24.1 was added to the ordinance in an endeavor to make Section 13 as amended retroactive. The new section provided that "any person now receiving a pension under the terms of this ordinance shall receive an amount based upon the average monthly rate of salary which such member received during the three years immediately preceding the date of retirement, and that said amount shall be a fixed amount that shall not increase nor decrease, regardless of any change in salary subsequent to the date of the granting of the original pension * * *."

[4] In support of the asserted retroactive effect of Section 24.1 the defendants contend that although the right to a pension is a vested right as an integral part of the contract of employment still it is a right

to a fair pension only the terms of which may be altered within reason without an impairment of the contract. They rely in the main upon *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799. But in that case and in the other cases referred to, *Packer v. Board of Retirement*, 35 Cal.2d 212, 217 P.2d 660; *Sweesy v. Los Angeles*, etc., *Retirement Board*, 17 Cal.2d 356, 110 P.2d 37; *Brophy v. Employees Retirement System*, 71 Cal.App.2d 455, 162 P.2d 939; *McCarthy v. City of Oakland*, 60 Cal.App. 2d 546, 547, 141 P.2d 4; *Brooks v. Pension Board*, 30 Cal.App.2d 118, 119, 85 P.2d 956, the court did not have before it the question of the obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency. In this connection, see *Home v. Souden*, 199 Cal. 508, 250 P. 162, concerning changes beneficial to the pensioner made after the happening of the contingency. In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment. *State of Mississippi, for Use of Robertson, v. Miller*, 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517; *Kern v. City of Long Beach*, supra, 29 Cal.2d 848, 179 P.2d 799; *Kavanagh v. Board of Police P. F. Com'rs*, 134 Cal. 50, 66 P. 36; *Vero v. Sacramento City E. R. System*, 41 Cal.App.2d 482, 107 P.2d 82; 20 Cal.Jur. 998.

[5] Accordingly it is concluded that the provisions of Section 13 in effect when the plaintiff retired were in all material respects the same as the language of the charter

provisions of the City of Oakland involved in the *Cassery* case, insofar as those provisions relate to the present inquiry; and that the amended section did not affect the plaintiff's retirement benefits.

The judgment is affirmed.

CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

GIBSON, C. J., and EDMONDS, J., concur in the judgment.



121 Cal.App.2d 637

BOHN

v.

MAYOR AND CITY COUNCIL OF CITY
OF FONTANA et al.

Civ. 4752.

District Court of Appeal, Fourth District,
California.

Nov. 30, 1953.

Hearing Denied Jan. 27, 1954.

Petition for writ of mandate against Mayor and City Council to require them to submit at special election question whether or not municipal corporation should disincorporate. The Superior Court, San Bernardino County, R. Bruce Findlay, J., entered judgment dismissing proceeding, and petitioners appealed. The District Court of Appeal, Griffin, J., held that in view of Government Code provision to effect that elections in sixth class cities shall be held pursuant to provisions of Elections Code, which provided that municipal elections not otherwise provided for "shall be held and conducted in accordance with the provisions of this code governing elections generally," procedure set up in Government Code pertaining to disincorporation of cities of sixth class was not in itself complete, and provision of Elections Code prohibiting circulation of petitions for disincorporation of sixth class cities for period of two years following city's incor-

poration, was applicable to petition presented in September, 1952, to disincorporate sixth class city incorporated in June of 1952.

Affirmed.

1. Municipal Corporations ☞51

Election Code provision prohibiting circulation of petitions for disincorporation of city of sixth class for two years following incorporation was applicable to petition presented in September, 1952, to disincorporate sixth class city incorporated in June of 1952. Elections Code, §§ 6, 650 et seq., 950, 1700 to 1723, 9703; Government Code, §§ 34700 to 34735.

2. Mandamus ☞154(5)

In proceeding for mandate against Mayor and City Council of municipal corporation to require them to submit to special election question of whether or not city should disincorporate, allegation that petition for disincorporation was signed by not less than 20 per cent of qualified voters as shown by number qualified at last general state election was essential, and allegation that such petition was signed by more than 20 per cent of qualified voter electors of such city, was insufficient, but could have been subject to proper amendment. Government Code, § 30701; Elections Code, §§ 23, 950.

O'Connor, Eckhardt & Fick, San Bernardino, for appellants.

Henry F. Rager, Fontana, for respondents.

GRIFFIN, Justice.

On October 3, 1952, petitioners, as qualified electors of the City of Fontana, filed a petition for a writ of mandate against the Mayor and City Council of that city and the members thereof, as individuals, alleging generally that the City of Fontana was incorporated as a sixth-class city on June 25, 1952; that subsequent thereto and prior to September 2, 1952, a petition was circulated requesting disincorporation, and that said petition was presented to said body; that the petition was signed by 1,009 qualified electors of the city of Fontana;

that 1,009 qualified electors are more than 20 per cent of the qualified electors of said city; that the city council refused to submit at a special election the question of whether or not the city should disincorporate.

It should be here noted that less than two years elapsed between the incorporation of said city and the circulation of the petition, and that it is not alleged that said petition was signed by not less than 20 per cent of the qualified electors as shown by the number qualified at the last state general election.

These are the pivotal points presented on this appeal and the determining factors which caused the trial court to sustain the demurrer and allow petitioners to amend, and from such refusal to amend a judgment of dismissal followed.

It is respondents' main contention, in support of the trial court's ruling, that section 1702 of the Elections Code was applicable and prevented the circulation of such petition within the two-year period. It provides:

"Before circulating any petition relating to the annexation of territory by a city, * * * the dissolution of a city * * * the proponents thereof shall publish a notice of intention so to do, which notice shall be accompanied by a printed statement not exceeding five hundred words in length of the reasons for the proposed petition.

*"No petition for the dissolution or disincorporation of a city * * * may be circulated until after the expiration of two years from the date that such city * * * was incorporated."*

It is petitioners' claim that these disincorporation proceedings provided for in the Government Code, Title 4, Division 2, Part 1, Chapter 6, comprising sections 34700 to 34735, provides a complete procedure for disincorporation of cities of the sixth class; that petitioners proceeded thereunder; that said Government Code sections made no reference to any time limit in this respect, and that therefore said section 1702 of the Elections Code had no application to the provisions of the Government Code, citing Re-

port of Code Commissioners, Legislative Session 1947, p. 9; also Report of Code Commissioners, Legislative Session 1945; and the Draft of Government Code published by California Codes Commission February 23, 1948; also *Mintzer v. Schilling*, 117 Cal. 361, 49 P. 209; *Taylor v. Burks*, 6 Cal.App. 225, 91 P. 814; *Frederick v. City of San Luis Obispo*, 118 Cal. 391, 50 P. 661; and *Watson v. Fouch*, 55 Cal.App. 765, 205 P. 58.

The argument is that this procedure set forth in the Government Code was originally enacted in 1895, Stats. 1895, chap. 125, § 1, p. 115, et seq.; that it has since been amended several times in minor particulars and that at no time was any time limit fixed in any of the amendments and that the legislature has never seen fit to make its provisions dependent upon any other provisions of law; that the Elections Code procedure has continuously been treated as part of the general procedure for the enactment of initiative measures by all cities and other local government bodies, citing 30 Cal. Law Review p. 1, Title "Municipal Home Rule in California" by Professor John C. Peppin; that it was the intention of the legislature by the act of 1895 and its amendments to afford to sixth-class cities a special readily available and easily used procedure for its disincorporation; to give them a special opportunity to divest themselves of incorporated status if after adopting it they deem it undesirable; that the provisions of the Elections Code, Division 4, Chapter 3, Article 1, §§ 1700 to 1723, inclusive, have no application to the disincorporation of sixth-class cities under the Government Code, as manifested by the legislative history of the two enactments, citing 23 Cal. Jur. p. 237, sec. 34; 18 Cal.Jur. p. 945, sec. 228; and section 34700 Government Code.

In this connection it is argued that the chapter and section titles of the two acts, being a part and parcel of the enactment, are integral parts of the code itself, and when examined illustrate the contention advanced by petitioner; that the specific and special provisions of the Government Code control the general provisions of the Elections Code; that if all the provisions of the Elec-

tions Code were brought into and applied with the procedure prescribed in the Government Code; they, not being in *pari materia*, disincorporation of a city of the sixth class would be impossible, citing *In re Forthmann's Estate*, 118 Cal.App. 332, 5 P.2d 472; *Gonzales v. Superior Court*, 3 Cal.2d 260, 44 P.2d 320; and 23 Cal.Jur. p. 772, sec. 147.

The "Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code." Section 6, Elections Code.

Division 11, Part 2, Chapter 2 of the Elections Code provides for the "General Regulations Governing Elections in Fifth and Sixth Class Cities". Section 9703 thereof provides:

"In all respects, not otherwise provided for in this chapter, municipal elections shall be held and conducted in accordance with the provisions of this code governing elections generally, so far as they may be applicable."

Section 34050 of the Government Code provides:

"Elections in cities organized pursuant to Division 2, or its predecessors, shall be held pursuant to Part 2, Division 11 of the Elections Code, except as otherwise specifically provided."

Section 34051 of the Government Code provides who are eligible to vote, and sections 650 et seq. of the Elections Code provide for the appointment of election officers. Provisions in reference to the manner of voting is only to be found in the Elections Code. The duties of the city clerk in reference to the examination of the petitions and certification of the results thereof is found only by reference to the Elections Code.

[1] Accordingly, the procedure set up in the Government Code pertaining to the disincorporation of cities of the sixth class, is not entirely complete in itself since it must refer back to those sections of the Elections Code to complete its full operation.

Section 1702 of the Elections Code, in its original enactment, did not contain the

provision contained in the paragraph providing that no petition for the disincorporation of a city of the sixth class may be circulated until after the expiration of two years from the date such city was incorporated. This paragraph was added in 1939. Stats.1939, chap. 26, page 93. It is of interest to note that this same paragraph has been removed from that section and set over into the Government Code, now section 34701.1 without any change. Stats. 1953, chapter 315, effective September 9, 1953, which, if petitioner's argument is correct, would not now require any time limit before petitions for disincorporation under the Elections Code could be circulated, but would require it under section 34701.1 of the Government Code in relation to disincorporation of cities of the sixth class only. Such an interpretation would appear to be incongruous with the intent of the legislature and the true intention would appear to be that the legislature at all times since the enactment of that provision into our laws pertaining to disincorporation of cities meant that at least two years must expire before the circulation of petitions for such disincorporation was permissible, and that there was no substantial change in the law, but merely the placing of the law from one code to another.

It is well settled, as stated in *In re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 712, where provisions in the Labor Code and the Business and Professions Code were being considered, that "The code separation is for convenience only. It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute." (Citing cases.) See, also, *People v. Darby*, 114 Cal.App.2d 412, 250 P.2d 743, 752, where it is said: "The two codes (The Education Code and Government Code) are not antagonistic laws, but both are parts of the state's jurisprudence and must be harmonized and effect given to every section. * * * What the legislature says is the law, where-soever it be found." See, also, *Guardianship of Thrasher*, 105 Cal.App.2d 768, 234 P.2d 230, and *Southern California Jockey Club, Inc. v. California Horse Racing Board*, 36

Cal.2d 167, 223 P.2d 1, where it was held (quoting from the syllabus) that "The codification of the horse racing law (placing it in the Business and Professions Code) was presumably not intended as a change in the law." In *Webster v. Zevin*, 77 Cal.App.2d 855, 176 P.2d 960, 961, it was said: "Transplanting the section to the Vehicle Code without change in its terms furnishes no ground for an interpretation different from what would manifestly be given it as a Civil Code provision."

If we follow the usual and general rules of statutory construction the two codes can be harmoniously construed together in this respect. Thus proper effect can be given to Elections Code section 1702 and the other provisions of the Elections Code necessarily applicable, and to the provisions of the Government Code in respect to the disincorporation of municipalities of the sixth class.

[2] We therefore conclude that the demurrer to the petition for the writ could have been properly sustained without leave to amend in this respect. It therefore becomes unnecessary to determine the other issues presented. However, an allegation that the petition was signed by not less than 20 per cent of the qualified electors, as shown by the number qualified at the last general state election was essential for a proper compliance with section 30701 of the Government Code and not that it was signed by more than 20 per cent of the qualified electors of said city. Elections Code sections 23 and 950. Section 950, *supra*, defines a general election. However, this allegation would have been subject to a proper amendment.

The fact that there was no general state election held throughout the state between the date of incorporation and the time when the petition was circulated adds additional reasoning why the legislature may have intended that a two-year period must elapse between those occasions so that such a proper calculation may be made as to the sufficiency of the petition. *Watson v. Fouch*, 55 Cal.App. 765, 205 P. 58.

The claim that the members of the city council named individually as respondents, were not proper or necessary parties to the

action has merit. *Taylor v. Burks*, 6 Cal. App. 225, 91 P. 814. However, in view of the previous determination, further consideration of this point is unnecessary.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



121 Cal.App.2d 521

VARGAS v. GIACOSA et al.

Civ. 15548.

District Court of Appeal, First District,
Division 1, California.

Nov. 25, 1953.

Rehearing Denied Dec. 24, 1953.

Hearing Denied Jan. 20, 1954.

Action by former tenant against landlords and their parents charging civil conspiracy, rental overcharge, malicious prosecution, and wilful and malicious shutting off of water supply in flat occupied by tenant. The Superior Court, San Francisco County, Thomas M. Foley, J., entered judgment for plaintiff, and certain defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that statement of one landlord to tenant that hole in tenant's kitchen roof was nothing and that it need not be fixed because tenant was going to get out, and similar statement by other landlord concerning delay in repairing leaks in roof were not statements that landlords should have recognized as likely to result in illness to tenant, and were not actionable, but that evidence sustained finding that for six months tenant had paid \$8 per month in excess of \$12 rental fee applicable to premises under federal statute.

Judgment in accordance with opinion.

1. Conspiracy ⚡6

Conspiracy cannot be made subject of civil action unless something is done which without conspiracy would give right of action, as it is the wrong done and damage

suffered pursuant to the conspiracy which is cause of action, rather than the conspiracy itself.

2. Conspiracy ⚡18

As cause of action is for damage suffered, and not the mere conspiracy, complaint alleging civil conspiracy must state facts which show that civil wrong was done resulting in damage.

3. Conspiracy ⚡14

In action for alleged civil conspiracy, major significance of conspiracy lies in fact that it renders each participant in wrongful act responsible as joint tort-feasor for all damage ensuing from the wrong, irrespective of whether or not he was direct actor and regardless of degree of his activity.

4. Torts ⚡4

Evil motive which may inspire doing of an act not unlawful will not of itself make such act unlawful.

5. Conspiracy ⚡20

Where verdict on other counts of action covered damage for overt acts charged in civil conspiracy counts, damages for commission of those overt acts included in verdicts on other counts could not be properly included in verdict on counts charging civil conspiracy.

6. Conspiracy ⚡1

In civil conspiracy action, exoneration of member of family on count charging her with making statement for purpose of harassing and injuring plaintiff and his family, exonerated her alleged coconspirators from liability in respect to words uttered by her.

7. Conspiracy ⚡1

If actor is not liable, there is no basis for holding his or her coconspirators liable.

8. Appeal and Error ⚡930(4)

In absence of indication to contrary, District Court of Appeal would assume that jury which had returned verdict on malicious prosecution count and rental overcharge count, had excluded those items from subsequent verdict on conspiracy count which included items set out in other counts.

9. Torts ⇨6

If actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, actor is subject to liability to other for illness or bodily harm of which distress is legal cause, although actor had no intention of inflicting such harm, and liability attaches irrespective of whether act was directed against other or third person.

10. Torts ⇨6

If acts resulting in physical injury to another are intentional and unreasonable and such that actor should recognize as likely to result in illness, actor is liable for such acts even if only utterance of mere words, oral or written.

11. Torts ⇨6

Statement of one landlord to tenant that hole in tenant's kitchen roof was nothing and that it need not be fixed because tenant was going to get out, and similar statement by other landlord concerning delay in repairing leaks in roof, were not statements that landlords should have recognized as likely to result in illness to tenant, and were not actionable.

12. Malicious Prosecution ⇨16

"Malicious prosecution" is institution or maintenance of "judicial proceedings" against another with malice and without probable cause.

See publication Words and Phrases, for other judicial constructions and definitions of "Malicious Prosecution".

13. Malicious Prosecution ⇨1

Act of landlord in petitioning local Housing Expeditor for permission to terminate tenancy was not "judicial proceeding," and even if done with malice and without probable cause, could not constitute basis for malicious prosecution action.

See publication Words and Phrases, for other judicial constructions and definitions of "Judicial Proceeding".

14. Torts ⇨6

Landlord's refusal to give receipts for rental payment was not an act as could cause tenant mental shock and ensuing

physical illness where prior to landlord's refusal to issue receipts landlord had lowered tenant's rent under level paid by other tenants and had announced his desire that decrease in tenant's rent remain secret.

15. Trial ⇨251(2)

In civil conspiracy action charging landlords with harassing and annoying and injuring tenant, instruction that if jury found that landlords had owned or had possession of premises involved and had rented them to tenant for occupation as housing accommodations, and had agreed to furnish water, and had thereafter shut off water, that such shutting off was interference with use and occupation of property, and in effect amounted to constructive eviction, was erroneous where eviction was not in issue under pleadings.

16. Landlord and Tenant ⇨200(1½)**War and National Defense** ⇨220

In tenant's action against landlord and his family for rental overcharge, evidence sustained finding that for six months tenant had paid \$8 per month in excess of \$12 rental fee applicable to flat under federal statute.

17. Malicious Prosecution ⇨72(2)

In tenant's malicious prosecution action based on landlords' unlawful detainer action, instruction to jury that if they found from evidence that there was no rent due on date unlawful detainer action was filed, there was no probable cause for filing action was erroneous, under evidence that a landlord had need of premises for occupancy by himself, and that tenants were committing nuisance upon premises.

18. Malicious Prosecution ⇨59(1, 10)

Fact that landlord needed tenant's premises for occupancy by himself and his bride, and that nuisances were being committed upon premises, and that landlord believed that tenant was behind in his rent payments and that attorney had advised landlord that he had good cause to evict tenant were material to issue of probable cause prompting landlord to file unlawful detainer action against tenant for possession of premises which was basis of tenant's subsequent malicious prosecution action.

19. Malicious Prosecution $\Rightarrow$ 71(2)

Fact that landlord inadequately pleaded his causes for eviction in his unlawful detainer action, and that he had not obtained permission from rent control authorities to evict tenant, would not as matter of law negative existence of probable cause in instigating such action, and would not render landlord guilty of malicious prosecution, where landlord had made fair and full statement of facts to his attorney, and had been advised by attorney that he had good cause for filing action, and had in reliance upon that advice instituted action.

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellants.

H. W. Glensor, Theodore M. Monell, San Francisco, for respondent.

FRED B. WOOD, Justice.

From August 10, 1949, until December 7, 1950, plaintiff rented and occupied a flat owned by Edward and Mario Giacosa.

In July, 1950, he filed his complaint herein against Edward, Mario, Vincenzo and Pasqualina Giacosa¹ for damages sustained by him, alleging four causes of action separately stated in as many counts. By a supplemental complaint he alleged additional causes of action.

In the first count plaintiff alleged that the defendants, for the purpose of harrassing, annoying and injuring plaintiff and his family, conspired to and did commit the following overt acts: (1) defendants collected \$256 in excess of the lawful rent fixed by the Housing Expeditor; (2) refused to give receipts for rent paid; (3) through Pasqualina, said to plaintiff, "You are bad people, get out, I don't want you in here"; (4) through Mario, said, "Get out, you are not going to be there to pay any rent. You are going to get out"; (5) through Edward, said, "I am your real landlord. You people are going to get out"; (6) for the sole purpose of compelling plaintiff to pay more than the lawful rent, filed two petitions with the Housing Expeditor requesting authority to evict plaintiff, both of which petitions were denied;

(7) maliciously and without cause filed an unlawful detainer action, obtaining a default judgment upon a false affidavit of service, which judgment was set aside and the action later dismissed; (8) turned off plaintiff's water supply for a period of 29 hours. On this count the jury awarded \$2,500 actual damages against Edward and Mario jointly and \$1,250 punitive damages against each of them separately; no recovery from Pasqualina. (Vincenzo had been granted a nonsuit.)

In the second count he alleged rent overcharges (overt act No. 1 of the first count), for which the jury awarded \$48 against Edward and Mario.

In the third count he alleged damages for malicious prosecution, the filing and prosecution of an unlawful detainer action (overt act No. 7 of the first count), for which the jury awarded \$500 actual and \$100 exemplary damages against Edward. (Nonsuit had been granted as to the other defendants.)

In the fourth count he alleged a wilfull and malicious turning off of the water supply for the flat occupied by him (overt act No. 8 of the first count). The court granted each of the defendants a nonsuit on the fourth count.

In the supplemental complaint he alleged two causes of action for the shutting off of the water supply at a later date, the first cause was described as a conspiracy, the second not. On the second cause all the defendants were granted a nonsuit.

Edward and Mario have appealed from the judgment. In support of their appeal, they claim that the verdicts are against law and not supported by the evidence, errors of law were committed during the trial, erroneous instructions were given the jury, and the verdicts are excessive and appear to have been awarded under the influence of passion and prejudice.

1. The Verdict on the First Count,
Damages for the Alleged Civil
Conspiracy

[1-4] "It is well settled that a conspiracy cannot be made the subject of a

1. Vincenzo and Pasqualina are husband and wife, the parents of Edward and Mario.

civil action unless something is done which without the conspiracy would give a right of action. The damage is the gist of the action, not the conspiracy. [Citations.] It is the wrong done and the damage suffered pursuant to the conspiracy which is the cause of action, rather than the conspiracy itself. [Citation.]" (Wallace v. Kerr, 42 Cal.App.2d 182, 184-185, 108 P.2d 754, 756.) "As the cause of action is for the damage suffered, and not the mere conspiracy, the complaint must state facts which show that a civil wrong was done, resulting in damage." Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 488, 110 P.2d 396, 398. "In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." Mox Incorporated v. Woods, 202 Cal. 675, 677-678, 262 P. 302, 303. An "evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful." Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 554, 112 P. 886, 887, 33 L.R.A.,N.S., 1034.²

[5-7] In our case eight overt acts are alleged as actionable wrongs in the first count, the civil conspiracy. Damages for the commission of four of these overt acts could not properly be included in the verdict on this count. The verdicts on the second and third counts covered damages for overt act No. 1, the rental overcharge, and overt act No. 7, malicious prosecution. There was a failure of proof as to commission by the defendants of overt act

No. 8, the shutting off of the water supply, demonstrated by the nonsuit on the fourth count, which is supported by the evidence and the failure of plaintiff to appeal. Exoneration of Pasqualina on the first count exonerated her alleged co-conspirators from liability in respect to the words uttered by her, overt act No. 3. If the actor is not liable, there is no basis for holding his or her alleged coconspirators liable; a principle implicit, though not precisely so expressed, in Horowitz v. Sacks, 89 Cal.App. 336, 341, 265 P. 281, and Perna v. Bank of America N. T. & S. Ass'n, 28 Cal.App.2d 372, 377-378, 82 P.2d 605.

[8] The parties agree that since the jury returned a verdict on the malicious prosecution count it should be presumed that they excluded that item from consideration when assessing damages on the conspiracy count. Defendants claim the same is true of the rental overcharge item and plaintiff does not expressly challenge that claim. It seems reasonable to entertain such a presumption as to all four of these items if the record does not indicate the likelihood of a different intent on the part of the jury.

This leaves four overt acts for consideration as bases for damages under the conspiracy count. Two of them (overt acts 4 and 5) are but words uttered by Mario and by Edward. What legal injury did the utterance of these words inflict? According to the complaint, as a result of defendants' course of conduct "plaintiff became worried as to the housing of himself and family, became nervous, sick, sore and disordered to his damage * * *." There was no physical impact. There was, at most, a shock, through the senses, to plain-

2. Plaintiff, as authority for his theory that lawful acts become actionable if two or more persons conspire to commit them, mistakenly relies upon a statement in Swift and Company v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L. Ed. 518, concerning various acts charged: " * * * whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged

are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful." That statement must be read in its context, the discussion of the sufficiency of a complaint to enjoin the violation of the federal Anti-Trust Act of 1890, 26 Stat. 209, 15 U.S.C.A. §§ 1-7, which expressly proscribed every combination or conspiracy in restraint of trade among the states or with foreign nations.

tiff's nervous system. Was there here such a shock, so given, as might furnish a legal basis for compensatory relief to plaintiff for the consequences which he claims he suffered?

[9,10] "It cannot be overemphasized that the human body can through negligence of others suffer injury in only two ways: (1) by physical impact, and (2) by shock, through the senses, to the nervous system. A person can suffer both at the same time or he can experience one alone. In either event, actionable mental suffering may result. But merely because a shock to the nervous system is an injury to the body rather than to the mind, *Easton v. United Trade School Contracting Co.*, 173 Cal. 199, 203, 159 P. 597, L.R.A.1917A, 394, it does not necessarily follow that every mental disturbance is caused by a shock to the nervous system." *Espinosa v. Beverly Hospital*, 114 Cal.App.2d 232, 234, 249 P.2d 843, 844. "If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person." Sec. 312 of the Restatement of the Law of Torts. "The important elements are that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness. Given these elements the modern cases recognize that mere words, oral or written, which result in physical injury to another are actionable. [Citations.]" *Bowden v. Spiegel, Inc.*, 96 Cal.App.2d 793, 795, 216 P.2d 571, 672.

In the instant case, were the words uttered under such circumstances as to make them actionable? We think not.

The words described as overt act No. 4 were uttered to plaintiff's wife during a discussion between her and Mario, concerning his delay in repairing leaks in the roof of the rented premises. Plaintiff was not present. Mrs. Vargas does not say or in-

dicate that the utterances of those words frightened or shocked her. Neither she nor plaintiff mentions this utterance as a shock to him or as a cause of his nervousness. She did say that "every time he got a notice like that [a notice in the unlawful detainer action] he got very nervous and was at times unable to work." Further as to the effect of the notice, she said "he was terrible nervous, and he suffered with arthritis before, and after all this trouble it all came back." Plaintiff testified he had suffered from arthritis since 1926; his health condition was pretty good prior to August, 1949; then there was a change (nervousness, dizziness, and pains in hands, knees and neck) starting the first month he paid the rent and did not get a receipt. He did not consult a doctor until November, 1950. The doctor described plaintiff's condition as of that date and expressed the opinion that plaintiff's condition was aggravated by nervous excitement but the doctor did not know the cause of plaintiff's nervousness. This evidence falls short of showing that Mario, by the words he addressed to Mrs. Vargas, injured plaintiff by shock, through the senses, to his nervous system.

Moreover, we see no basis for an inference that Mario should have recognized that the uttering of those words, under the circumstances described, would likely result in illness or bodily harm to anyone.

About an hour after this incident, Mario brought Edward to plaintiff's flat. They went into the kitchen, looked it over and Edward said, "Oh, this is nothing." He said "This is nothing. Anyhow, you don't need it fixed. You are going to get out, you are going to get out." And he just went down the stairway, repeating that over and over." Overt act No. 5. Plaintiff overheard those words but had no conversation with Edward. He said he just saw Edward come into the flat and walk out. He never met Edward in his life. Nor did plaintiff say or indicate that this utterance by Edward shocked him, frightened him or put him in any fear. And we see no basis for an inference that Edward should have foreseen the likelihood of resultant illness or bodily harm to any one.

[11] We conclude that overt acts 4 and 5 did not involve the commission of an actionable wrong.

[12, 13] Overt act No. 6, the filing by Edward of two petitions with the Housing Expeditor for authority to evict plaintiff, did not furnish the basis for a cause of action in plaintiff's favor. It was done in the exercise of a right given Edward by statute. Even if it were done with malice and without probable cause (which we need not and do not decide) it did not institute such a proceeding as could constitute malicious prosecution. It did not invoke the exercise by the Housing Expeditor of a judicial function within the meaning of that term as used in the legal concept of malicious prosecution. Malicious prosecution is defined as the institution and maintenance of "judicial proceedings" against another with malice and without probable cause. 16 Cal. Jur. 728, Malicious Prosecution, § 2. Thus, the sending of letters and telegrams to a board of special inquiry of the federal Bureau of Immigration, which caused the detention of an alien for a period of time as a person likely to become a public charge, was not "malicious prosecution" because the Bureau in making such an inquiry and determination was "acting in an administrative and not in a judicial capacity". Hayashida v. Kakimoto, 132 Cal.App. 743, 747, 23 P.2d 311, 313. This does not mean that no proceeding before an administrative body, instituted with malice and without probable cause, could constitute malicious prosecution. It means simply that a proceeding which merely invokes the exercise of administrative not judicial powers (such as a landlord's petition to a Housing Expeditor for permission to terminate a tenancy) is not a "judicial proceeding."

[14] The sole remaining overt act is the refusal of defendants to give receipts for rental paid. Just how such a refusal, in the circumstances under which made, could cause plaintiff mental shock and ensuing physical illness or upon what basis defendants could be charged with foreseeing such a result, we do not perceive. Plaintiff narrated at some length a *friendly* conver-

sation he had with Mario in October, 1949, culminating in a reduction of the rental from \$30 to \$20 a month, plaintiff agreeing not to tell the other tenants in the building because, as Mario told him, they were paying more. How, under those circumstances, the aggravation of plaintiff's arthritic condition could be deemed a legally actionable consequence of the landlords' refusal to give rent receipts, we do not perceive. In addition, commencing a few months later and continuing throughout the remainder of his tenancy, plaintiff did obtain receipts, paying the rent by money order or by check. We see no legal basis for the assessment of damages for the commission of overt act No. 6.

The verdict on the first count of the complaint is not sustained by the evidence.

[15] In view of this conclusion we perhaps need not consider defendants' other points in respect to this count. However, an instruction given at plaintiff's request told the jury that if they found that the defendants or some of them owned or had possession of the premises and rented them to plaintiff for occupation as a housing accommodation and agreed to furnish water and thereafter shut off the water, that such shutting off "is an interference with the use and occupation of said property and in effect amounts to a constructive eviction therefrom." This was erroneous because eviction was not an issue under the pleadings and, in fact, plaintiff continued in possession and paid rent after the temporary shut-off; there was no evidence that any defendant shut the water off; the court had properly granted a nonsuit on the substantive count and plaintiff has confirmed that ruling by his failure to appeal. Although plaintiff argues that this instruction "does not tell the jury that damages may be awarded or that they can consider shutting off the water in arriving at the amount of the verdict," they were potentially misled into believing they could properly assess damages therefor as the legal consequence of one of the overt acts alleged in the first count. Whether they did or not, we do not know. Whether they did or not, the net result is the same, insufficiency of evidence to support the verdict on the first count.

2. The Verdict on the Second Count, the Rental Overcharge

[16] Defendants appealed from the whole of the judgment but in their opening brief describe this as an appeal from a judgment entered on the first and third counts of the complaint, thus inferentially excluding consideration of the second count, the rental overcharge.

We have examined the record and find that the \$48 verdict is amply supported by evidence that for six months plaintiff paid \$8 a month in excess of the \$12 rental which obtained for this flat under the applicable federal statute, and that Edward and Mario were the owners of the property. This verdict can not be disturbed.

3. The Verdict on the Third Count, Malicious Prosecution

The third count alleges that defendants with malice, without cause, and for the purpose of harassing and injuring plaintiff and his family, filed and maintained an unlawful detainer action in which defendants herein ultimately failed because the unlawful detainer complaint did not state facts sufficient to constitute a cause of action.

On this count plaintiff was nonsuited as to all the defendants except Edward. He had been the sole plaintiff in the unlawful detainer action. Edward claims that the verdict on this count is not sustained by the evidence and that certain instructions pertaining to malicious prosecution were erroneous.

The complaint in the unlawful detainer action alleged that in February, 1950, Edward gave the tenant written notice to quit and deliver possession; that Edward was in good faith seeking to recover possession for use and occupancy as a dwelling by himself and his newly acquired wife; that in March, 1950, he gave the tenant a three-day notice to deliver possession or pay all overdue rent, which the tenant refused to do; that the tenant was maintaining a nuisance on the premises, causing damage to the property and to other tenants; and prayed for restitution of the premises and cancellation of the rental agreement.

One of the instructions given at plaintiff's request told the jury: "If you find from the evidence that there was no rent due on April 14, 1950, the date the action for unlawful detainer was filed in the Municipal Court, as a matter of law, there was no probable cause for filing said action."

[17-19] This was an erroneous instruction. It left out of account and withdrew from the jury's consideration evidence which tended to prove that Edward did in good faith need and desire this flat for the occupancy of himself and bride; that nuisances were being committed upon the premises, the making of unusual noises at night and the throwing of garbage out the door and down the stairway to the distress of other tenants; that he believed the tenant was behind in his rent payments; that Edward made full disclosure to an attorney (not his present counsel); he was advised he had good cause to evict the tenant; and, believing such advice and relying thereon he read and signed the unlawful detainer complaint prepared by his attorney. The facts which this evidence tended to prove were material to the issue of probable cause. See cases collected in 16 Cal.Jur. 737-743, Malicious Prosecution, §§ 9-11, and supplements thereto. The circumstance that the causes for eviction may have been inadequately pleaded in the unlawful detainer complaint or that permission to evict may not have been obtained from the rent control authority, would not as a matter of law negative the existence of probable cause if Edward made a fair and full statement of the facts to his attorney, was advised he had good cause and in reliance upon that advice instituted the action. We do not find that the error inherent in this instruction was cured by other instructions given.

The verdict on the third count cannot be sustained. We need not consider defendants' other points of asserted error.

The judgment is reversed, except that portion thereof which decrees that plaintiff have and recover \$48 from defendants Mario and Edward Giacosa with interest thereon at 7% per annum until paid, which

portion is affirmed; and the cause is remanded for such proceedings as are consistent with the views herein expressed. In view of partial affirmance and major reversal of the judgment, it is ordered that defendants Edward and Mario Giacosa have and recover their costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.



BLOTTER et al. v. FARRELL et al.*

Civ. 4712.

District Court of Appeal.
Fourth District, California.

Dec. 4, 1953.

Hearing Granted Jan. 27, 1954

Proceeding for writ of mandate to compel city governing body to submit redistricting ordinance to city electorate. The Superior Court, Riverside County, Thomas P. O'Donnell, J., entered judgment denying writ, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that electorate of city of the sixth class does not have implied power to redistrict city.

Judgment affirmed.

1. Municipal Corporations ⇨57

A municipal corporation can exercise only such powers as have been conferred upon it in its charter, some constitutional provision or general law.

2. Municipal Corporations ⇨60, 108.2

The city council of city of the sixth class has no power to redistrict the city by ordinance and therefore has no authority to adopt an initiative ordinance for that purpose. Government Code, §§ 34871, 34876, 35322, 35323.

3. Mandamus ⇨16(1)

Writ of mandate may not be used to compel city governing body to submit to

electorate proposed redistricting ordinance which could have no validity by virtue of being beyond the power of electorate to enact by initiative.

Leonard A. Bock, Palm Springs, for appellants.

Roy W. Colegate, City Atty., and Jerome J. Bunker, Asst. City Atty., Palm Springs, for respondents.

MUSSELL, Justice.

This is a proceeding to obtain a writ of mandate compelling the mayor and council of the city of Palm Springs to forthwith submit an ordinance to the vote of the city electors. Plaintiffs appeal from a judgment of the trial court dismissing the petition and granting judgment on the pleadings in favor of the defendants.

The city of Palm Springs is a city of the sixth class. It was incorporated in April, 1938, and as a part of the petition for corporation, it was laid out in seven councilmanic districts, numbered one through seven. A councilman is elected from each of the districts and the legislative powers of the city are vested in the mayor and seven members of the city council.

During February and March of 1952, plaintiffs (petitioners herein) circulated in the city two initiative petitions calling for a special election for the purpose of adopting a proposed ordinance amending the boundary lines of the councilmanic districts. These petitions were presented to the city council on or about March 26, 1952, and by it referred to a committee for study and recommendation. The council failed to act on the petition and on or about April 15, 1952, refused to submit the proposed ordinance to a vote of the electors or call an election for that purpose.

Appellants state that the population distribution has changed since the city was incorporated and that the purpose of the ordinance involved is to redistrict the city so as to give each district as near as possible the same voting strength.

* Subsequent opinion 270 P.2d 481.

The principal question involved is whether the petition for a writ of mandate states facts sufficient to constitute a cause of action.

It is the contention of the appellants that the power of the electors of the city to district includes the power to amend or change its districts and it is stated in appellants' brief that the power to redistrict or amend is based upon the following sections of the Government Code:

"§ 34871. *Submission of ordinance to electors for election of legislative body by districts.* At any municipal election, or special election held for that purpose, the legislative body may submit to the electors an ordinance providing for the election of members of the legislative body by districts."

"§ 34876. *Inclusion of provisions in petition for incorporation.* If the petition for incorporation of a sixth class city provides for the election of members of the legislative body by districts and includes substantially the provisions required to be included in an ordinance providing for such election, the members shall be elected pursuant to this article."

"§ 35322. *Territory annexed to city divided into wards: Alteration or addition of wards.* Where territory is annexed to a city divided into wards, or to a city which later divides itself into wards, the legislative body, by ordinance, shall alter the boundaries of the city wards to include the annexed territory in one or more wards adjoining the territory, or make one or more additional wards out of the annexed territory. The number of wards shall not be increased to exceed the number which the city is allowed by law."

"§ 35323. *Same: Wards to contain equal number of inhabitants.* In altering the boundaries of wards, or creating new wards, each ward shall contain, as nearly as possible, an equal number of inhabitants eligible to citizenship."

It is apparent that by enacting section 34871, *supra*, the legislature intended to

provide for the election of legislative bodies of cities of the sixth class by district where no such procedure had been previously adopted. The section does not provide for a redistricting of such cities. Section 34876 merely provides that where such city has theretofore provided in its incorporation for the election of members of the legislative body by districts substantially as required in an ordinance enacted pursuant to section 34871, the members shall be elected pursuant to Chapter 7, Article 4 of the Government Code. No change in existing districts is therein authorized. Sections 35322 and 35323 of the Government Code relate to the duties of the legislative body of the city in annexation proceedings and are clearly not intended to authorize the city to otherwise change the boundaries of existing districts or city wards.

The record shows that in March, 1948, the city, by ordinances Nos. 187 and 188, annexed certain uninhabited territory to the city under the provisions of the Uninhabited Territory Act of 1939, Sections 35300-35326, Government Code. Councilmanic district No. 4, only, adjoined the territory annexed and the boundaries of district No. 4 were altered so as to include the uninhabited territory annexed. No problem arose as to the number of inhabitants in said district by reason of the annexation. We are not here concerned with the power of the city to alter the boundaries of wards in annexation proceedings and sections 35322 and 35323 of the code have no application except in such proceedings. Our attention has not been called to any constitutional or statutory provision authorizing cities of the sixth class to redistrict such cities under the circumstances shown by the record.

[1] Appellants argue that whatever the electorate originally do, they can amend or change in the absence of specific restraining state legislation. This contention is without merit. A municipal corporation can exercise only such powers as have been conferred upon it in its charter, some constitutional provision or general law. 18 Cal.Jur. 798, *Municipal Corporations*. In *Dillon on*

Municipal Corporations, 5th Ed., para. 237, the rule is stated that:

"A municipal corporation possesses and can exercise the following powers and no others:

"(1) Those granted in express words;

"(2) Those necessarily or fairly implied in or incidental to the powers expressly granted; and,

"(3) Those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable."

In the instant case there is no implied power to redistrict the city. When it was incorporated in 1938, councilmanic districts were established and the city was then subject to the provisions of the Government Code in the matter of the election of its councilmen. Petitioners are attempting by ordinance to change the boundaries of councilmanic districts so as to change and modify the procedure set forth in the general laws for the election of members of city councilmanic bodies. A super-imposition of the map of the proposed districts over that showing the existing districts clearly demonstrates the confusion in the election of councilmen which would result if the proposed ordinance were adopted.

In *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308, 310, the Supreme Court said:

"The city of Burlingame is a city of the sixth class organized and existing under and by virtue of the provisions of the General Municipal Corporations Act (Stats.1883, p. 93, and acts amendatory thereof and supplemental thereto). As such the city is limited in the exercise of its powers by the Constitution and general laws. It has only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the municipal corporation. Its powers are strictly construed, and any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation. These rules are ele-

mentary. *Egan v. [City and County of] San Francisco*, 165 Cal. 576 [133 P. 294, Ann.Cas.1915A, 754]; 18 Cal.Jur. pp. 797, 801, and cases cited.

* * * * *

"It is the established law of this state that an ordinance proposed by the electors of a county or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact under the law granting, defining and limiting the powers of such body. *Newsom v. Board of Supervisors*, 205 Cal. 262, 270 P. 676; *Galvin v. Board of Supervisors*, 195 Cal. 686, 235 P. 450. See, also, *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 P. 977; *Hyde v. Wilde*, 51 Cal.App. 82, 196 P. 118; *State ex rel. Davies v. White*, 36 Nev. 334, 136 P. 110, 50 L.R.A.,N.S., 195."

[2] It seems quite clear that since no power has been granted by general law for cities of the sixth class to redistrict such cities, the proposed ordinance is invalid. The city council has no power to pass an ordinance redistricting the city and in the absence of such power has no authority to adopt an initiative ordinance for such purpose.

[3] Appellants argue that the city council has no authority to pass on the validity or invalidity of the proposed ordinance. This argument is without merit. As was held in *Myers v. Stringham*, 195 Cal. 672, 676, 235 P. 448, 449: "* * * the writ may not be used to compel the performance of an act which would have no effect in law." And in *Hyde v. Wilde*, 51 Cal.App. 82, 84-85, 196 P. 118, 119, it is stated:

"If the proposed ordinance does not fall within the purview of the initiative reservation, then petitioners would have no right to insist that the city council pass the ordinance or call an election and submit it to a vote, for nothing would be thereby accomplished, and mandate is never permitted to be invoked to compel the performance of acts which will have no effect in law.

Navajo Mining [& Development] Co. v. Curry, 147 Cal. 582, 82 P. 247, 109 Am.St.Rep. 176; Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580. In State ex rel. Davies v. White, et al., 36 Nev. 334, 136 P. 110, 50 L.R.A.,N.S., 195, it is said: 'The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that would be void even if approved by a majority of the electors is too clear for discussion or the citation of authorities. It remains only to consider whether the proposed ordinance would be valid if enacted.'"

We conclude that the trial court did not err in granting respondents' motion for judgment on the pleadings and in ruling that the petition fails to state facts sufficient to authorize the issuance of the writ sought.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



121 Cal.App.2d 651

PEOPLE v. RYAN.

Cr. 2422.

District Court of Appeal,
Third District, California,

Dec. 2, 1953.

Defendant was convicted of issuing bad checks with intent to defraud, and moved to set aside judgment and petition for writ coram nobis. The Superior Court, Stanislaus County, B. C. Hawkins, J., denied motion and petition, and defendant appealed. The District Court of Appeal, Peek, J., held that where all errors complained of in proceedings leading to conviction were reviewable on appeal, writ of coram nobis did not lie to attack them.

Motion denied and order affirmed.

1. Criminal Law ⇨232

In absence of any affirmative showing to the contrary, court officials are presumed to have regularly performed their official duties, and defendant is presumed to have been advised of his rights. Code Civ. Proc. § 1963, subd. 15.

2. Criminal Law ⇨245

Where defendant did not move to set aside information on ground that he was denied right to counsel at preliminary examination, he waived any such defect in proceedings prior to commitment.

3. Criminal Law ⇨641(1)

Where defendant, who appeared to be intelligent and aware of court procedure, waived counsel, after having been fully advised of his rights, he could not complain that he was denied counsel.

4. Criminal Law ⇨1158(1)

Where defendant contended that he pleaded guilty upon representation by district attorney that he would receive lighter sentence, but district attorney denied the contention, court of appeal could not disturb Superior Court's decision on issue of fact presented.

5. Criminal Law ⇨273

Where defendant pleaded guilty to issuing checks with intent to defraud, he thereby admitted all of the essential elements of the crime, and it was unnecessary for prosecution to submit other evidence.

6. Criminal Law ⇨997(2)

Where all errors complained of in proceeding leading to conviction were reviewable on appeal, writ of coram nobis would not lie to attack them.

7. Criminal Law ⇨997(12)

Where defendant delayed four years after conviction before filing petition for writ of coram nobis, without showing justification for delay, his contentions could not be considered, since diligence is a prerequisite to issuance of writ of coram nobis.

8. Criminal Law ⇨997(17)

Where defendant filed motion to set aside judgment and petition for writ of coram nobis after his conviction for issu-

ing bad checks with intent to defraud, trial court's ruling denying his request to personally argue his petition was not an abuse of discretion.

Jackson Ryan in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Sacramento, for respondent.

PEEK, Justice.

This is an appeal from an order of the trial court denying defendant's motion to set aside a judgment of that court and his petition for a writ of error coram nobis. None of the contentions made by defendant are well founded, hence the conclusion of the trial court must be sustained.

The record before this court shows that by a complaint filed in the Justice Court of Modesto Township defendant was charged with issuing bank checks with intent to defraud. At the preliminary hearing in said Justice Court the defendant expressed a desire to take the stand and testify; the court admonished him that any statement that he might make or testimony he might give would be used against him in the event he was held to answer in the Superior Court. The defendant acknowledged that fact, stating that he understood the same but that he still desired to testify. He thereupon took the stand and admitted writing three checks on a Merced bank, at which bank he had no account or arrangements made for credit. He also admitted that he had suffered a prior conviction for the crime of robbery in the state of Texas and had served a sentence therefor in the Texas state penitentiary. He was thereupon held to answer in the Superior Court.

Thereafter an information was filed in the Superior Court charging defendant with three counts of issuing checks with intent to defraud. Upon his arraignment in the Superior Court defendant was advised of his rights, to which he replied that he did not want an attorney, that he "would just like to plead guilty and get it over with." Following his waiver of time for pro-

nouncement of sentence judgment was entered sentencing him for the term prescribed by law on each count in the information, said sentences to run concurrently. No appeal was taken from that judgment.

Subsequently defendant made a motion for the records in his case, which motion apparently was granted. He next moved to set aside and vacate the judgment and filed a petition for a writ of error coram nobis. A counter-affidavit filed by the district attorney of Stanislaus County specifically denied the allegations of the petition. Following the denial of defendant's motions he appealed to this court.

No briefs have been filed by appellant. However, he has communicated with the court stating that he would stand on the record of the Superior Court of Stanislaus County, which is on file herein.

From an examination of his petition in that court it would appear that three main contentions are made:

1. That he was denied the right to counsel at the time of his preliminary examination; (2) that he pleaded guilty solely upon the promise of the district attorney that he would receive a county jail sentence, and (3) that there was no evidence to support his conviction.

[1, 2] The record before us does not disclose the proceedings at the time of arraignment in the Justice Court but only those at the time of the preliminary examination. In the absence of any affirmative showing to the contrary we must presume that official duty was regularly performed and that the defendant was advised of his rights. Code Civ.Proc. § 1963, subd. 15. But even if we assume that the justice of the peace in the proceedings in that court failed to instruct the petitioner concerning his constitutional rights "the omission to do so affects only the legality of the commitment by the magistrate." In re Tedford, 31 Cal.2d 693, 192 P.2d 3, 4. Here, as in the Tedford case, no motion to set aside the information was made, hence the rule as therein stated is likewise applicable in this proceeding, that "in the absence of such a motion, any invalidity in the pro-

ceedings prior to the commitment is deemed waived. (Penal Code secs. 995, 996 [citing cases])."

[3] The record of the proceeding at the time of his preliminary hearing in the Superior Court shows that he was fully advised of his right to counsel and that he specifically waived that right. Furthermore, the record shows that he was not wholly ignorant of court procedure since he had suffered a prior conviction for a felony. Also his testimony before the Superior Court demonstrated that he was not an ignorant person but was a man of reasonable intelligence. He had finished his elementary schooling and was engaged in the business of a painter and decorator at the time of his arrest. While it is the rule that the right of an accused to counsel will be zealously protected, nevertheless it is a right which may be waived. In *re Connor*, 16 Cal.2d 701, 706, 108 P.2d 10. And in a case such as the present where the record "affords substantial basis for the conclusion that the waiver of his right to counsel was made by one who had an intelligent conception of the consequences of his act", In *re Tedford*, 31 Cal.2d 693, 695, 192 P.2d 3, 5, a reviewing court will not interfere. See, also, In *re Jingles*, 27 Cal.2d 496, 498, 165 P.2d 12.

[4] Defendant's next contention is that he pleaded guilty solely upon the promise of the district attorney that he would receive a county jail sentence. The affidavit of the district attorney denies that such representation was made. The district attorney further avers that the case was never discussed by him with any of the judges of said Superior Court and that no promise or assurance of any kind was made to the defendant for the purpose of inducing him to enter a plea of guilty or to testify at the hearing in that court. The factual issue so raised by defendant was resolved against him by the trial judge and cannot be disturbed by this court on appeal. *People v. Shapiro*, 85 Cal.App.2d 253, 194 P.2d 731.

[5] Defendant's final contention is likewise without merit. The record shows that defendant pleaded guilty to all of the counts as charged and therefore admitted all of the essential elements. Under such circumstances there was no necessity for other evidence to be adduced by the prosecution. *People v. Stone*, 69 Cal.App.2d 533, 159 P.2d 701.

[6, 7] It may well be added that there was no motion for a new trial nor was there an appeal from the judgment of conviction. Since all of the errors of which he now complains could have been reviewed on appeal, a writ of *coram nobis* will not now lie to attack the same. *People v. Smith*, 1952, 108 Cal.App.2d 696, 239 P.2d 466. Further there was a delay of more than four years between the time of the judgment and the filing of the petition for the writ. A defendant who by *coram nobis* would seek to attack a judgment must show due diligence in the pursuit of his remedy. In the absence of a showing justifying such delay this court will not now consider such contention.

[8] Lastly, it cannot be said that the trial court abused its discretion in denying him the right to personally appear and argue his petition. As stated in *People v. Russell*, 139 Cal.App. 417, 419, 34 P.2d 203, 204, the rule is well established that a defendant's "presence is not necessary after entry of judgment at the hearing of an appeal or other review of the judgment (citing cases) * * * [and] As there is no constitutional nor statutory right of a defendant to demand his presence at a proceeding brought to review or set aside a judgment, the failure of the trial court to order his presence on the hearing of this motion was not error." See *People v. Kerr*, 113 Cal.App.2d 90, 247 P.2d 927; *People v. Martin*, 78 Cal.App.2d 340, 177 P.2d 813.

The motion to dismiss is denied and the order of the trial court is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

121 Cal.App.2d 679

PEOPLE v. WILLIAMS.

Cr. 2931.

District Court of Appeal, First District,
Division I, California.

Dec. 4, 1953.

Defendant was convicted of possession of heroin. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence sustained the conviction.

Affirmed.

I. Criminal Law §698(1)

In prosecution for possession of heroin, testimony that landlord had told officers, just before they entered room in which plaintiff was arrested, that the "occupants" were then in the room, was competent when given, without objection, in response to questions asked by defendant's counsel upon cross-examination of one of officers.

2. Poisons §9

Conviction for possession of heroin was sustained by evidence. Health and Safety Code, § 11500.

C. L. Shinn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant Enos Williams has appealed from the judgment entered upon his conviction of a violation of section 11500 of the Health and Safety Code (possession of heroin) and from the order denying a new trial. One Jack Treasure, tried at the same time upon the same charge, admitted possession, was convicted, and has not appealed. The case was tried before the court without a jury.

The sole question is whether the evidence supports the verdict.

There was substantial evidence to the effect that Williams and Treasure were in a room about 10 feet by 14 feet in size. It contained a bed, a dresser and a table, with a wash basin in one corner. The table was against the wall, about four feet to the left of the door and Williams was standing at the table. Upon the table, in plain view, there were 8 bindles of heroin, 6 small pieces of paper, a can containing baking powder with a soda content, two eyedroppers in a package, a needle wrapped in cellophane; and in Williams' pocket another hypodermic needle. As the officers entered Treasure ran to the wash basin. Immediate inspection disclosed a fingerstall containing 18 grains of heroin in the basin.

[1] Treasure said to the officers at the time, "We have been here for several days," inferentially referring to himself and Williams, not to himself and wife, for she had not been in that room. She was serving a jail sentence of several months. Williams, present in the small room when the quoted statement was made, remained silent; said nothing to negative occupancy of the room by him. The landlord told the officers, just before they entered, that the "occupants" were then in the room.¹

Treasure, in his testimony, explained the use of the eyedropper and the hypodermic needle when making an intravenous injection. The state chemist testified that milk sugar is customarily used in cutting heroin but that sometimes a baking soda mixture is used.

Williams did not take the witness stand.

[2] The evidence of occupancy, the open display of the bindles of heroin and other articles used in the preparation and application of narcotics, and other circumstances including the presence of the hypodermic needle upon his person, with the inferences which reasonably may be drawn from such evidence, support an implied finding that Williams had physical control

4. This hearsay testimony was competent because given without objection, in response to questions asked by Williams'

counsel upon cross-examination of one of the officers.

with intent to exercise control of the heroin, including "*knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute." The basic element of the offense as defined in *People v. Gory*, 28 Cal.2d 450, 455-456, 170 P.2d 433. We conclude that his conviction of possession, as charged, is supported by the evidence.²

The judgment and the order are affirmed.

PETERS, P. J., and BRAY, J., concur.



CHARLES H. BENTON, Inc.

v.

PAINTERS LOCAL UNION NO. 333 et al.*

Civ. 4808.

District Court of Appeal,
Fourth District, California.

Dec. 3, 1953.

Rehearing Denied Dec. 22, 1953.

Hearing Granted Jan. 27, 1954.

Action by employer against labor unions to enjoin picketing and to recover damages for violation of no-strike provision of contract with one of defendant unions. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment granting an injunction and awarding damages, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that state court had no jurisdiction to enjoin peaceful picketing of operations affecting interstate commerce.

2. The following decisions furnish adequate exposition of the pertinent principles of law and apply them to varying sets of similar circumstances which support conviction of possession as denounced by the statute: *People v. Charley Quong*, 5 Cal.App.2d 137, 140-141, 42 P.2d 386; *People v. Rodrigues*, 25 Cal.App.2d 393, 77 P.2d 503; *People v. Graves*, 84 Cal.

* Opinion vacated 291 P.2d 13.

Judgment affirmed in part and reversed in part.

1. Labor Relations ⇨332

Demand that employer whose activities affected interstate commerce within meaning of National Labor Relations Act execute a contract with labor unions, neither of which had been designated by any of employer's employees as collective bargaining representative or certified as such by National Labor Relations Board, declaring such unions to be exclusive bargaining agent for all employees and requiring all employees to join union was unlawful under National Labor Relations Act. National Labor Relations Act, §§ 1 et seq., 8(a) (3), (b) (2), as amended 29 U.S.C.A. §§ 141 et seq., 158(a) (3), (b) (2).

2. Labor Relations ⇨510

Peaceful picketing of operations affecting interstate commerce, though for unlawful purpose of compelling employer to execute contract with uncertified unions which would require employer to violate National Labor Relations Act, must be separated from such illegal purpose and was not in itself in violation of state law, and hence under amendment of National Labor Relations Act giving National Labor Relations Board exclusive jurisdiction of unfair labor practices, affecting interstate commerce, state court had no jurisdiction to enjoin such picketing. National Labor Relations Act, §§ 1 et seq., 8(a) (3), (b) (2), as amended, 29 U.S.C.A. §§ 141 et seq., 158(a) (3), (b) (2).

3. Labor Relations ⇨768

State court had jurisdiction to award damages against roofers' union and other unions which, though they had no contract with plaintiff, actively participated in bringing about a violation of no-strike

App.2d 531, 534-535, 191 P.2d 32; *People v. Hardeman*, 94 Cal.App.2d 51, 52-54, 210 P.2d 283; *People v. Watkins*, 96 Cal.App.2d 74, 77, 214 P.2d 414; *People v. Torres*, 98 Cal.App.2d 189, 193, 219 P.2d 480; *People v. Rumley*, 100 Cal. App.2d 6, 9-10, 222 P.2d 913; *People v. Foster*, 115 Cal.App.2d 866, 868-869, 253 P.2d 50.

provision of contract between plaintiff and roofers' union, particularly where plaintiff's roofing business did not affect interstate commerce. National Labor Relations Act, §§ 1 et seq., 303(a, b), as amended, 29 U.S.C.A. §§ 141 et seq., 187 (a, b).

4. Labor Relations ⇐768

Whether hiring clause contained in contract between roofers' union and employer whose roofing business did not affect interstate commerce would be forbidden by National Labor Relations Act if interstate commerce was affected did not affect jurisdiction of state court to award damages against roofers' union and other unions for violation of no-strike provision of contract. National Labor Relations Act, §§ 1 et seq., 303(a, b), as amended, 29 U.S.C.A. §§ 141 et seq., 187(a, b).

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellants Painters Union and Roofers Union.

Thomas Whelan, San Diego, for appellant Truck Drivers Union.

Gray, Cary, Ames & Frye, James W. Archer, Ward, W. Waddell, Jr., San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff is engaged in business as a paint dealer, and as a roofing contractor. It is admitted that its activities as a paint dealer affect interstate commerce, within the meaning of the National Labor Relations Act, 29 U.S.C.A. § 141 et seq. The plaintiff had a contract with the defendant roofers' union, by which it was agreed that there should be no strikes and that all controversies should be settled by arbitration. It had no contract with the other defendants. The painters' union and the truck drivers' union demanded that the plaintiff sign a contract declaring those unions to be the exclusive bargaining agent for all employees, and requiring all employees to join the union. The plaintiff refused to sign this contract and sought a National Labor Relations Board election.

Its application was denied because the unions admitted that they did not represent any of plaintiff's employees. The painters' and truck drivers' union then started picketing operations, and the roofers' union joined them in inducing the roofers to strike, in violation of the existing contract. None of plaintiff's employees had designated either the painters' or truck drivers' unions as their collective bargaining representative, and neither of these unions had been certified by the National Labor Relations Board as the bargaining representative of the employees. The plaintiff made no effort to file an unfair labor practice charge, as provided for by the National Labor Relations Act as amended.

The plaintiff brought this action asking that the defendants be enjoined from picketing or interfering with its business in order to compel the execution of such a contract as that demanded until the unions were properly designated as the bargaining agent of the employees; that the roofers' union be restrained from refusing to furnish roofers so long as its contract remained in effect; and for damages for a violation of that contract. The court found in favor of the plaintiff, finding among other things that plaintiff's paint business affects interstate commerce; that the picketing was for an unlawful purpose, to compel the plaintiff to sign a contract that would require it to unlawfully discriminate with respect to conditions of employment; and that the contract with the roofers' union had been violated. A judgment was entered restraining the painters' and truck drivers' unions from picketing or interfering with plaintiff's business in order to compel the plaintiff to execute any contract of that nature until such unions, or one of them, was properly designated as the collective bargaining representative of plaintiff's employees; restraining the roofers' union from inducing any work stoppage among the roofers employed by plaintiff so long as that contract remained in effect; and awarding damages in the sum of \$2,243.78 against all defendants. All three unions have appealed from the judgment.

The sole question raised is whether the trial court had jurisdiction to grant an injunction or to award damages because of activities of the defendants which constituted an unfair labor practice under the provisions of the National Labor Relations Act, as amended. The main question presented is whether the court had jurisdiction to enjoin those union activities, one purpose of which involved a demand for a contract requiring a violation of the federal law, when the decision of the controversy would necessarily involve and be based upon the effect and application of the provisions of the federal act. The appellants contend that their actions were not in violation of any law of this state; that any unlawfulness would arise only from the provisions of section 158(a) (3) and (b) (2) of the National Labor Relations Act as amended, which forbid an employer or a labor organization to discriminate or cause a discrimination against an employee in violation of other provisions of the act; that the National Labor Relations Act, as amended, provides the only remedy; and that the trial court had no jurisdiction to enjoin acts of the appellants which constituted unfair labor practice under the federal act, but which were otherwise lawful in this state.

The respondent contends that the act of the appellants in seeking this contract was not expressly forbidden by the federal statute; that the contract they sought would have forced the respondent to violate the federal law; that the purpose of appellants' strike was, therefore, illegal because it was to procure a contract which by virtue of the federal law it would be illegal to carry out; that since its purpose is unlawful under the federal law the activity of appellants is not protected by that law; that since this activity is neither forbidden by nor protected by the federal law it is subject to regulation by the state; and that the appellants may be enjoined by a state court since it is unlawful in this state to picket for an unlawful purpose, as declared in many decisions. It is then argued that this activity of the unions has never been held in any

case to be an unfair labor practice under the National Labor Relations Act; that even if this conduct was in violation of the federal law this would not prevent a state court from enjoining a violation of its own law; and that it was held in *Sommer v. Metal Trades Council*, 40 Cal. 2d 392, 254 P.2d 559, that any activity which is neither forbidden nor protected by federal law is subject to state regulation.

[1] The real purpose of this action was to restrain activities claimed to be for an illegal purpose, in that they were intended to compel the respondent to execute a contract which would require it to violate the National Labor Relations Act. It clearly appears that the demand made was unlawful under the federal act. The effect of the injunction as ordered was to forbid picketing activities, although the unlawful demand for a contract was not the only or ultimate purpose of those activities. This unlawful demand may be separated from the later activities, and we regard certain decisions of the Supreme Court of this state as controlling here. In the *Park & Tilford* case (*Park & Tilford Import Corp. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*), 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426, the unions presented a closed shop contract which the employer refused to sign on the ground that to do so would be an unfair labor practice, under the federal act, since the union did not represent the salesmen. The trial court enjoined the defendant from picketing or interfering in any way with the sale or delivery of products. The Supreme Court held that while the union's demand for a contract was unlawful, its later activity was lawful since its purpose was to secure a closed shop, and modified the judgment by limiting the injunction to restraining the defendant from making any unlawful demand so long as it did not represent the requisite majority of the plaintiff's employees. While that decision, on its face, supports the form of injunction granted here, that case was decided prior to the 1947 amendment of the fed-

eral act. Under that amendment a different question is presented with respect to the matter of jurisdiction.

In *Gerry of California v. Superior Court*, 32 Cal.2d 119, 194 P.2d 689, 694, the situation presented was very similar to that in the instant case. Although the plaintiff was willing to enter into a contract if the unions were properly certified by the National Labor Relations Board, the uncertified unions carried on picketing and boycotting activities before that was done, and the plaintiff sought an injunction. It was there held that under the National Labor Relations Act, as amended in 1947, a state court has no jurisdiction, at the suit of a private person, to enjoin union activities affecting interstate commerce and covered by the federal act. The court said: "The provisions of the 1947 Act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers." After pointing out that the language used in the *Park & Tilford* case, *supra*, indicating a contrary holding, had been rendered inapplicable by the 1947 amendment, the court said: "The employer as well as the union is now required by the 1947 Act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause of action for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 act."

In the case of *In re De Silva*, 33 Cal. 2d 76, 199 P.2d 6, 8, the employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Relations Act, 1947, since there had been no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board un-

der the terms of the federal act. In commenting on the *Gerry* case, *supra*, the court said: "This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of actions for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

The decision of the Circuit Court, Ninth Circuit, in the case of *Capital Service, Inc., etc., v. National Labor Relations Board*, 204 F.2d 848, involving an unfair labor practice under the National Labor Relations Act, confirms the position taken by the State Supreme Court with respect to the principles here involved.

The case of *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559, 563, involved a claimed violation of the Jurisdictional Strike Act, Section 1115 et seq., Labor Code, which was also prohibited by the National Labor Relations Act as amended. After pointing out that the decision in the *Gerry* case "was a determination that in the absence of a valid applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National Board", the court held that the state statute there in question was consistent with the policy expressed in the federal act; that since the union activity involved was not protected by the federal act it was not immunized from state action; that since the national board had not finally acted on proceedings brought there, a possible area of activity was involved which was neither protected nor condemned under the federal act, and which was subject to state action; and that, since the requisite factual elements could not be determined until a trial on the merits, the court was justified in maintaining the status quo, through a preliminary injunction, until the questions as to the lawfulness of the union activity could be decided. In the instant action no state statute

forbidding these union activities is involved. While the demand for this contract was illegal under the federal act, the subsequent activities were not illegal under the state law. There was no area of activity involved which was neither protected nor condemned by the federal act; and the activity in question, which must be separated from the illegal demand under the holding in the Park & Tilford case, was not illegal under the decisions in this state. There being no local statute affording relief, there was no factual element dependent upon a trial, which would justify a preliminary injunction.

[2] The real purpose of this action was, in effect, to invoke the protection of the federal law in order to obtain an injunction restraining activities which were not illegal under the state law. Under the circumstances, in view of the decisions cited, we feel bound to hold that the trial court had no jurisdiction to issue this injunction.

The appellants further contend that the trial court was likewise without jurisdiction to award damages. It is argued that the purposes of the union activities here did not come within the matters condemned in subsection (a) of section 303 of the Federal Act; that section 303 did not create any rights of action for damages in classes of cases falling outside the definition therein set forth; and that it follows that subsection (b) of that section does not authorize the exercise of jurisdiction by a state court in the matter of damages here involved.

[3, 4] Aside from the ultimate purpose of the union activities here in question the appellants, working together, brought about a violation of the no-strike provision of the contract between the respondent and the roofers' union, which was then in force. Not only were some of the activities in question sufficient to bring the matter within the intent and meaning of section 303, but aside from that phase of the case, there was also a clear-cut violation of the roofers' union contract in which the other unions took an active part. These elements were separate and distinct, and could be separately treated. Moreover, the roofing business did not affect interstate commerce, and the

question as to the violation of the roofers' union contract was a matter which was within the jurisdiction of the state court. While the idea is somewhat startling in these days, there is nothing inherently illegal in requiring a labor organization to live up to its written contracts. In the closing brief the appellants argue, for the first time, that the entire contract between the respondent and the roofers' union was illegal and unenforceable, since it contained a hiring clause which would be forbidden by the National Labor Relations Act if interstate commerce was affected. Aside from other considerations, including the matter of severability, no lack of jurisdiction appears in this connection, and that is the only question raised.

That part of the judgment awarding damages is affirmed, and the portion which orders the issuance of an injunction is reversed. Each party to pay its own costs.

GRIFFIN and MUSSELL, JJ., concur.



SCHLYEN et al. v. SCHLYEN.*
Civ. 19324.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1953.

Rehearing Denied Dec. 7, 1953.

Hearing Granted Jan. 13, 1954.

Minor children of deceased brought action against widow of deceased to cancel deceased's joint tenancy deeds conveying realty to deceased and widow, on ground that execution of deeds was procured by widow's alleged undue influence and fraud. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered judgment dismissing the action for lack of jurisdiction of the subject matter, and the minor children appealed. The District Court of Appeal held that the Superior Court committed prejudicial error in dismissing the action.

* Subsequent opinion 273 P.2d 85.

for lack of jurisdiction of the subject matter.

Judgment reversed.

Fox, J., dissented.

See also 105 Cal.App.2d 648, 234 P.2d 211.

Appeal and Error ⇨1061(2)

Dismissal and Nonsuit ⇨55

In action by minor children of deceased against widow of deceased to cancel deceased's joint tenancy deeds conveying realty to deceased and widow, on ground that execution of deeds was procured by widow's alleged undue influence and fraud, trial court committed prejudicial error in dismissing the action for lack of jurisdiction of the subject matter.

Samuel W. Blum and M. Seaton Cohen, Los Angeles, for appellants.

Benjamin Elconin and Max Bergman, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiffs appeal from a judgment of dismissal rendered April 9, 1952, vacating and setting aside a prior judgment rendered herein, and dismissing the action "for lack of jurisdiction of the subject matter."

The action is one in equity brought by plaintiffs, through their mother as guardian *ad litem*, as the minor children and heirs-at-law of David Schlyen, deceased, against defendant, the third wife of decedent, individually, as the remaining heir-at-law of decedent. The purposes of the suit are to cancel two joint tenancy deeds executed by David Schlyen, dated May 28, 1948, purportedly conveying certain real property to decedent and defendant as joint tenants, upon the ground that the same were procured by defendant's undue influence and fraud, and also to have such real property restored to decedent's estate and administered therein according to law.

The dismissal was granted upon defendant's sole contention, that since defendant at the commencement of this action was the special administratrix of decedent's estate, although not sued herein as such, the

court of equity had no jurisdiction of the subject matter and was thus precluded from granting any relief. She made such demand notwithstanding the action was by heirs of decedent against a co-heir, the title of the property involved had been in joint tenancy, had constituted no part of decedent's estate, and defendant had appeared and contested the action solely in her individual capacity and claimed the property as her own, adversely to the estate and the plaintiffs as heirs.

The question of jurisdiction was first urged on February 9, 1951, in defendant's opposition to plaintiffs' motion to dismiss a prior appeal (*Schlyen v. Schlyen*, 102 Cal. App.2d 742, 228 P.2d 55).

This is the sole question necessary for us to determine:

Did the trial court commit prejudicial error in granting the motion to dismiss for lack of jurisdiction for the reason that in a prior appeal the appellate court necessarily determined that the trial court did have jurisdiction over the subject matter of the instant action, which determination became the law of the case?

Yes. David Schlyen died October 5, 1948, leaving surviving him as his sole heirs, plaintiffs, his two minor children, and defendant, his third wife, whom he had married September 3, 1943. On May 28, 1948, shortly before his death, he executed two joint tenancy deeds purportedly conveying certain valuable real property, consisting of his sole and separate property, to himself and the defendant as joint tenants.

After decedent's death, defendant filed a petition for probate of his alleged will, dated April 20, 1945, wherein defendant was named executrix and was given decedent's entire estate, except \$1.00 which was given to each of the plaintiffs. Plaintiffs, by their mother as guardian *ad litem*, filed written objections to the probate and contest of said will, alleging (1) improper execution of the will; (2) unsoundness of mind of decedent; (3) undue influence exercised by defendant, and (4) fraud exercised by defendant. Pending said contest defendant was appointed special administratrix of decedent's estate.

On April 28, 1949, and before the trial of the will contest, plaintiffs, as heirs at law of decedent, commenced the present action against defendant, individually, and as decedent's only other heir at law, to cancel the two joint tenancy deeds above mentioned and to restore said real property to decedent's estate to be administered according to law. Defendant appeared and answered the complaint solely in her individual capacity.

On June 24, 1949, by stipulation this action and the will contest were consolidated for trial before a jury, the stipulation providing for separate verdicts and judgment, the verdict in this action to be advisory only, with the final determination to be made by the court, and that the same evidence was to apply to both cases, so far as applicable, under their respective pleadings.

Trial of this action and the will contest was had. On October 13, 1949, the jury, in response to special interrogatories, found that the joint tenancy deeds were procured through the undue influence and fraud of defendant. On December 14, 1949, the court adopted the jury's findings and made and filed its written findings of fact and conclusions of law in accordance with the allegations of plaintiffs' complaint and signed and filed its judgment herein, by which the two joint tenancy deeds were cancelled, and the real properties therein described were restored to and declared a part of decedent's estate, subject to the administration thereof. The judgment further ordered defendant to account for all rents, issues and profits obtained from said real property from decedent's death to said accounting, and directed said sum, so ascertained, to be turned over to the then legally appointed and qualified representative of decedent's estate, to be administered therein according to law. The court further retained juris-

diction for the purpose of such accounting, to make further necessary orders in connection therewith, and to render a judgment in connection with such accounting.

On January 6, 1950, defendant appealed from the aforesaid judgment and the cause came on for hearing before the District Court of Appeal. On January 25, 1951, plaintiffs, as respondents therein, filed a notice of motion to dismiss said appeal upon the ground that the judgment was interlocutory and not final, and hence not appealable. A few days before the hearing, defendant filed a memorandum in opposition to said motion and for the first time raised the question of jurisdiction, asserting that the trial court had no jurisdiction over the subject matter of this action and therefore could not require defendant to render any accounting, and urged that said judgment was null and void. During the oral argument on said motion the question of jurisdiction was raised both by the appellate court and by defendant's counsel.*

On March 8, 1951, the appellate court granted plaintiffs' motion to dismiss the appeal, saying in part: "Motion to dismiss appeal. The judgment from which an appeal was attempted annulled two joint tenancy deeds and restored and declared to be a part of the estate of David Schlyen, deceased, the real property described therein. It further ordered defendant and appellant, Alice Harriet Schlyen, to account for all rents, issues and profits of the real property from October 5, 1948 and to turn over the same to the representative of the estate of said decedent. The judgment also provided: '* * * and the court, upon such accounting, shall grant such other and further relief and make such other and further order as may be just and proper in connection therewith. The above entitled Court shall and hereby does retain and maintain con-

* During the course of the argument the following occurred:

"Justice Vallée: Are there any authorities to the effect that the court does not have jurisdiction in equity to try title as between an executor or administrator on the one hand and the estate on the other?"

"Mr. Bergman: Yes, but I did not go into the argument because that would af-

fect the entirety of the judgment and not the interlocutory. The question is, is it an interlocutory or a final judgment? A direction for an accounting is final. On the basis of the accounting they make their motion to dismiss. This is not the time to argue validity of the entire judgment—that would be an issue on the main appeal."

tinuing jurisdiction of the above entitled action, and of all of the parties hereto for all purposes in connection with such accounting, and the taking, the rendition, and the enforcement thereof, and to make such other and further order or orders in connection therewith as may be necessary and proper and to render a judgment in connection with such accounting.' The ground of the motion to dismiss is that the judgment was interlocutory and not final, and hence is not appealable. The motion should be granted. Further judicial action will be required in the ascertainment of the amount due, if any, upon a just accounting and in the rendition of a money judgment therefor. All matters determined by the judgment will be reviewable on appeal from a final judgment when the same is entered. (David v. Goodman, 89 Cal.App.2d 162 (200 P.2d 568).)" [102 Cal.App.2d 742, 228 P.2d 55.]

On May 3, 1951, defendant's petition for a hearing by the Supreme Court was denied.

In defendant's written opposition to plaintiffs' motion to dismiss the appeal in *Schlyen v. Schlyen*, 102 Cal.App.2d 742, 228 P.2d 55, defendant first raised the question of jurisdiction of the trial court in this action and asserted that the accounting provisions of said judgment were null and void and should be disregarded as a nullity. Defendant therefore asserted that the judgment was final and appealable, even though the judgment in its entirety was void for lack of jurisdiction. Her entire argument was predicated upon the claim that the court of equity was without jurisdiction and that the probate court had exclusive jurisdiction in this action. This position was maintained upon oral argument, defendant's counsel stating, among other things, "I indicated in my memorandum and cited three cases in point in which it was directly held that the entire judgment would be void." Defendant attempted to partially withdraw from the court's consideration the issue of the invalidity of the entire judgment by asserting "this is not the time to argue the validity of the entire judgment—that would be an issue on the main appeal." Such attempt, however, could not withdraw the issue of jurisdiction that was then squarely before the appellate court and it did not and cannot

prevent the operation of the rule of "the law of the case" since the asserted invalidity of the interlocutory provisions of the judgment, to wit, a total lack of jurisdiction in the trial court, if correct, would have permeated not only the accounting provisions of the judgment but also the entire judgment itself.

If, under defendant's argument, the interlocutory provisions were null and void, then for the same reason the entire judgment was null and void for it took the same jurisdiction to render the accounting provisions as it did to render the entire judgment. If, as defendant claimed, the record before the appellate court disclosed that the entire judgment was void, the appellate court on the motion to dismiss had the absolute duty to consider that point. Lack of jurisdiction of the trial court may be raised at any time, at any stage of the proceedings, including a motion to dismiss, and it is the duty of the court, irrespective of the wishes of the parties, when the point is raised as to the lack of jurisdiction at any stage in the proceedings to consider and pass upon such question. (In re Fox West Coast Theatres, D.C.S.D.Cal., 25 F.Supp. 250, 256 [1]; Fitzpatrick v. Sonoma County, 97 Cal.App. 588, 593 [3], 276 P. 113; In re Estate of Palmieri, 120 Cal.App. 698, 700 [2], 8 P.2d 152; see also cases cited in 14 West's California Digest (1951), p. 329, Courts, ¶39.)

Obviously this court in *Schlyen v. Schlyen*, supra, rejected defendant's contention in toto for it upheld the validity of the accounting provisions, thereby rendering the judgment interlocutory and of necessity upholding the validity of the entire judgment on jurisdictional grounds. The court in its opinion obviously passed upon the contention adversely to defendant that the trial court did not have jurisdiction by stating in its opinion, after reciting the provisions of the judgment and the particulars wherein the trial court reserved jurisdiction for an accounting, and the rendition of a money judgment thereon, "Further judicial action will be required in the ascertainment of the amount due, if any, upon a just accounting and in the rendition of a money judgment therefor." Certainly if the trial

court was without jurisdiction then there could be no "further judicial action" on its part nor could it ascertain the amount due upon a just accounting and render "a money judgment therefor."

It is self-evident that a court without jurisdiction could not render a valid judgment. It is also crystal clear that the appellate court's decision upheld the jurisdiction of the trial court in this action and that such holding is now the law of the case. All questions and issues adjudicated on a prior appeal are the law of the case and must be adhered to through subsequent stages of the same case, both in the lower court and upon any succeeding appeal. (*Allen v. California Mutual Bldg. & Loan Ass'n*, 22 Cal.2d 474, 481, 139 P.2d 321; *Gore v. Bingham*, 20 Cal.2d 118, 120 et seq., 124 P.2d 17; *Kirman v. Borzage*, 89 Cal.App.2d 898, 900 [1], 202 P.2d 303.) Likewise, the law of the case doctrine will be applied to decisions of the District Court of Appeal after those decisions become final. (*Gore v. Bingham*, supra, 20 Cal.2d 122 [3], 124 P.2d 19; *Allen v. California Mutual Bldg. & Loan Ass'n*, supra, 22 Cal.2d 481 [1] [2], 139 P.2d 325.) The doctrine of the law of the case applies to jurisdictional questions as well as to other matters. The rule is aptly stated in 4 Cal.Jur.2d (1952), p. 606, Appeal & Error, § 700, thus: "The law of the case doctrine applies to jurisdictional questions as well as to other matters."

In *Clary v. Hoagland*, 6 Cal. 685, at page 687, the court said: "The answer as we conceive is this: the first point decided by any Court, although it may not be in terms, is, that the Court has jurisdiction, otherwise it could not proceed to determine the rights of the parties. For the purposes of the first trial in this Court, the jurisdiction was as much determined as though the point had been made and passed upon; certain it is, that unless made, it cannot now be questioned." (See also *Gore v. Bingham*, supra, 20 Cal.2d at page 120, 124 P.2d 18; *Security Trust & Savings Bank v. Southern Pacific Railroad Co.*, 19 Cal.App.2d 420, 422, 65 P.2d 818.)

Where questions presented on a subsequent appeal were necessarily involved in

a former appeal, and the conclusion reached in the former appeal could not have been reached without impliedly deciding the question subsequently urged, the decision in the former appeal is the law of the case and rules throughout all subsequent stages of the action. (*Kirman v. Borzage*, 89 Cal. App.2d 898, 900 [2], 202 P.2d 303; *People v. Walker*, 76 Cal.App. 192, 202, 244 P. 94; *Neale v. Morrow*, 163 Cal. 445, 448, 125 P. 1052.)

In the present case on the former appeal, as pointed out above, the appellate court of necessity impliedly held that the trial court had jurisdiction of the present action. It is settled that all questions decided on a motion to dismiss an appeal become the law of the case. (*Stock v. Meek*, 114 Cal.App. 2d 584, 586 [1], 250 P.2d 622; *Craig of California v. Green*, 89 Cal.App.2d 829, 833, 202 P.2d 104.)

In conclusion, we quote from Mr. Justice Vallée's opinion in *Tomkins v. Tomkins*, 89 Cal.App.2d 243, 250, 200 P.2d 821, 826, thus: "If want of jurisdiction of the subject matter is made to appear, the decree is a nullity and it may be attacked either directly or collaterally on this ground. * * * These principles are subject to the qualification, that if a court's jurisdiction to render a particular decree has once been attacked, a final adjudication of that issue precludes the raising of the question again."

It is obvious that the court's jurisdiction over the subject matter of the present action was attacked on the prior appeal and that necessarily in determining the motion to dismiss, the appellate court held that the trial court did have jurisdiction and this has become the law of the case and may not now be questioned by defendant.

The judgment of dismissal is reversed.

MOORE, Presiding Justice.

I concur in the judgment.

The superior court pursuant to its equity powers has general jurisdiction of actions to impress trusts, to cancel deeds and to set aside fraudulent conveyances. Const. Art. VI, sec. 5; *Tulare Irrigation District v. Superior Court*, 197 Cal. 649, 660, 242

P. 725; *Morrissey v. Morrissey*, 191 Cal. 782, 784, 218 P. 396. In general, the superior court sitting in probate is without jurisdiction to try the question of title to property. *Bauer v. Bauer*, 201 Cal. 267, 271, 256 P. 820; *In re Estate of Haas*, 97 Cal. 232, 234, 31 P. 893, 32 P. 327; *Ex parte Casey*, 71 Cal. 269, 272, 12 P. 118. But where such title is claimed by a representative of an estate in his individual capacity, the superior court sitting in probate is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative. *In re Estate and Guardianship of Vucinich*, 3 Cal.2d 235, 243, 44 P. 2d 567; *Stevens v. Superior Court*, 155 Cal. 148, 150, 99 P. 512; *Teeple v. Stanley*, 93 Cal.App.2d 581, 583, 209 P.2d 628. This exception exists because it is essential to the proper administration of estates that, for the purpose of determining the extent of the liability of the executor or administrator to those interested in the estate, the probate court should have the power to determine as against him what money or other property belonging to the estate has come into his hands. However, where a court has general jurisdiction of the subject matter a lack of jurisdiction of the particular case may be waived by failure to take timely and specific objection as may other objections to jurisdiction, such as lack of jurisdiction of the person. *In re Estate of Michels*, 18 Cal.App.2d 201, 203, 63 P.2d 333; *Donegan v. City of Los Angeles*, 109 Cal.App. 673, 682, 293 P. 912; *Young v. City of Los Angeles*, 86 Cal.App. 13, 17, 260 P. 798.

The foregoing doctrine is exemplified in *Miller v. Forster*, 131 Cal.App. 509, 21 P. 2d 678, a decision whose facts closely parallel those at bar. It was an action to declare a trust, filed while the estate, for the benefit of which the action was brought, was in probate. Plaintiff was an heir of the decedent; defendant, sued in his individual capacity, was the administrator. Since defendant did not raise the point of lack of jurisdiction in the equity court by demurrer or by answer, on appeal the court refused to consider the contention, but held that defendant had waived his privilege of having to assert his individual title to the

property only at the final accounting in probate. Accord: *Simons v. Bedell*, 122 Cal. 341, 346, 55 P. 3.

In the present action appellants, heirs of decedent, sued respondent, executrix, in her individual capacity seeking equitable relief. The complaint having been filed April 28, 1949, respondent answered without objecting to the jurisdiction of the court and raised several affirmative defenses. After a trial of more than twenty days, resulting in a verdict for appellant, respondent moved for judgment notwithstanding the verdict. Subsequently she objected to the findings of fact and conclusions of law, filed two notices of intention to move for a new trial, argued the motion, appealed and filed an opening brief without ever questioning the jurisdiction of equity. In February 1951, seventeen months after the trial, in opposing a motion to dismiss the appeal, the question of jurisdiction was raised for the first time. In such circumstances, respondent has waived every right she had to object.

The authorities relied on by respondent may be distinguished on their facts. They concern actions to impress trusts by an heir against an executor or administrator. But in each there is an objection to jurisdiction made at the first possible instant. In *Stevens v. Superior Court*, *supra*, as well as in *Re Estate of Roach*, 208 Cal. 394, 281 P. 607, the action was in the probate court where it was argued that the court *did not have* jurisdiction to impress a trust on property held by the executor as an individual, relying on the general rule discussed above. But the court created and followed the exception in favor of the representative of an estate where the action is prosecuted by an heir. *Bauer v. Bauer*, *supra*, and *Teeple v. Stanley*, *supra*, were actions for equitable relief under the general jurisdiction of the superior court. In each of them it was held that since there had been an objection to jurisdiction made by the representative and there was an action pending in the probate court and that court had jurisdiction, the privilege of the representative would be recognized and the cases were dismissed without prejudice.

The judgment of this case is not and does not purport to be conclusive against non-appearing heirs or creditors of the estate, as to their ultimate rights to the property. The judgment does transfer the title from the name of respondent as an individual to the estate of the decedent and there it will be subject to the regular probate procedures.

The judgment vacating the prior judgment and dismissing the action should be reversed.

FOX, Justice (dissenting).

I dissent.

The dismissal of the prior appeal was upon the ground that the judgment was interlocutory and nonappealable. In passing on the appealability of a particular judgment or order on a motion to dismiss, an appellate court will not review the authority of the trial court to make it. 3 Cal.Jur.2d 512; *In re Estate of Mailhebau*, 201 Cal. 664, 666-667, 258 P. 378; *Sherman v. Standard Mines Co.*, 166 Cal. 524, 525, 137 P. 249; *In re Seymour's Estate*, 15 Cal.App. 287, 292, 114 P. 1023; *Howard v. Howard*, 87 Cal.App. 20, 27, 261 P. 714; *In re Estate of Flint*, 15 Cal.App.2d 299, 301, 59 P.2d 609. On the prior appeal no inquiry into the trial court's jurisdiction was required to determine the nonappealability of the judgment. A mere examination of the judgment disclosed that it was interlocutory, hence the appellate jurisdiction of the court to review it was not invoked. *In re Estate of Mailhebau*, *supra*; *Sherman v. Standard Mines Co.*, *supra*. The court was therefore not called upon to determine whether or not the trial court initially had jurisdiction of the subject matter. Consequently, "the law of the case" is not here applicable. Actually, the only effect of the dismissal of the appeal was to clear the records of the appellate court of the matter. *Central Savings Bank of Oakland v. Lake*, 201 Cal. 438, 443, 257 P. 521. It "left the case with the superior court just as it stood on the date the abortive appeal was taken." *In re Estate of Brady*, 95 Cal.App.2d 511, 513, 213 P.2d 125, 127.

In dismissing the appeal the court undoubtedly had in mind its lack of authority to then pass upon the question of the trial

court's jurisdiction which had been adverted to in the course of the argument, for the court pointed out that "All matters determined by the judgment will be reviewed on appeal from a final judgment when the same is entered." Obviously, one of the matters determined by the final judgment would be that of the trial court's jurisdiction.

The jurisdiction of the subject matter in the instant proceeding was exclusively in the probate court under the decisions in *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820, and *In re Estate of Roach*, 208 Cal. 394, 281 P. 607.

In the *Bauer* case the executrix of decedent's estate claimed certain property as her own. Plaintiffs, as legatees, brought a suit in equity against her, praying that she be adjudged a trustee of said property for the benefit of plaintiffs and the estate. The trial court sustained, without leave to amend, a demurrer and dismissed the action. In affirming the judgment the Supreme Court pointed out, 201 Cal. at page 271, 256 P. at page 821, that "The main question presented upon this appeal is as to whether the court had *jurisdiction of the subject-matter of the action*, for the reason that there was pending in the probate court the proceedings for the administration of the estate of Emile Bauer, deceased, and that, this being so, the probate court was the proper forum for the presentation and determination of the issues sought to be tried in this action." (Emphasis added.) Two years later, in the *In re Estate of Roach*, *supra*, it was held that the probate court had exclusive jurisdiction to hear the objections of an heir of the decedent to the effect that the administratrix of the estate had fraudulently procured, shortly prior to the death of the decedent, a deed to certain of his separate property, and that she had failed to include such property in the assets of the estate. In arriving at its conclusion the court relied on the *Bauer* case, and stated 208 Cal. at page 396, 281 P. at page 608, that "The necessary effect of the above decision, in dismissing said proceeding in equity, is to vest in the probate court *exclusive jurisdiction* to hear and determine issues of this character." (Emphasis added.) Thus

these two cases adjudicate the question of the jurisdiction of the subject matter in an action such as this both from the standpoint of the general jurisdiction of the superior court and the specific jurisdiction of the probate court. They make it clear that such jurisdiction lies exclusively with the latter court. Where the trial court initially lacks jurisdiction of the subject matter of the action, such jurisdiction may not be conferred by either consent, waiver, agreement, acquiescence or estoppel. (*Sampsell v. Superior Court*, 32 Cal.2d 763, 773, 197 P.2d 739; *Fong Chuck v. Chin Po Foon*, 29 Cal.2d 552, 554, 176 P.2d 705; *Schipp v. Superior Court*, 209 Cal. 671, 677, 289 P. 825; *Higgins v. Coyne*, 75 Cal.App.2d 69, 70, 170 P.2d 25.) Since the trial court never acquired jurisdiction of the subject matter here involved it was proper to set the judgment aside. Therefore the judgment here on appeal, which vacated the prior judgment, should be affirmed.



121 Cal.App.2d 602

DISNEY v. DISNEY.

Civ. 19656.

District Court of Appeal, Second District,
Division 2, California.

Nov. 30, 1953.

Action by a wife for a divorce, which was granted her by an interlocutory decree. From orders of the Superior Court of Los Angeles County, Joseph W. Vickers, J., modifying an order awarding plaintiff the custody of the parties' two minor sons by awarding the custody of one of them to defendant, with directions to enroll such son at a certain private school and pay all his expenses, and denying plaintiff any increase in alimony or the monthly sum previously allowed her for the other son's support, plaintiff appealed. The District Court of Appeal, Fox, J., held that the modification of the custody order was justified by

changed conditions and the best interest and welfare of the son involved and that the evidence showed no legitimate increased need of plaintiff justifying an increase in alimony and her allowance for the other son's support.

Orders affirmed.

1. Parent and Child ⇨2(2, 4)

In contest between parents concerning their minor child's custody, neither of them is entitled to such custody as matter of right, but under statute each is equally entitled to custody and no showing or finding of unfitness therefor is necessary to enable court to award custody to one or the other parent in accordance with what court, in its sound discretion, deems child's best interest. Civ.Code, § 138(2).

2. Infants ⇨19

The Superior Court has broad discretion in matters pertaining to change of minor children's custody.

3. Infants ⇨19

In passing on question of changing minor child's custody, child's welfare, not shortcomings of respective parties seeking custody, is determinative.

4. Infants ⇨19

The feelings and desires of parties contesting for minor child's custody cannot be considered except in so far as they affect child's best interests.

5. Infants ⇨19

An application for modification of court's award of minor child's custody is addressed to court's sound legal discretion, which will not be disturbed on appeal, unless record clearly shows abuse of discretion.

6. Infants ⇨19

Generally, to warrant modification of order as to minor child's custody, there must be substantial evidence of change of circumstances after entry of order, but child's welfare may require change of custody order though there is apparently no change of circumstances.

7. Divorce ⇨303(3)

Evidence justified Superior Court's modification of order granting divorced

wife custody of divorced spouses' two minor sons by awarding custody of one of them to his father, with directions to enroll such son at certain private school and pay all his expenses, on grounds of changed conditions since entry of previous order and such son's best interest and welfare.

8. Divorce ⇨303(3)

A Superior Court judge's remarks, in response to inquiry of divorced wife's counsel as to whether court desired to hear further testimony on question of custody of one of divorced spouses' two minor sons, that judge could not think of anything that might be helpful, but did not know what facts such counsel had, and that, with facts before court and assuming that both parents were proper persons, it was almost impossible to say "No" to proposed change of such son's custody from his mother to his father, did not justify conclusion that judge prejudged case or was unwilling to hear mother's evidence, thereby denying her fair trial, especially in view of her extended testimony as to her views on such question after judge stated that he would hear whatever her counsel had to offer.

9. Divorce ⇨303(3)

A Superior Court judge's comment that he was sorry that "this matter is going to descend from its lofty plane" after a divorced wife's counsel stated that divorced husband's offer to enroll one of divorced spouses' two minor sons at private school and pay all his expenses, if his custody were changed from his mother to his father, was not made for boy's benefit, but for selfish reasons only, did not indicate judge's bias toward father or prejudice against mother where hearing of father's application for such change of custody had been conducted up to such point on primary question of boy's best interest and welfare.

10. Divorce ⇨303(3)

A Superior Court judge's question to a consulting psychologist, opposing her divorced husband's application for change of their minor son's custody from his mother to his father, as to whether she had talked to psychologists about herself and her attitude toward situation, did not show un-

fair attitude of judge toward her, particularly in view of her affirmative response to question.

11. Divorce ⇨303(3)

On divorced husband's application for change of custody of divorced spouses' minor son from divorced wife to applicant, Superior Court judge's comment that "it is very nice to write some article, but here that means nothing. Give us facts. You speak of emotional attitude. What are you referring to?" after divorced wife testified that it was not for boy's best welfare for his father to see him frequently because father exerted influence over boy through his attitudes, which built in boy undesirable attitudes emotionally disturbing to him, did not show unfair attitude of judge toward divorced wife.

12. Divorce ⇨303(3)

On divorced husband's application for change of custody of divorced spouses' minor son from divorced wife to applicant, Superior Court judge's suggestion that parties have no further discussions with boy as to what he should do or why he had done things or made certain decisions after his mother testified that boy told her on evening after his interview by judge that he did not know what he was going to tell judge until he talked to him in chambers and was surprised by what he had said was not improper, wrong, or unfair to mother.

13. Divorce ⇨303(3)

On divorced husband's application for change of custody of one of divorced spouses' two minor sons from their mother to applicant, trial court properly ordered applicant not to answer question, on his cross-examination by mother's counsel, as to whether applicant, by stating to boys that applicant thought that mother had adequate amount of money and that she had more money in bank than applicant had, intended to convey to boys the thought that mother was better situated financially than applicant, and was guilty of no impropriety in then commenting that "we are going very slowly with this matter", and suggesting that mother's counsel proceed.

14. Divorce ⇨303(3)

On divorced husband's application for change of custody of one of divorced spouses' two minor sons from their mother to applicant, trial court was guilty of no impropriety in suggesting that applicant, in answer to question on cross-examination by mother's counsel as to amount of money applicant had given boys personally in alleged campaign to gain their favor since court's previous decision increasing amount required to be paid mother by applicant for boys' support, roughly estimate amount, and stating that "that is near enough" and directing counsel to proceed after applicant stated in response to court's inquiries that he possibly gave boys as much as \$50 each and thought he gave them more than \$25 each.

15. Divorce ⇨245(2), 309

A divorced wife, in whose professional income as a consulting psychologist there was no appreciable change between Superior Court hearing, on which her requests for increase of amounts previously awarded her as alimony and for support of divorced spouses' two minor sons were denied, and hearing on divorced husband's subsequent application for award to him of custody of one of sons, was not entitled to additional allowances of alimony and support money on ground of her increased need because of certain relatives' discontinuance of their previous voluntary contributions to her support and great increase in her expenses, particularly for rent.

16. Divorce ⇨225, 288, 312½

Where divorced wife, in her petition for order to show cause why she should not be granted increased alimony and sums for support of divorced spouses' two minor sons in her custody after filing of divorced husband's application for change of custody of one of such sons to him, asked almost same relief sought by her at previous hearing, on which she was awarded attorney's fees and costs, and no change of circumstances justifying new demands during interval of only about 4½ months between hearings were shown, Superior Court properly refused to allow her attorney's fees and costs for prosecuting such order.

17. Contracts ⇨143

A contract must be construed in light of, and to effectuate, if possible, objects and purposes sought to be attained thereby.

18. Contracts ⇨154

A fair and reasonable interpretation of contract, rather than one leading to harsh and unreasonable results, is always preferred.

19. Husband and Wife ⇨279(1)

Divorced spouses' property settlement agreement, obligating divorced husband to pay all reasonable costs and attorney's fees resulting from any suit or proceeding by divorced wife to enforce divorced husband's obligations to support her and their two minor sons, did not entitle her to recover attorney's fees and costs for prosecuting order to show cause why she should not be allowed increased alimony and support payments for such sons in divorced husband's proceeding for change of custody of one of sons from wife to husband, where such issues were heard and determined only about four months before filing of petition for such order and there was no substantial change in circumstances during such interval.

20. Divorce ⇨288, 312½

A divorced husband was not liable for costs of taking portion of his deposition relating to divorced wife's unjustified petition for allowance of increased alimony and payments for support of parties' two minor sons in husband's proceeding for change of custody of one of such sons from wife to husband.

21. Divorce ⇨312½

Where divorced husband advised his divorced wife of his plan to have one of their two minor sons, whose custody was awarded wife, live at husband's home and attend certain private school because of his low public school grades, of which she was fully aware in ample time to investigate school and discuss with head thereof such son's study program, if he were accepted by school, Superior Court was justified in concluding that there was no necessity to take husband's deposition in his proceeding for change of such son's custody to husband in further-

ance of plan and did not abuse its discretion in refusing to order husband to pay expense of taking deposition.

Patrick James Kirby, Los Angeles, for appellant.

Chas. R. Thompson, Los Angeles, for respondent.

FOX, Justice.

Plaintiff and defendant were married in June, 1933, and separated after having lived together for ten years. Twin boys, Douglas and Jack, were born to this union on June 1, 1935. Plaintiff secured an interlocutory decree of divorce in November, 1944, the parties having previously entered into a property settlement agreement. In accordance with the stipulation of the parties, defendant was ordered to pay \$165 per month for plaintiff's support and \$100 per month for the maintenance of the two boys plus one-half of their dental, medical or hospital expense and to maintain a \$15,000 policy on his life for the benefit of the boys during their minority. Custody of the children was awarded plaintiff, with the right of reasonable visitation by their father.

As a result of a hearing in October, 1951, defendant was required to pay \$200 per month for the support of each boy. Plaintiff's request for an increase in her alimony was denied. Defendant, however, paid a \$500 counsel fee for plaintiff's attorney, and \$225 court costs in connection with that proceeding.

On February 20, 1952, defendant, who had remarried and established a new home, secured the issuance of an order to show cause by which he sought to have the original custody order modified so as to award custody of Douglas to him. Plaintiff immediately filed notice of motion for allowance of attorney's fees and costs to resist defendant's application for change of custody, and also procured the issuance of an order to show cause by which she demanded increased alimony and support for the boys in substantially the same amounts that she had sought in the hearing the previous October. All of these matters were heard together early in April, 1952.

At the conclusion of the hearing the court modified the former custody order by awarding custody of Douglas to the father with right of reasonable visitation to the plaintiff and directed that Douglas be enrolled at the Chadwick private school as a day student, commencing April 15th, the father to pay all of his expenses including \$50 per month to plaintiff for his support "for such time as he shall spend during visits with his mother." The court also ordered defendant to pay \$350 attorney's fees for plaintiff and \$1.50 costs in defending the custody proceeding. The court denied plaintiff any increase in alimony or any increase for the maintenance of Jack. The court also denied attorney's fee and costs relative to plaintiff's petition for such additional support. Plaintiff appeals from these orders.

Douglas made an excellent scholastic record at John Burrows Junior High School in Los Angeles. He was also president of the student body, and did well in athletics. In his first semester in Los Angeles High he made a B average; during his second semester, however, he received one B and four C's. In his next semester, which was the first portion of his junior year, he received straight D grades. During this semester he had not been studying, had skipped classes and was out on school nights. The twin brother, Jack, who was attending a different high school, was getting along satisfactorily. Mrs. Disney became concerned about the cause of Douglas' grades slipping and conferred with his high school advisor as early as November, after Douglas had received a flunk notice in one subject; she also conferred with a specialist in adolescent problems and a number of men connected with private schools. Mr. Disney was also concerned about Douglas' grades and feared he would not be able to enter college. He conferred with the head of the Chadwick School, which is a small accredited, private preparatory school located in the vicinity where he lived, and arranged for Douglas to attend it as a day student, with supervised study for two hours each evening at the school; also, that he attend summer school. This plan contemplated Douglas' living at his father's

home, which had ample accommodations. Douglas was interested in and agreeable to this program and wanted to try it, but his mother would not consent. It was because of her refusal that the custody proceeding was initiated by Mr. Disney.

Plaintiff's first contention is that the court abused its discretion in awarding custody of Douglas to the father. She particularly insists "there is no evidence to support the order for change of custody" and that "absolutely no change of circumstances relevant to consideration of custody of the child has been shown." Her position, however, is not well founded.

[1-5] "In a contest between parents concerning the custody of their minor child neither is entitled to custody as a matter of right. Under the statute (Civ.Code, § 138(2) each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interest of the child." *Davis v. Davis*, 41 Cal.2d 563, 261 P.2d 729, 730. It is also pointed out in this opinion 41 Cal.2d 565, 261 P.2d at page 731, that "The court has broad discretion in matters pertaining to the change of custody of children." In passing on such question, "It is the welfare of the child and not the shortcomings of the respective parties which is determinative", *Young v. Young*, 117 Cal.App.2d 735, 256 P.2d 1009; *Clarke v. Clarke*, 35 Cal.2d 259, 262, 217 P.2d 401, and "the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child." *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36, 37. In *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268, 272, the court states that "It is settled that 'An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion.'"

[6] It is, of course, the general rule that to warrant the modification of a custodial order there must be substantial evidence

of a change of circumstances after the entry of the original decree. *Davis v. Davis*, supra. However, it is pointed out, in *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719, that "the change of circumstances" rule is not an absolutely ironclad rule, and that there might be a case in which, despite the fact that there was apparently no change of circumstances, nevertheless, the welfare of the child might require that the previous order of custody be changed. 8 Cal.2d at page 728, 68 P.2d 719.

[7] Applying these principles, it is clear the court was amply justified in modifying the custody order. While there is no suggestion of misbehavior on the part of plaintiff, or that she is not deeply interested in the welfare of her boys, the inference is inescapable that she has become ineffective in her supervision and guidance of Douglas. The fact that Douglas skipped classes, did not study, was out on school nights, and that his grades slumped, does not mean that Mrs. Disney was an unfit parent but rather that she was inadequate to meet and solve his problems at that stage of his development. Her difficulty may have been due largely, or perhaps entirely, to the well-recognized fact that boys, during their adolescent years, are frequently, for psychological reasons, unable or unwilling to properly evaluate and follow their mother's advice and direction. Plaintiff undoubtedly appreciated this aspect of the situation for she was a consulting psychologist and sought advice from a specialist in adolescent problems and school men who constantly dealt with young boys. But whatever the cause, the stark fact remains that she was not able to provide the effective guidance that Douglas required although she was apparently directing Jack satisfactorily.

Furthermore, the educational future of Douglas was at a crucial point. He is a bright boy with leadership ability and capability of doing college work, but his chance for admission to college was fast disappearing. This is emphasized by the fact that at the end of the first semester of his junior year he had D grades in all subjects. That he was capable of earning college-required grades is demonstrated by his record

for the first semester of his sophomore year, when he made a B average. Thus, in two semesters Douglas' school work dropped from college-required standards to near failing.

It should be noted here that plaintiff blames Douglas' drop into the D column on his alleged emotional upset following visits with his father, after the October, 1951, hearing and decision on her petition for more alimony and support for the boys. The first of these visits took place about October 14th. The trial judge said he found "no justification" for her belief. The court indicated Douglas' grades had started down earlier. The school record sustains that conclusion. Although Douglas had received one A, three B's and one C in the first semester of his sophomore year, he only received one B the next semester and four C's. This was a noticeable decline in his grades. This semester covered the period from February, 1951, to June, and was therefore prior to the October hearing.

It is obvious that drastic action was required; a complete change of attitude was necessary and former study habits must be resumed, else Douglas could not hope for a college education. To expect this change to take place in an environment where scholastic disaster had been fast approaching and was then near at hand was a vain hope. If Douglas was to have the opportunity for the development which a college education affords, something must be done immediately. A chance to attend an accredited, preparatory school which had small classes, coupled with supervised evening study and followed by summer school, was an educational program that gave reasonable prospect of meeting Douglas' needs and provided for him the school climate in which to do the quality of work he was capable of doing and thus retrieve a fast-fading opportunity for college training. In the light of Douglas' precarious school situation it clearly appears that it was for his best interest and welfare to approve the father's school program and permit Douglas to live in his father's home and thus have adult male supervision and guidance during this important teen-age

period. To make this plan effective it was proper to give the father custody so that he would have complete authority in directing Douglas and in supervising the execution of his school program. Thus the custody order finds substantial support in the changed conditions and on the ground that it is for the best interest and welfare of Douglas.

[8] Plaintiff contends she was denied a fair trial. She charges the trial judge prejudged the case and that he was guilty of prejudice against her and her cause.

She first complains about certain remarks of the court during the first afternoon session of the trial. The court had examined the file, heard the father's testimony as to Douglas' poor grades and deteriorating scholastic interest and his proposed plan for the boy, and at the suggestion of and upon stipulation of counsel had interviewed Douglas in chambers and reported the substance of that conference, which included the statement that Douglas "would like to try out this plan of his father's going to Chadwick School and living with his father * * *." At the conclusion of the court's statement, counsel for plaintiff inquired whether the court desired "to hear further testimony about this matter at all," to which the court replied, "Well, I can't think of anything that might be helpful. Of course, I don't know what facts you have, Mr. Kirby." After some further comment the court said: "Now Mr. Kirby, coming back to your original question. With the facts that we have before us, and assuming the father is a proper person, as I do, and that the mother is a proper person, it does seem to me that it is almost impossible to say No to the proposed change." In response to counsel's statement that plaintiff desired this matter to be "tried out as fully as she is able to present it," the judge replied, "I will hear whatever you have to offer." He then added this admonition: "Let's guard the most important thing, and that is that the boy remains satisfied that whatever his father or mother offer is because they think it is for his best interest, and not because of some selfish reason of their own." To this Mr. Kirby responded: "I

regret very much, if the court please, that it is precisely our position that Mr. Disney's offer is not made for the benefit of this boy but for selfish reasons only." The court then observed: "Well, this matter is going to descend from its lofty plane that it has been on, I gather, and I am very sorry to hear that."

The judge's response to the inquiry of plaintiff's counsel, as to his desire to hear any further testimony on the custody and school plan for Douglas, that while he could not think of anything that might be helpful, but "Of course, I don't know what facts you have, Mr. Kirby," clearly does not indicate that the court had prejudged the case or that plaintiff was to be cut off without an opportunity to present her evidence. The clear inference is that plaintiff might have additional facts to offer and that she would be given an opportunity to present them. The later comment by the judge that "it does seem to me that it is almost impossible to say No to the proposed change" was prefaced by these words, "*With the facts we have before us, and assuming the father is a proper person, as I do, and that the mother is a proper person * * **" (Italics added.) This language shows the judge was only expressing a tentative opinion on the evidence then before him, not knowing, as he had just pointed out to Mr. Kirby, what other facts he might have. The court was entitled to assume that each of the parents was a fit and proper person to have custody of Douglas. This comment affords no basis for saying that the judge was then deciding this aspect of the case or that additional evidence would not be received and considered. When counsel for plaintiff indicated he desired to present further evidence the court replied: "I will hear whatever you have to offer." Whereupon plaintiff was on the witness stand approximately a full court day giving her views on the custody question and school plan for Douglas. Certainly this does not justify a conclusion that the court prejudged the case or was unwilling to hear her evidence. *Barr v. Barr*, 119 Cal.App.2d —, 259 P.2d 957.

[9] There is no substance to plaintiff's complaint about the judge's remark that he was sorry "this matter is going to descend from its lofty plane." Up to that point the best interest and welfare of Douglas had been the "lofty plane" upon which the hearing had been conducted, and that was the plane upon which the court had expressed the hope it would be maintained, for that was the primary question to be determined. Such a comment does not indicate bias toward defendant or prejudice against plaintiff.

[10] Plaintiff cites "merely as illustrative of the unfair attitude of Judge Vickers" that he asked her if she had ever seen a psychologist about herself. She apparently attaches great significance to this illustration because in her brief it is italicized. The record on this point is as follows:

"The Court: Have you talked to psychologists about yourself and your attitude towards this situation?

"The Witness: I have."

Just what possible unfairness can attach to the asking of that question, particularly in view of the affirmative response, we are totally unable to see.

[11] During the course of the trial the following transpired while Mrs. Disney was on the witness stand:

"The Court: You think it is not for their welfare [the boys] for him [the father] to see them frequently, not to their best welfare?

"The Witness (Plaintiff): No; I think it is not, under the circumstances.

"The Court: And your reasons for that?

"The Witness: My reasons for that are that I believe that Mr. Disney exerts an influence over the boy through his attitudes, which builds attitudes in Douglas which are not desirable and are emotionally disturbing to him.

"The Court: It is very nice to write some article, but here that means nothing, madam. Give us facts. You speak of emotional attitude. What are you referring to?"

Plaintiff cites this comment as illustrative of the unfair attitude of the judge. It will be noted that in the last answer the witness indulged in generalities. The court, perhaps in an inarticulate fashion, was undoubtedly attempting to suggest to plaintiff that while such general statements would be "very nice" in some article she might write, they were not helpful here; that she must give the court facts. Specifically, what was she referring to when she spoke of emotional attitude? We are unable to see any unfairness in the foregoing. Of course, the court wanted facts and not generalities, and was entitled to know what attitudes she considered the father's influence developed in Douglas which were not desirable and emotionally disturbing to him.

[12] Plaintiff testified that the evening following the interview of Douglas by Judge Vickers, the boy told her that he did not know what he was going to tell Judge Vickers until he talked to the judge in chambers and that he was surprised at what he had said. As further illustrative of the court's alleged unfairness, plaintiff makes the following statement with emphasis in her brief: "*At this point Judge Vickers sternly directed the appellant [plaintiff] to have no further discussions with the boy Douglas although the boy was in the legal custody of appellant and living with appellant in their family home.*" Here again the record will assist in evaluating the fairness of the judge's admonition. It is as follows:

"The Court: I would suggest until this proceeding is completed that you have no further discussions with Douglas as to what he should do or why he has done things or made certain decisions. Let the boy from now on come to such conclusions as he can for himself, as far as this proceeding is concerned." This admonition was also made applicable to Mr. Disney. No impropriety as to this admonition to the parties was then suggested and we can see nothing wrong or unfair about it.

[13] During the cross-examination of Mr. Disney as to conversations he had had with the boys relative to the manner in

which Mrs. Disney used the money he was giving for their support, Mr. Disney said: "One of them stated that their mother did not have much money. I said I thought she had an adequate amount of money, both from the standpoint of income and that she had more money in the bank than I did." Then counsel for plaintiff asked this question: "By so stating to the boys, did you intend to convey to them the thought that Mrs. Disney is better situated with reference to this world's goods than you are, Mr. Disney?" Whereupon the court interrupted by saying: "Well, don't answer that question. I don't see any importance to that." The court further said: "Proceed, Mr. Kirby. Let's save a little time. We are going very slowly with this matter, and this part is comparatively simple. It is important, but it is simple." The foregoing is cited as an example of the judge's unfairness. There is no merit whatsoever in this assignment. The question was wholly immaterial and the court was correct in ruling it need not be answered. There was absolutely no impropriety in the court's comment that "We are going very slowly with this matter," and suggesting to counsel that he proceed.

[14] Plaintiff complains of the court's interruption of her counsel's cross-examination of Mr. Disney as to the amount of money he had given the boys personally since the October decision, in an alleged campaign to gain their favor. The court suggested he "roughly estimate" the amount rather than read each item and date from his memorandum book. In response to his expressed inability to do this the court inquired whether it was as much as \$50 apiece. The witness replied: "Possibly." The court then asked whether it was more than \$25 apiece, to which Mr. Disney responded: "I would think so." The court said, "That is near enough," and directed counsel to proceed. There was no suggestion at the time that any greater detail or more exact amount of such gifts was either necessary or desirable. There was clearly no impropriety on the part of the court in this incident.

Plaintiff mentions a number of other incidents which she asserts show bias and un-

fairness on the part of the trial judge. To recite and analyze these would unduly extend this opinion. Suffice it to say that we have examined each of them and find nothing in support or justify her charges.

[15] Plaintiff complains because she was denied an increase in alimony and support for the boys. It will be recalled that these questions had been heard and passed upon the previous October. Plaintiff had been denied additional alimony and the support for the boys had been set at \$200 each per month. Her petition in the instant proceeding was essentially the same as the previous one. She, of course, was not entitled to retry the October proceeding. She was, therefore, necessarily limited in this aspect of the case to a showing of changed conditions since the October decision which would justify an increase in her allowance. There is simply no basis whatever for increasing the \$200 per month for the support of Jack. There is likewise a failure to show any legitimate, increased need on the part of plaintiff. She had a gross income as a consulting psychologist of approximately \$5,000 in 1951. Her income for the three months of 1952 prior to the hearing apparently averaged about the same per month. Her net income from her profession seems to have been between \$3,000 and \$3,500 per year. There does not appear to have been any appreciable change in her professional income between the two hearings.

Plaintiff seeks to justify her claim for additional alimony by two asserted changes in her circumstances since the October decision. These are: (1) that certain of her relatives who had previously voluntarily contributed to her support have since the October decision discontinued such aid; and (2) that her expenses, particularly for rent, have greatly increased. Plaintiff, however, overlooks the fact that in the October hearing the court was advised that her relatives were "unwilling to further continue such aid." Plaintiff so stated in her affidavit in support of her order to show cause. Thus, when the court refused to increase her alimony in October, 1951, it did so in the light of her sworn

statement that she would no longer receive aid from her relatives. She therefore cannot claim a change of circumstances in that respect. As to the item of rent, it appears that prior to the October decision plaintiff had been paying \$65 per month rent. Immediately thereafter she moved into a different neighborhood and rented a house at \$200 per month, plus utilities and inside repairs, and employed a gardner, although the boys were then 16½ years old. The court could have reasonably concluded that such a radical increase in the cost of her living accommodations was unwarranted, and that this was not a legitimate or necessary change of circumstances.

With the funds available to plaintiff, viz., her professional income, alimony and child support, she is in a position to maintain herself on an economic plane at least equal to (and perhaps better than) that attained either at the time of the separation of the parties or subsequent thereto. The fact that she is receiving less money for child support is offset by the fact that she is no longer financially responsible for the support and maintenance of Douglas, although she receives \$50 per month to defray expenses incident to his visits with her.

[16] Although plaintiff was awarded counsel fees for defending the custody proceeding, the court refused to allow attorney's fees and costs for prosecuting her order to show cause for more alimony and child support. In denying attorney's fees for this phase of the proceeding the court pointed out that in this petition plaintiff asked "almost the identical relief" she sought the previous October when she was awarded \$725 attorney's fees and costs; that there had been no showing of any change of circumstances during the interval which justified her demand; that it was "more an attempt to retry the very issues which the court had passed upon in the October hearing; that "the demands should not have been made," and that "they are without justification." Without further delineating the record it may reasonably be said that the evidence and the inferences therefrom abundantly justify the court's

findings and conclusions. The foregoing, coupled with the further circumstances that plaintiff filed her new demands for more alimony and child support immediately after defendant petitioned for Douglas' custody and approximately only 4½ months after the October decision, justifies the inference that her action was retaliatory and vexatious in character. Since there was no justification for plaintiff's application for more alimony and child support, there can be no obligation in law for defendant to pay her counsel fees and costs incurred in prosecuting the same. *Parkhurst v. Parkhurst*, 118 Cal. 18, 22, 50 P. 9. But, argues plaintiff, by the property settlement agreement defendant agreed to pay "all reasonable costs and attorney's fees resulting from any suit or proceeding commenced" by her to enforce defendant's obligations to support and maintain her and their minor children, hence he must pay her counsel fees and costs incurred in the support proceeding.

[17,18] A contract must be construed in the light of the objects and purposes sought to be attained and to effectuate those objects and purposes if possible. *Obervise v. Poulos*, 124 Cal.App. 247, 251, 12 P.2d 156. A fair and reasonable interpretation is always preferred rather than one leading to harsh and unreasonable results. *Bergin v. Van der Steen*, 107 Cal.App.2d 8, 14, 236 P.2d 613.

[19] Applying these principles to the unusual situation in the instant matter, plaintiff is not entitled under the property settlement agreement to recover attorney's fees and costs in the support phase of this proceeding for the clear object and purpose of that agreement was to indemnify plaintiff against attorney's fees and costs in any legitimate litigation she might have based on or growing out of it. As previously noted, the issues here involved as to support had been heard and determined only a little more than four months prior to the filing of this petition. By it, plaintiff sought essentially to retry those issues. There had

been no substantial change in circumstances. There was no justification for this new application for more alimony and child support, and it had the appearance of being retaliatory and vexatious. To hold that defendant was required under the contract to pay plaintiff's attorney's fees and costs would produce a harsh and unfair result and one that was not within the objects and purposes of the agreement. Such a holding would tend to encourage groundless litigation and to permit the use of the courts for purposes of harassment. This would be contrary to sound public policy.

[20] Plaintiff further complains that defendant was not required to pay the expense of taking his deposition. For the reasons above stated, defendant is not liable for the cost of that portion of the deposition which relates to her petition for more alimony and child support.

[21] This leaves, however, the question of requiring defendant to pay the expense of such portion of the deposition as relates to the custody phase of the proceeding. The court determined there was no necessity for taking such deposition since defendant had advised plaintiff of his plan to have Douglas live at his home and attend the Chadwick School. She was fully aware of the situation with respect to Douglas' grades. She had full opportunity to investigate the Chadwick School and its standing, and to discuss with the head of the school the program for Douglas in the event he was accepted. The court was justified in the circumstances in concluding that there was no necessity to take the deposition. It was, therefore, not an abuse of discretion to refuse to order defendant to pay the expense thereof. *Stewart v. Stewart*, 156 Cal. 651, 655-656, 105 P. 955; *State ex rel. Pearce v. Superior Court*, 34 Wash. 2d 768, 209 P.2d 906, 907.

The orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

121 Cal.App.2d 564

PEOPLE v. FREUDENBERG.

Cr. 2445.

District Court of Appeal, Third District,
California.

Nov. 27, 1953.

Manslaughter prosecution arising out of fatal shooting of defendant's wife. The Superior Court, Solano County, Donovan, J., entered judgment of conviction for involuntary manslaughter, and defendant appealed. The District Court of Appeal, Schottky, J., held that there was no error in the instructions and that the evidence supported the conviction.

Affirmed.

1. Indictment and Information ⇨10

The fact that evidence which would have been excluded at trial was given before grand jury did not render indictment void. Pen.Code, §§ 919, 921.

2. Homicide ⇨255(2)

Defendant's testimony that defendant had loaded and cocked gun and had offered it to his wife, who was on the verge of intoxication and who knew nothing about firearms, muzzle first, and that gun had accidentally discharged, fatally injuring defendant's wife, supported conviction for involuntary manslaughter. Pen.Code, § 192.

3. Criminal Law ⇨822(1)

Instructions must be read together as a whole in order to determine whether jury was properly charged.

4. Criminal Law ⇨822(6)

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, instructions, viewed as a whole, were not objectionable on ground that they removed from jury's consideration the issue of proximate cause and the duty of care. Pen.Code, § 192.

5. Criminal Law ⇨823(2)

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, instruction that, even though death were by misfortune and accidental, homicide would not be excused if

it were by an unlawful act, or by the doing of a lawful act in an unlawful manner, or without due caution and circumspection, when viewed in light of previous instructions defining involuntary manslaughter and necessity for defendant to have acted in such a manner as to constitute a crime before the offense could be proved beyond a reasonable doubt, was not objectionable as assuming the very fact in issue, that is, the question as to whether a homicide had taken place. Pen.Code, § 192.

6. Homicide ⇨291

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, court properly instructed jury on proximate cause and intervening cause. Pen.Code, § 192.

7. Homicide ⇨304

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, instruction to effect that defendant should be acquitted if jury found that the gunshot wound was inflicted by accident or misfortune and without culpable negligence on part of defendant was proper. Pen.Code, § 192.

8. Criminal Law ⇨829(2)

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, where court had instructed jury that contributory negligence of defendant's wife would not exonerate defendant unless defendant was guilty of no negligence which proximately contributed to the fatal injury, failure to instruct jury that conduct of defendant's wife was material to extent that it bore upon negligence or wrongful conduct of defendant or on issue of whether conduct of defendant was proximate cause of death was not error. Pen.Code, § 192.

9. Criminal Law ⇨829(1)

The trial court was not required to give further instructions on subjects which were covered by instructions given.

10. Criminal Law ⇨825(1)

Where jury was properly instructed in involuntary manslaughter prosecution, and defendant did not request additional

instructions on a particular point, there was no duty of the court to give additional instructions on specific points.

11. Criminal Law ⚖️655(1)

In prosecution for involuntary manslaughter, wherein defendant sought to show that victim had died because of incompetent and negligent medical treatment of gunshot wound, statement by court to defense counsel that negligence of those other than defendant would be a defense only if such negligence were the sole cause of death and inquiring as to why defense counsel was going into detail about operation necessitated by gunshot wound did not prejudice defendant's rights or remove issue of causation and proximate cause from jury's consideration. Pen.Code, § 192.

12. Homicide ⚖️5

Fact that negligence of doctor who treats wound inflicted by another contributes to death of victim affords no defense to the other to charge of homicide. Pen. Code, § 192.

13. Criminal Law ⚖️1173(2)

In prosecution for involuntary manslaughter arising out of fatal shooting of defendant's wife, where court properly instructed jury as to burden of proof, presumption of innocence and doctrine of reasonable doubt, defendant was not prejudiced by court's refusal to give specific instruction requested by defendant on circumstantial evidence. Pen.Code, § 192.

14. Criminal Law ⚖️1172(2)

Where defendant testified in prosecution for involuntary manslaughter, he was not prejudiced by instruction on constitutional right of defendant in criminal trial not to be compelled to testify and on effect of failure of defendant to testify. Pen. Code, § 192.

15. Criminal Law ⚖️822(8)

In prosecution for involuntary manslaughter, when considered together with all the other instructions, giving of instruction to effect that defendant was not required to establish his defense beyond a reasonable doubt but was only required to raise a reasonable doubt as to his guilt in

order to be entitled to acquittal was not prejudicial.

16. Criminal Law ⚖️829(9)

In prosecution for involuntary manslaughter, where instructions given covered contents of proposed instructions on burden of proof, refusal of proposed instruction was not error. Pen.Code, § 192.

17. Criminal Law ⚖️781(6)

In prosecution for involuntary manslaughter, cautionary instruction to effect that law admonished jury to view with caution testimony of any witness which purported to relate oral admission of defendant or oral confession by him was not erroneous in view of fact that several statements made by defendant were read to jury and defendant could not have been prejudiced by court's referring to them as admissions or confessions. Pen.Code, § 192.

18. Criminal Law ⚖️829(12)

In prosecution for involuntary manslaughter, refusal of proposed instruction as to weight to be accorded testimony of witnesses was not error, in view of fact that subject matter of proposed instruction was adequately covered by instructions given. Pen.Code, § 192; Code Civ.Proc. § 1844.

19. Criminal Law ⚖️558

Generally, the uncontradicted testimony of a witness to a particular fact is binding on the court, but the trial court may give consideration to inherent improbabilities in the statement of a witness, the manner of the witness while testifying and all of the circumstances surrounding the particular fact which is the subject of the inquiry.

20. Criminal Law ⚖️785(10)

Proposed instruction to effect that testimony which was not inherently improbable and which was not impeached or contradicted by other evidence should be accepted as true by jury was not a correct proposition of law in view of fact that it did not present elements of demeanor of witness and other facts which would justify jury in disbelieving testimony of otherwise uncontradicted witness.

21. Homicide $\hookrightarrow$ 340(2)

Instruction defining involuntary manslaughter as being, inter alia, killing resulting from an unlawful act or a lawful act performed in an unlawful manner was proper and did not prejudice defendant, though there was no evidence showing that defendant was committing an unlawful act at time of fatal, accidental shooting of his wife. Pen.Code, § 192.

22. Homicide $\hookrightarrow$ 309(1)

In prosecution for involuntary manslaughter arising out of accidental shooting of defendant's wife, instruction defining criminal negligence was proper. Pen.Code, §§ 20, 192.

23. Homicide $\hookrightarrow$ 139

A general charge of manslaughter is sufficient to uphold conviction of either voluntary or involuntary manslaughter, and it is not necessary to allege in the information which of the two kinds of manslaughter is charged, and no recital of precise facts relied upon is necessary. Pen.Code, § 192.

24. Homicide $\hookrightarrow$ 139

Indictment charging manslaughter in that defendant did willfully, unlawfully, feloniously and without malice kill named person sufficiently notified him that he was called upon to defend charge of involuntary manslaughter. Pen.Code, § 192.

25. Criminal Law $\hookrightarrow$ 1032(5), 1044

Where defendant did not demur to indictment and did not make motion in arrest of judgment, he could not urge any defect appearing on face of indictment for first time on appeal.

26. Homicide $\hookrightarrow$ 313(1)

Verdict of guilty as charged in indictment was sufficient to support judgment of conviction for involuntary manslaughter, though indictment charged both voluntary and involuntary manslaughter, in view of fact that punishment for both kinds of manslaughter is the same. Pen.Code, § 192.

27. Criminal Law $\hookrightarrow$ 1040

Objection to form of verdict in criminal proceeding could not be raised for first time on appeal.

28. Homicide $\hookrightarrow$ 255(2)

Evidence supported conviction for involuntary manslaughter arising out of accidental shooting of defendant's wife. Pen. Code, § 192.

Dunnell, Herbert & Dunnell, Fairfield, O'Hara, O'Hara & Healy, O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Sacramento, for respondent.

SCHOTTKY, Justice.

On November 6, 1952, the Grand Jury of Solano County returned an indictment against the defendant, Herman Freudenberg, Jr., charging him with the offense of manslaughter in that on the 18th day of October, 1952, he "did wilfully, unlawfully, feloniously and without malice, kill one Elizabeth Anne Freudenberg, a human being." Upon being arraigned defendant made a motion to set aside the indictment for lack of reasonable or probable cause, pursuant to section 995, subd. 2, of the Penal Code. The motion was denied and defendant entered a plea of not guilty. Trial was had before a jury and the jury returned a verdict finding defendant guilty of manslaughter as charged in the indictment. The court then referred the case to the probation officer for investigation and report and, after a hearing on the report, denied defendant's motion for probation, and pronounced judgment. Defendant thereupon filed this appeal from said judgment.

Appellant urges a number of grounds for reversal of the judgment, but before discussing them we shall give a summary of the evidence.

Appellant, Herman Freudenberg, Jr., was a Buick dealer in the city of Fairfield in Solano County where he resided with his wife, Betty Freudenberg, her two children by a former marriage, and their daughter, Madeline, aged two and one-half years. On Saturday, October 18, 1952, defendant went to work as usual about 8:00 a. m. and returned to his home about 1:00 p. m., after

his place of business closed. Defendant spent the afternoon doing yard work at his home and receiving callers, and his wife spent most of the afternoon with him in the yard, tending the couple's young daughter. During the afternoon a Mr. and Mrs. Bushing, friends of the Freudenbergs, stopped at the Freudenberg home and the two couples sat around talking, and divided the contents of two cans of beer. Defendant and his wife had a dinner engagement with a Mr. and Mrs. Crane and a Mrs. Shirley Walt, and later in the afternoon they had a drink of Bourbon and water while they were dressing to go out for dinner. At about 7:30 p. m. Mr. and Mrs. Crane and Mrs. Walt arrived at the Freudenberg home, and two rounds of drinks were served. About 8:00 p. m. the group left the Freudenberg home to go to dinner at a restaurant known as Dick's, which was about a mile from the Freudenberg home in Fairfield. Upon entering the Crane automobile Betty Freudenberg remarked to defendant that the garage door was open and requested defendant to close it. Defendant replied that there wasn't anything of value in there to be stolen and that it was not necessary to close it, but his wife again told him to close it and he then closed the garage door. Defendant evidently did not like the tone of his wife's voice and when he returned to the car Mrs. Walt told Mrs. Freudenberg, "Betty, I think you got a dirty look." Nothing more was said at the time and the group drove to the restaurant. The Crane car was parked a short distance from the restaurant, and while the Cranes and Mrs. Walt entered the restaurant the Freudenbergs stood outside arguing. Betty said to defendant, "What's wrong with you Herman, anyway?" and defendant replied, "Well, I didn't like the tone of your voice when you told me to close the garage door." Betty then stated, "Well, why don't you pack your bags and leave?" Betty then started to walk away from the restaurant but defendant and Mrs. Walt prevailed upon her to return to the party. Before entering the restaurant Betty apparently made some remark to defendant which made him angry, and he started walking toward home. Betty enter-

ed the restaurant and asked Mrs. Crane for the car keys so that she could go and pick up the defendant, but Mrs. Crane said that Mr. Crane would drive her, and Mr. Crane and Betty drove up the road about one-quarter of a mile to where defendant was walking, and Betty asked him to come back to the party. Defendant refused, telling her to do what she wanted. Betty then stated to Mr. Crane, "I had better get out and walk with him because if I don't he will never forgive me." Mr. Crane stopped the car and Betty walked a short distance opposite defendant and stated that she was sorry about the garage door. She said: "If it will do any good I will get down on my knees and tell you I am sorry." She proceeded to get down on her knees, but defendant picked her up almost immediately and stated that he was too embarrassed to go back to the party and that he was going home. Mr. Crane then turned his car around and left them. This was between 8:30 and 8:45 p. m., and the Freudenbergs were then about three blocks from their home.

Defendant and Betty walked home by different routes, she arriving first. She entered the house and saw her daughter Phyllis who was watching television in the living room. Defendant did not enter the house when he arrived but got into his automobile which was parked in front of the house and sat in the automobile for a short time until Betty came out of the house. She did not see him in the automobile, but he called to her and asked her where she was going and she said she was going out to look for him. They then entered the house together, and it was then between 9:00 and 9:30 p. m., and defendant went to their bedroom and began to undress, when Betty entered the bedroom and they apparently resumed their quarrel, and Betty stated to defendant, "Well, why don't you pack your bags and leave?" to which defendant replied, "O.K., I will." Defendant then put on his shirt, tie and coat and went to the kitchen to mix himself a drink, and found his wife already there having a drink. Defendant testified that they then discussed how silly it was to quarrel over such trivial matters, reviewed their happy married life

together, conversed about matters in general, and embraced and kissed each other several times. During this time, according to defendant, he and Betty had "two or three or maybe four drinks" of Bourbon and plain water. After the couple had talked for some time, at about 11:00 p. m., Betty stated to defendant, "Herman, sometimes you make me so mad I could kill you." The record shows the following testimony by defendant:

"Q. [Mr. Lynch] Now, this statement she made about 'Herman, sometimes you make me so mad I could kill you,' did this all come out of the clear sky, there was nothing leading up to it? A. There was nothing leading up to it. No, it was a joking remark.

* * * * *

"The Court: When you say it was a joking remark, what do you mean? A. It was just something someone would say in a joking remark."

Defendant replied to the effect that "Well, I could make it easy for you" or "I can help that." He then went to their bedroom, opened the bureau drawer and took out his .45 caliber army type semi-automatic pistol which he had retained from his military service. The gun was not loaded, so defendant took out a loaded clip which was also in the drawer, put it in the gun, placed a shell in the chamber, which cocked the gun while he was on his way back to the kitchen. Upon entering the kitchen defendant found his wife sitting on a chair-type metal stool, and, according to his testimony, he went up to her and said, "Here is the gun." In defendant's testimony at the trial is the following:

"Question [Mr. Lynch]: And do I understand you handed it to her muzzle first? Answer: It wasn't pointed to her. I[t] was off on an angle. She was facing this way and it was off at an angle.

"Question: And then what happened? Answer: Well, I told her there was a safety catch there on the grip handle, one that has to be depressed there. I showed her that, and I think I held the gun—I don't remember—it

seems to me she took the gun with her left hand, and about that time it went off. It seems like I had just started to sit down on the stool or had already sat myself on the stool.

"Question: Did she have only her left hand on the gun? Answer: It seems to me—I don't know—it seems to me she had her left hand on the gun and was reaching her other hand for it. It seems to me both my hands were off the gun, but I don't know. It just happened so fast I just don't know.

"Question: You did have it, however, in your closed hand at the time you reached out to her? Answer: Yes sir.

"Question: She was seated at the time, was she? Answer: Yes sir.

"Question: What was your position? Answer: I was either standing or just stooping down to be seated in the chair.

* * * * *

"Question: How did she take the gun, did she take it gently or violently or how? Answer: She didn't take it violently. It seems to me she just took hold of the gun.

"Question: Did she give it a pull, do you recall? Answer: Well, I don't know. It seems to me she reached out with her left hand and just took hold of the gun.

"Question: And then what happened? Answer: I think both of my hands were off it, but I don't know."

The bullet went through Betty's midsection and exited on the left side of her back about three or four inches above the belt line. In the opinion of the ballistics expert, Roger Greene, at the time of the gun's discharge it was directly against Betty's sweater as the powder burns were in the inside of the fabric, the fabric from the bullet hole was missing and had been blown out by the blast and a tear in her sweater suggested that the muzzle of the gun went through the hole after the bullet was fired and tore the garment. The bullet also penetrated the chair in which Betty

was sitting at a height of about 32 inches and went into the wall at the back of the chair at a height of about 27 inches. The bullet had a downward course. After the shot Betty moaned, tumbled off her chair and fell on her side on the floor.

When the police viewed the premises early the following morning the gun was lying on the kitchen floor cocked and loaded. An empty shell from the gun was found near the rear of the kitchen about 17 feet away from the scene of the shooting where it had apparently rolled after being ejected from the gun.

Upon seeing his wife slump to the floor defendant rushed to the phone and called the county hospital and told them his wife had been shot, but was referred to the Fairfield Hospital, which defendant contacted immediately. He was told to bring his wife in and the doctors would be contacted. This defendant did by automobile and was met by nurses at the door who had a gurney ready upon which his wife was placed. Betty was still alive and conscious when taken to the hospital, and made several statements to defendant to the effect: "Honey, I don't want to die, I don't want to die, Honey." "My back hurts me. Put your arm around my back." Then when the family doctor, Dr. Olson, arrived at the hospital, in Betty's presence while she was conscious, the doctor asked what happened, to which defendant replied, "It was an accident, Bill." Betty made no comment to the reply.

At the time Dr. Olson arrived Dr. Zimmerman was taking Mrs. Freudenberg's blood pressure. Mrs. Freudenberg was in shock and they started giving her plasma. They then gave her transfusions of whole blood. Since her condition was not improving the doctors determined to operate. Doctors Rossi and Gauder were notified and shortly thereafter arrived at the hospital. Mrs. Freudenberg was taken to the operating room, and upon operating the doctors found that her liver had been lacerated about the edge and the transverse colon completely severed in the mid-portion. The second portion of the small bowel in the approximal region of the liga-

ment had been severed and blood was coming from the area of the left kidney hilus. The doctors temporarily repaired the large bowel but were unable to staunch the flow of blood in the abdomen as there was damage to the large blood vessels coming off the aorta, and in spite of transfusions Mrs. Freudenberg died at about 2:15 a. m. from shock, blood loss, and the penetrating injury due to the bullet wound. It was the doctors' opinion that they did everything in their power to prevent Mrs. Freudenberg's death but nothing could have changed the ultimate result of the gunshot wound.

The record shows that an analysis was made of the blood of defendant and Betty to determine the alcoholic content. The sample of defendant's blood was not taken until five hours after Betty was shot and showed an alcoholic content of 0.031 per cent which Dr. Olson testified was a trace only and had no significance as to intoxication. The doctor also testified that the fact that the sample was taken five hours after the incident would cause a slight decrease in the alcoholic content.

The analysis of Betty's blood showed an alcoholic content of 0.163 per cent which Dr. Olson testified would be the border line of intoxication and that "the average person would be intoxicated at that point."

Appellant's first contention is that the motion to quash the indictment should have been granted because the district attorney presented improper testimony before the grand jury. He then details certain testimony of Betty's father before the grand jury, much of which was highly critical of appellant and much of which would, upon proper objection being made, have been excluded at a trial in court.

While it is true that section 919 of the Penal Code provides in part that "The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence", it is also true that section 921 provides that "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained

or uncontradicted, would, in their judgment, warrant a conviction by a trial jury."

[1] However, the fact that there may have been some incompetent or illegal evidence before the grand jury does not render the indictment void. As was stated in *Stern v. Superior Court*, 78 Cal.App.2d 9, at pages 17-18, 177 P.2d 308, at page 313:

"Complaint is made that the grand jury received hearsay testimony and other than the best evidence. The hearsay testimony was that of admissions made by other defendants and was admissible against the several defendants who had made such admissions. It is urged that in producing this testimony the district attorney should have informed the grand jury that it could not be considered in determining whether to return an indictment against any other person than the one making the admission. No authority is cited in support of this argument. In the analogous case of a hearing by a committing magistrate it has been held that the production before the committing magistrate of incompetent evidence is immaterial if there is sufficient competent evidence to justify the committing magistrate in holding the defendant to answer. In *re Kawaguchi*, 12 Cal.App. 498, 107 P. 727. Where it appears that sufficient competent evidence was introduced to support the indictment we are satisfied that the indictment is not rendered void by the reception of some incompetent evidence."

And as this court said in *McFarland v. Superior Court*, 88 Cal.App.2d 153, at page 158, 198 P.2d 318, at page 321 (hearing denied):

"An indictment may not be set aside merely because some incompetent evidence was received by the grand jury, provided there is substantial competent evidence upon which the grand jury is authorized in its judgment to return the indictment. Section 995 of the Penal Code does not authorize the setting aside of an indictment for in-

sufficiency of evidence, or because incompetent evidence is received or considered. *Stern v. Superior Court*, 78 Cal.App.2d 9, 18, 177 P.2d 308; *People v. Hatch*, 13 Cal.App. 521, 528, 109 P. 1097, 1100; 14 Cal.Jur. sec. 59, p. 76. In the *Hatch* case the district attorney advised the grand jury that there was adequate evidence to warrant the finding of an indictment. The court said: '* * * The law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and found an indictment thereon, there is no method of reviewing its action in so doing. An indictment is but an accusatory paper, and it was never intended that on a motion to dismiss, irregularities in the proceedings before the grand jury should be reviewed, except as expressly provided in the statute.'"

Defendant next contends that "the evidence both before the Grand Jury and the trial court was legally insufficient to warrant the indictment or support the verdict." Defendant testified before the grand jury and at the trial, and the evidence before the grand jury was substantially the same as that before the trial court. If there was sufficient evidence to support the conviction there was, of course, sufficient evidence to support the indictment, so we shall treat this contention of defendant as presenting the question of whether or not there is sufficient evidence to support the verdict of manslaughter.

The indictment accused defendant of the crime of manslaughter in that he "did wilfully, unlawfully, feloniously and without malice kill Elizabeth Anne Freudenberg."

Section 192 of the Penal Code, so far as material here, defines manslaughter as follows:

"Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle."

It is clear from the record that the people only sought to prove that defendant was guilty of involuntary manslaughter. The evidence is clear that the deceased died as a result of a bullet wound from the pistol in evidence which belonged to the appellant. The theory of the prosecution was that the appellant did not use due caution and circumspection in handling the loaded pistol from which a bullet was fired into the deceased. Appellant contends that there is no evidence whatsoever that the pistol was discharged while under his control, or discharged by any act of his at all. He argues that there were no identifiable fingerprints found on the pistol, and the paraffin test for nitrate performed upon appellant was of no value and inconclusive, as was the paraffin test performed upon the deceased. Appellant contends, therefore, that he can in no way be held criminally responsible for the death of the deceased since he did not fire the pistol, nor was it under his control when fired. He points to his testimony that while explaining the mechanism of the pistol to his wife she reached over with her left hand and placed it on the pistol and then followed with her right hand, at about which time the pistol fired, appellant contending that it was not in his hand when fired, nor was his finger on the trigger. Appellant further contends that at no time did he point the muzzle of the pistol toward the deceased, and that the act in reaching for and taking hold of the pistol drew the muzzle toward her body so that any bullet emitting therefrom would be sent into her body.

Defendant then argues that the only evidence that the prosecution had to connect the appellant with the crime was his own statement and admission that he brought the loaded pistol into the room where his wife was sitting, and contends

that where the people, to connect a defendant with a homicide, rely upon the statement of the defendant to connect him with the death and where in said statement a set of facts is related which, upon their face, show a defense to the alleged crime, and there is no proof to contradict anything contained in the statement or testimony of the defendant, the people are bound by the defense as related and the proof is insufficient to sustain a conviction. He cites *People v. Toledo*, 85 Cal.App.2d 577, 193 P.2d 953; *People v. Estrada*, 60 Cal.App. 477, 213 P. 67; *People v. Salaz*, 66 Cal.App. 173, 225 P. 777; *People v. Coppla*, 100 Cal.App.2d 766, 224 P.2d 828.

Each of the cases cited is factually dissimilar to the case at bar and inapplicable thereto. In *People v. Estrada*, 60 Cal.App. 477, 213 P. 67, a judgment of manslaughter was reversed on the ground that the circumstantial evidence fully supported the defendant's claim of self-defense and therefore the verdict was not supported as a matter of law.

In *People v. Toledo*, 85 Cal.App.2d 577, 193 P.2d 953, a manslaughter conviction was reversed where the evidence as a matter of law showed the defendant's action to be justifiable as only done in self-defense.

In *People v. Coppla*, 100 Cal.App.2d 766, 224 P.2d 828, conviction of bookmaking was reversed on the ground that the record disclosed no evidence that the defendant was engaged in such activity.

In *People v. Salaz*, 66 Cal.App. 173, 181, 225 P. 777, 780, a manslaughter judgment was reversed on the ground that evidence was erroneously admitted and by virtue of the closeness of the case, its admission constituted reversible error. However, in this case the court stated with reference to a similar contention raised by the appellant therein as to the necessity for accepting his account of the killing:

"But it does not necessarily follow that appellant's account of the killing, though uncontradicted by direct evidence, should control the jury. If there be any well-established circumstance in the case which may reason-

ably be regarded as incompatible with the theory of the defense that the killing was justifiable, then the jury, from a consideration of all the evidence, was warranted in finding that the act amounted to an unlawful homicide."

Again, in *People v. Jacobs*, 111 Cal.App. 2d 281, 283, 244 P.2d 500, 502, the court after setting forth the rule urged by defendant herein rejected it and stated:

"Under the foregoing rule the question presented is: Does the record furnish evidence of any circumstances which cannot reasonably be reconciled with the theory that defendant did not intend to stab her husband? It certainly does."

In the instant case the evidence shows that defendant's wife was on the verge of intoxication. She had no knowledge of firearms. Defendant went from the kitchen to the bedroom, obtained an unloaded gun which he loaded, placed a shell in the chamber which cocked the gun, and then brought this cocked and loaded gun back to the kitchen and offered it to his wife, muzzle first as hereinbefore set forth. The reason given by him for loading and cocking the gun was that he wished to show his wife that he trusted her and that he knew she would never use the gun but would say, "Herman, put it away." Defendant knew that his wife knew nothing about firearms, and so far as she was concerned he could have made his test without loading the gun. He knew the gun was loaded and cocked; he knew his wife was on the verge of intoxication; he knew that she knew nothing about firearms. Nevertheless, he took this loaded gun back into the kitchen, and holding it by the pistol grip offered it to his wife, muzzle first, but, according to his statement, with the barrel pointing at an angle away from her. This gun was the revolver that defendant had used while a naval officer in World War II, and he was trained in the use and handling of firearms. As the witness Roger Greene of the State Department of Criminal Investigation testified: "If you are going to pass the gun to somebody else you don't pass the gun if you are at all courteous muzzle toward the other fel-

low." He could have made his test also by offering the gun to his wife butt first. He was not sure whether both his hands were off the gun when it went off, but he did have the gun in his closed hand at the time he offered it to her.

The theory of the prosecution was that defendant handled a dangerous weapon without due caution and circumspection and the case was presented to the jury on that basis, both in the arguments and in the instructions.

In the case of *People v. Searle*, 33 Cal. App. 228, 164 P. 819, 820, the court in quoting from 1 Michie on Homicide, page 253, stated:

"'An unintentional homicide committed through the negligent handling of a firearm in a way indicating a reckless disregard of life is manslaughter. It is negligence to point a firearm at another without examining to see whether or not it is loaded, or to handle or use it in a place where a discharge is likely to injure another, as in a highway.'"

In the case of *People v. Carmen*, 36 Cal. 2d 768, at page 776, 228 P.2d 281, at page 286, the court said:

"Accepting defendant's testimony that he stumbled, and the gun went off, and that he did not intend to shoot or injure anyone, yet he was carrying the gun with a cartridge in the firing chamber, with the gun pointed forward, and approaching a car occupied by persons, the jury would have been justified in concluding that he did not act with 'due caution and circumspection'. A killing is manslaughter where it is done in the commission 'of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection'. Penal Code, § 192(2). It has been held repeatedly that a killing resulting from the negligent handling of firearms may be manslaughter. *People v. Searle*, 33 Cal.App. 228, 164 P. 819; *People v. Hubbard*, 64 Cal.App. 27, 220 P. 315; *People v. Attema*, 75 Cal.App. 642, 243 P. 461; *People v. Sidwell*, 29 Cal.

App. 12, 154 P. 290; *People v. Sica*, 76 Cal.App. 648, 245 P. 461. Under some circumstances a claim supported by evidence that the killing was accidental will not justify an instruction on manslaughter, for the defendant is either guilty of murder or not guilty of any crime. See *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1. But here, as above shown, the jury could have found defendant guilty of manslaughter on the ground that the 'accident' was the result of his negligence."

And in *People v. Southack*, 39 Cal.2d 578, at page 584, 248 P.2d 12, 15, the court said:

"The above summarized evidence is sufficient to support a finding of manslaughter, either voluntary in 'heat of passion' (Pen.Code, § 192, subd. 1), or involuntary. The involuntary manslaughter might be 'in the commission of an unlawful act, not amounting to felony' (Pen.Code, § 192, subd. 2), for it could be found that defendant unlawfully exhibited the gun in an angry manner, a misdemeanor (Pen.Code, § 417), or it might be 'in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection' (Pen.Code, § 192, subd. 2), for it could be found that defendant was simply holding the gun but that he was negligent in so doing. (See *People v. McGee* (1947), 31 Cal.2d 229, 238, 187 P. 2d 706; *People v. Carmen* (1951) 36 Cal.2d 768, 774, 228 P.2d 281.)"

[2] In view of these authorities and the evidence in the record we are convinced that the jury was fully justified in concluding that in handling the gun in the manner and under the circumstances shown by the record the defendant acted without due caution and circumspection, and that defendant's contention that the verdict of manslaughter is unsupported by the evidence cannot be sustained.

[3] Defendant has challenged the propriety of certain instructions given by the court and its refusal to give certain instruc-

tions requested by him. Defendant apparently has disregarded the rule that the instructions must be read together as a whole, 8 Cal.Jur., Criminal Law, sec. 607. At the outset the court instructed the jury that they should "consider all of the instructions and as a whole, and to regard each in the light of all the others."

Defendant first urges that the following instruction removed from the jury's consideration the issue of proximate cause and the duty of care and hence was prejudicial error:

"Where the death of a human being results from playing with or the careless handling of a loaded firearm, there being no intent to injure anyone, and the firearm is discharged, the offense is involuntary manslaughter, the killing being caused by the doing of a lawful act without caution and circumspection."

However, immediately preceding the instruction complained of the court gave the following instructions:

"A jury may not find a defendant guilty of any homicide unless the jurors are convinced beyond a reasonable doubt that an unlawful act or unlawful acts by such defendant was or were a proximate cause of the death in question. When that person inflicts upon another a wound which is dangerous or calculated to destroy life and which does proximately cause the death of that other person, the fact if it be a fact, that negligence or mistake or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide."

"The mere fact that an unfortunate and fatal accident happened, in which the defendant, Herman Freudenberg, Jr., was involved, considered alone, does not prove and does not support an inference that the defendant conducted himself without due caution and circumspection. It is incumbent upon us, when determining whether or not a person exercised due caution and circumspection, to consider the facts im-

mediately preceding and all the facts surrounding the occurrence in question and not to be moved to a conclusion solely by the fact of an unfortunate result."

"When a person commits an act or makes an omission through misfortune or by accident under circumstances that show no evil design, intention or culpable negligence, he does not thereby commit a crime, although the same act or omission committed under different circumstances and coupled with criminal intent would constitute a crime."

"If you entertain a reasonable doubt, growing out of the evidence, as to whether the decedent, Betty Freudenberg, came to her death as the result of a gunshot wound inflicted by the defendant Herman Freudenberg, Jr., or as the result of a gunshot wound inflicted by the decedent, Betty Freudenberg, herself, or as the result of a gunshot wound inflicted by accident or misfortune and without culpable negligence on the part of the defendant, then I instruct you that the defendant, Herman Freudenberg, Jr., is entitled to the benefit of any such reasonable doubt, and you must find him not guilty."

"The doing of an act ordinarily lawful which results in the death of a human being may be manslaughter where the act, being one which might cause death, is performed in an unlawful manner or without due caution or circumspection. When a person is doing anything dangerous in itself or has charge of anything dangerous in its use and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances, and the death of another results therefrom, his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life."

From the time of the common law, firearms were recognized as a dangerous in-

strumentality because of their great potential harm and in the interest of the preservation of human life and safety, a high degree of care was demanded of those who use them. *State v. Hardie*, 47 Iowa 647; *Reg. v. Salmon*, L.R. 6, Q.B., D. 79; *R. v. Rampton*, Kelyng, 41; *Potter v. State*, 162 Ind. 213, 70 N.E. 129, 64 L.R.A. 942; *The Law of Homicide*, Moreland (1952) p. 103.

In *People v. Searle*, 33 Cal.App. 228, at page 231, 164 P. 819, at page 820, the court said:

"So, where parties were playing or skylarking and defendant recklessly handled his gun. *Murphy v. Commonwealth (Ky.)*, 22 S.W. 649; *Henderson v. State*, 98 Ala. 35, 13 So. 146. In the first-mentioned case the fact that the shot was caused by defendant's finger accidentally slipping on the trigger was held to be an insufficient excuse."

In the case of *People v. Sica*, 76 Cal.App. 648, 651, 245 P. 461, 462, the court after defining manslaughter in the language of section 192 of the Penal Code stated: "and it has been held in this state, as in others, that, where the death of a human being results from playing or skylarking with, or the reckless handling of firearms, it is involuntary manslaughter, the killing being the result of the commission of a lawful act which might produce death, without due caution and circumspection."

[4] Defendant in attacking the complained of instruction has failed to consider the purport of the instructions immediately preceding this where the jury were told that if they had a reasonable doubt as to whether the death of the decedent was from a gunshot wound caused by herself or caused by the defendant without culpable negligence they must find him not guilty. Considering this group of the instructions, it does not appear, as defendant contends, that the jury was instructed that merely because the defendant produced a loaded weapon, he was guilty of manslaughter. On the contrary, it appears that the jury was instructed that before they could find him guilty they must be convinced beyond

a reasonable doubt that his unlawful acts were a proximate cause of the death.

In the case at bar the admitted facts disclose that the defendant was the one who procured and loaded the weapon as well as brought it back to the room where his wife was seated. There was no question raised as to the shooting being in self-defense nor did defendant deny his presence at the scene of the offense. The discharge of the loaded weapon which the defendant brought into the decedent's presence and displayed to her was the cause of the victim's death.

When the instruction complained of is read together with the instructions given to the jury on proximate cause, reasonable doubt, the type of conduct necessary to constitute involuntary manslaughter, and the detailed instruction on what was meant by lack of due caution and circumspection, it is clear that the court did not err in giving the instruction complained of.

[5] Defendant next contends that the court erred in giving the following instruction:

"Even though the death was by misfortune and accidental, the homicide will not be excused if it was by an unlawful act, or by the doing of a lawful act in an unlawful manner, or without due caution and circumspection."

Defendant argues:

"This instruction is erroneous because it assumes the very fact in issue, the question as to whether a *homicide* had taken place. A *homicide* is the taking of a life by another. The defense contends that decedent took her own life.

"This instruction not only assumes the fact of a killing, but in addition ignores the question of proximate cause and fails to state whose accidental act would serve to fix responsibility on the defendant."

The instruction complained of must be read in the light of the previous instructions defining the particular offense with which defendant was charged and the necessity for defendant to have acted in such a manner as to constitute a crime before

the offense could be proved beyond a reasonable doubt. The jury was fully instructed on the question of proximate cause and it is readily apparent that the jury rejected the defendant's contention that the decedent shot and killed herself. It should be noted that the court instructed: "A jury may not find a defendant guilty of any homicide unless the jurors are convinced beyond a reasonable doubt that an unlawful act or unlawful acts by such defendant was or were a proximate cause of the death in question."

In view of the other instructions given by the court it is clear that the jury could not have understood from this instruction that the court was stating to them as a fact that a homicide had been committed, and no possible prejudice could have resulted to defendant from the giving of said instruction.

[6] There is no merit in defendant's next contention that the court did not properly instruct the jury on proximate cause or intervening cause.

The trial court instructed the jury on the doctrine of proximate cause as follows:

"To find the defendant guilty of involuntary manslaughter, you must find from the evidence that his conduct not only was of a kind described as essential to constitute involuntary manslaughter, by the definition heretofore given, but also that it was a proximate cause of the death involved in this case."

"The proximate cause of an injury is that cause which, in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstances, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury,

and in such cases, each of the participating acts or omissions is regarded in law as a proximate cause."

"A jury may not find a defendant guilty of any homicide unless the jurors are convinced beyond a reasonable doubt that an unlawful act or unlawful acts by such defendant was or were a proximate cause of the death in question. When that person inflicts upon another a wound which is dangerous or calculated to destroy life, and which does proximately cause the death of that other person, the fact, if it be a fact, that negligence or mistake or lack of skill of an attending physician or surgeon contributes to the death, affords no defense to a charge of homicide."

"The fact that the deceased or some other person was guilty of negligence which was a contributing cause of the death, is no defense to a criminal charge since a criminal prosecution is not an action on behalf of the injured party but for an offense against the State. Negligence of the deceased would be a defense only if such negligence was the sole cause of the death."

Reading these instructions together, it is apparent that the jury was instructed that the defendant could only be convicted if his unlawful acts were the proximate cause of the death and constituted manslaughter. *People v. Marconi*, 118 Cal.App. 683, 5 P.2d 974; *People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788; *People v. Leutholtz*, 102 Cal. App. 493, 283 P. 292; *People v. McKee*, 80 Cal.App. 200, 251 P. 675.

[7] Defendant complains also that the court erred in adding the italicized portion of the following instruction offered by him:

"If you entertain a reasonable doubt, growing out of the evidence, as to whether the decedent, Betty Freudenberg, came to her death as a result of a gunshot wound inflicted by the defendant, Herman Freudenberg, Jr., or as the result of a gunshot wound inflicted by the decedent, Betty Freudenberg, herself, or as the result of a gunshot wound inflicted by accident or

misfortune and without culpable negligence on the part of the defendant, then I instruct you that the defendant, Herman Freudenberg, Jr., is entitled to the benefit of any such reasonable doubt, and you must find him not guilty."

The modification of Defendant's Instruction No. 21 did not render the instruction erroneous. If the gunshot wound was inflicted by accident or misfortune but nevertheless by virtue of the culpable negligence of the defendant, the homicide resulting therefrom would be manslaughter for an accidental shooting is not always excusable or justifiable. 26 Am.Jur. 212, p. 301; *People v. Kerrick*, 86 Cal.App. 542, 546, 261 P. 756; *People v. Hubbard*, 64 Cal.App. 27, 220 P. 315; *People v. Peters*, 96 Cal.App.2d 671, 216 P.2d 145.

[8] Defendant next contends that since the court instructed the jury on contributory negligence of its own motion, it should have given further instructions to the effect that while contributory negligence is no defense to a charge of manslaughter, the conduct of the deceased is, however, material to the extent that it bears upon the negligence or wrongful conduct of the accused or on the issue of whether the conduct of the accused was the proximate cause of death. In support of this contention defendant relies on the dissenting opinion in *People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788. However, the majority opinion in the cited case held that the jury was correctly instructed where they were told in substance that negligence of the decedent was no defense; that such negligence would exonerate the defendant only if it was the sole proximate cause of the accident, but that the defendant was not exonerated if the jury found that he was guilty of negligence which proximately contributed to the injuries. Similar instructions were given to the jury in the case at bar.

[9] The trial court was not required to give further instructions on the subjects which were covered by the above instructions. *People v. McKee*, 80 Cal.App. 200, 251 P. 675; *People v. Marconi*, 118 Cal. App. 683, 5 P.2d 974.

In the case of *People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8, 14, the California Supreme Court in affirming a conviction of manslaughter stated:

"Nor is there merit to the contention that the court committed prejudicial error in failing to instruct the jury that Mrs. Haeussler should be acquitted if the accident were unavoidable or if it were found that the accident was caused solely by the negligence of Lovelace. The jurors were told that, to convict Mrs. Haeussler, they must find misconduct by her to have been the cause of death; also, the occurrence of an accident did not warrant an inference of negligence. There was no legal requirement that the court expressly negative liability in the event that either of these contingencies occurred. *People v. Rodgers*, 94 Cal.App.2d 166, 168, 210 P.2d 71."

[10] Under the facts of the case at bar it is fairly inferable that the obtaining and handling of a loaded gun in the manner admittedly done by the defendant herein in and of itself showed a lack of due caution and circumspection, and the result thereof, the death of the deceased, could not be attributed to any supervening or intervening cause but was a proximate result of the negligence of the defendant. Under the facts in the case it would appear that the jury was properly instructed. In the absence of a request by the defendant for additional instructions on the particular point there was no duty of the court to give additional instructions on specific points. *People v. Nudo*, 38 Cal.App.2d 381, 101 P.2d 162; *People v. Klor*, 32 Cal.2d 658, 197 P.2d 705; *People v. Reese*, 65 Cal.App.2d 329, 150 P.2d 571; *People v. Reed*, 38 Cal.2d 423, 240 P.2d 590.

[11] The next contention of defendant is that the trial court prejudiced the defendant's rights of cross-examination and removed the issue of causation and proximate cause from the jury's consideration. This contention is utterly without merit. Defendant's counsel cross-examined the doctors at great length in an effort to show that the bullet that penetrated Betty Freud-

enberg's body and the extensive damage hereinbefore described was not the cause of her death, and that she died of incompetent and negligent medical treatment. The cross-examination was not curtailed in any way and defendant has not pointed out any question asked by his counsel that was disallowed by the court.

Defendant quotes the following from the record:

"Mr. O'Hara: I assume that Mr. Lynch called Dr. Rossi today for one purpose, to show that proper surgical procedure was followed and I believe since he has testified as to his efforts on direct, it is within my province to inquire on cross-examination as to that which he has testified to.

"The Court: Counsel, do you agree with this statement, this proposition of law: The fact that the decedent, Mrs. Freudenberg, or some other person, was guilty of negligence which was a contributory cause of the death is no defense to a criminal charge, since a criminal prosecution is not an action on behalf of the injured party, but for an offense against the state. Do you agree with that proposition of law?

"Mr. O'Hara: Not only agree with it, but it is the law, your Honor.

"The Court: Exactly. And the negligence of the decedent would be a defense only if such negligence was the sole cause of death. Now, what are we going into all this detail about how the operation happened?"

Defendant now contends that the court by the last-quoted statement told the jury that the acts of the defendant were the proximate cause of death. We see no error in the statement of the court, and the jury was fully instructed by the court as to the applicable law.

[12] The general rule as to criminal responsibility of one who wounds another for the death of the victim is stated in 8 A.L.R. 516, as follows:

"When a person inflicts a wound on another which is dangerous, or calculated to destroy life, the fact that the

negligence, mistake, or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide."

In the case of *People v. McGee*, 31 Cal. 2d 229, 240, 187 P.2d 706, 713, the court stated:

"* * * On this subject it has been said to be 'the proper, and probably generally accepted, view * * * that mere negligence (in the treating of a wound) is no defense even though it is the sole cause of death because it is a foreseeable intervening cause. But death caused by grossly improper treatment is not the proximate consequence of the defendant's injury unless the injury is an actual contributing factor at the time of death, because such treatment is an unforeseeable intervening cause.'"

[13] Defendant next urges that since the only direct testimony as to the offense was his and the remainder was circumstantial, he was entitled to his proposed instructions on circumstantial evidence and that the court committed prejudicial error in refusing them.

In this case the fact of death by virtue of a gunshot wound was established by direct evidence. The circumstances surrounding the death were established through the statements of the defendant and through circumstances sometimes at variance with such statements. The defendant himself testified as to the shooting. If the jury, as was its prerogative, disbelieved that portion of defendant's testimony at the trial which was at variance with his prior statements, the offense was established by direct evidence chiefly and the circumstantial evidence was only incidental. The only circumstantial evidence involved was the testimony of the Chief of Police as to the location of the chairs and gun in the kitchen and the testimony of the expert witness as to the position of the gun when it was fired. The jury was instructed that it was to consider the opinion of duly qualified experts with the reasons given therefor; that they were not bound to accept the opinion of an expert as conclusive; and that

they should give to such an opinion the weight to which they found it to be entitled.

Defendant states that the only instruction given by the court on circumstantial evidence was the following:

"If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions appears to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

However, the record shows that immediately following the instruction just quoted the court gave an instruction defining the different classes of evidence and specifically stated that "Indirect evidence is that which tends to establish the fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact at issue, but which affords an inference or presumption of its existence."

The court also gave the following instruction:

"Two classes of evidence are therefore recognized and admitted in courts of justice, upon either or both of which, juries may lawfully find an accused either guilty or innocent of an offense charged. Direct evidence consists of the testimony of every witness who, with any of his own physical senses, perceived any conduct or act. All other evidence admitted in the trial is circumstantial, and insofar as it

shows acts, declarations, conditions or other circumstances, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence, but respects each as a reasonable method of proof."

The jury was also fully instructed as to the burden of proof, presumption of innocence and doctrine of reasonable doubt, and we are satisfied that no prejudice resulted to defendant by the refusal of the court to give the specific instructions requested by him.

[14] Defendant next contends that the court committed prejudicial error in giving the following instruction:

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

Defendant argues that while such an instruction would be proper in case where defendant did not testify it was improper and could only confuse the jury in the instant case where the defendant testified at great length. While it is true that the defendant did testify at great length it was for the jury to weigh the reasonableness

of his explanations and the weight of his testimony generally and we are unable to understand how he could be prejudiced by the giving of said instruction.

In *People v. Boggs*, 12 Cal.2d 27, 82 P.2d 368, 371, where a similar instruction was given in a case where the defendant did take the stand and testify, the court stated:

"Obviously, no prejudice could have resulted to the defendant from instruction number 9 in which the jury was merely informed of the right of court and counsel to comment on the evidence or the failure of defendant to explain or deny any portion thereof adverse to him. The instruction was undoubtedly based upon section 13, article 1, section 19, article 6 of the state Constitution and section 1439 of the Penal Code."

See, also, *People v. Keys*, 62 Cal.App.2d 903, 913-914, 145 P.2d 589.

[15] Defendant next complains of the following instruction given immediately after the instruction just discussed:

"The defendant is not required to establish any fact which he may undertake to prove beyond a reasonable doubt. If, by his evidence, or the evidence of his witnesses, he raises a reasonable doubt in your mind as to any material fact or element of the charge, this is sufficient and your duty is to acquit the defendant."

If this were the only instruction given on the subject of burden of proof there might be some basis for a claim of prejudicial error. But the jury was fully instructed on the general question of burden of proof and the necessity of the prosecution's proving every element of the offense beyond a reasonable doubt. The instruction complained of is one usually offered by a defendant to impress upon the jury the fact that he is not required to establish his defense beyond a reasonable doubt, as his guilt must be proved by the prosecution, but that he is only required to raise a reasonable doubt as to his guilt. When all of the instructions are considered together there was no error in giving the instruction.

[16] Defendant urges also that the court erred in refusing to give instructions offered by him on burden of proof, and that conviction cannot be had on suspicion or outside influences. Since the general instructions given by the court covered the contents of these proposed instructions they were properly refused.

[17] There is no merit in defendant's further contention that the following cautionary instruction was erroneous:

"The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him."

The several statements made by defendant were read to the jury and defendant could not have been prejudiced by the court's referring to them as admissions or confessions.

[18-20] There is no merit in defendant's next contention that in view of the fact that the only direct testimony was that of defendant his instructions 11 and 12 should have been given.

Instruction 11 was as follows:

"I instruct you that the direct evidence of any one witness heard during this trial who is entitled to full faith and credit is sufficient for the proof of any fact in evidence for your consideration. CCP Section 1844."

Instruction 12 was as follows:

"You are instructed that testimony received in the trial of this case which is not inherently improbable, and which is not impeached or contradicted by other evidence, should be accepted as true by you, the jury. *Gomez v. Cencena*, 15 Cal.2d 363 [101 P.2d 477]."

While instruction 11 appears to be a correct proposition of law under Code of Civil Procedure, section 1844, appellant again ignores the rule that instructions must be read together. A reading of all of the instructions given by the court indicates that instruction 11 as offered by defendant was adequately covered by the court in its charge to the jury, as pointed out by the respondent.

Instruction 12 as offered by defendant also appears to have been covered in substance by the instructions given by the court referred to above. Furthermore, as pointed out by respondent, instruction 12 as offered by defendant does not, standing alone, state a correct proposition of law. While the offered instruction might appear to state a general rule of law, it is not without exception, and to give it without also alluding to the exceptions would appear to be erroneous. As was stated in *People v. Kersten*, 60 Cal.App.2d 624, at page 626, 141 P.2d 512, at page 513:

"* * * There are exceptions to the general rule that the uncontradicted testimony of a witness to a particular fact is binding on the court. The trial court may give consideration to inherent improbabilities in the statement of a witness, the manner of the witness while testifying and all of the circumstances surrounding the particular fact which is the subject of the inquiry."

Thus while the offered instruction may have presented the elements of uncontradicted testimony and inherent improbability, it did not present the elements of the demeanor of the witness, and the other facts which would justify the trier of fact in disbelieving the testimony of an otherwise uncontradicted witness.

[21] Defendant contends further that the trial court erred in instructing on theories that were not involved in the proofs.

The court then instructed the jury that under the indictment the defendant could be convicted, if at all, only of manslaughter. The court then went on to instruct on the code definition of manslaughter, voluntary and involuntary. The court then further instructed:

"Manslaughter is the unlawful killing of a human being without malice. One kind of manslaughter, the definition, of which is pertinent in this case, is involuntary manslaughter, *being that which is done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an un-*

lawful manner, or without due caution and circumspection." (Italics added.)

The court also instructed the jury that they could not find defendant guilty of homicide unless they were convinced beyond a reasonable doubt that "*an unlawful act or unlawful acts* by such defendant was or were a proximate cause of the death in question." Further on the jury was instructed that the homicide would not be excused if it was "*by an unlawful act, or by the doing of a lawful act in an unlawful manner, or without due caution and circumspection.*" Then, again the jury was instructed that the "doing of an act ordinarily lawful which results in the death of a human being may be manslaughter where the act, being one which might cause death, is performed in an *unlawful manner* or without due caution and circumspection." (Italics added.)

It is the italicized portions of the above instructions of which appellant complains. It is appellant's contention that it was prejudicial error for the court to inject in the case by way of instructions the element of "unlawful act" or "unlawful manner," in that nowhere in the evidence did it appear that the defendant was committing an unlawful act at the time of the death.

Appellant cites *People v. Sica*, 76 Cal. App. 648, 245 P. 461, in which the jury was instructed in the language of Section 417 of the Penal Code as to the fact that the exhibition of a deadly weapon in a rude, angry, or threatening manner is a misdemeanor. No such instruction was given in this case. The evidence in *People v. Sica* disclosed that prior to the shooting the relationship between the boys was amicable, there was no fight or quarrel, and the weapon was not displayed in an angry manner. Hence the appellate court held that since it could not be determined on what theory the jury founded its verdict the giving of such instruction constituted reversible error.

In this case, since no instructions were given by the court as to any possible misdemeanors committed by defendant, it is apparent that the jury believed under the facts of the case that the defendant was

liable because of his lack of due caution and circumspection in committing a lawful act.

The jury under the evidence in the case at bar could have found that the defendant committed a lawful act—the obtaining of the gun—but performed it in an unlawful manner, by bringing it to his wife in a loaded condition, with the safety removed, and handing it to her barrel first ready to fire, and that such act without question displayed a lack of due caution and circumspection in view of his own statements as well as his testimony. Hence it is apparent that reading the instructions as a whole, defendant was not prejudiced and the jury was properly instructed on involuntary manslaughter.

[22] Defendant's next contention is that the court erred in instructing on the definition of criminal negligence.

Defendant contends that the trial court erred in instructing the jury that the words "criminal negligence" as used in Section 20 of the Penal Code and the word "negligence" as used in other penal statutes, as well as the phrase "without due caution and circumspection" do not indicate that the conduct described thereby shall display wantonness or a reckless disregard of the safety of others or wilful indifference but that ordinary negligence is sufficient.

Appellant asserts that this instruction was manifestly error in that it informed the jury that they need find the defendant guilty of "ordinary negligence" only to find criminal negligence or lack of due caution and circumspection on the part of defendant.

In the case of *People v. Pociask*, 14 Cal. 2d 679, 96 P.2d 788, 791, the court affirmed its previous decision in *People v. Wilson*, 193 Cal. 512, 226 P. 5, and the discussion therein as to what want of due caution and circumspection was required to constitute criminal negligence as well as its comments in denying a hearing in the case of *People v. Seiler*, 57 Cal.App. 195, 207 P. 396, and stated:

"The proper rule deducible from the cases cited in the note above referred to (note following report of John-

son v. State, 66 Ohio St. 59, 63 N.E. 607, 90 Am.St.Rep. 564, in 61 L.R.A. 277), would seem to be this: That when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life. * * *

In the Pociask case the case of *People v. Hurley*, 13 Cal.App.2d 208, 56 P.2d 978, relied upon by defendant with relation to the definition of criminal negligence was specifically disapproved.

We are unable to agree with defendant's contention that the instruction complained of was erroneous.

Defendant's final contentions are that he is deprived of his liberty without due process of law under both the state and federal constitutional guarantees because (1) the indictment failed to notify him of the charge he was called upon to defend; and (2) the verdict of the jury was legally insufficient to support the judgment.

As hereinbefore stated defendant was charged with the crime of manslaughter in that he did wilfully, unlawfully, feloniously and without malice kill one Elizabeth Anne Freudenberg.

[23] In the case of *People v. Dobbs*, 70 Cal.App.2d 261, 161 P.2d 46, the indictment similarly charged the defendant who made the same objection thereto as the instant defendant. In answering this contention the court cited *People v. Herbert*, 6 Cal.2d 541, 58 P.2d 909, 912, which case held:

"The ingredient of manslaughter is that a human life was unlawfully taken. * * * The statute defining it is general and it makes no difference as to the particular means or methods by which it is committed if death ensues from the commission of an unlawful

act not amounting to a felony, or from the commission of a lawful act which might produce death in an unlawful manner or the commission of a lawful act without due caution and circumspection. Section 192, Pen.Code. The manner of its commission need not be pleaded."

In the *Dobbs* case the court, 70 Cal. App.2d at page 266, 161 P.2d at page 49, went on to state:

"In *People v. Pearne*, 118 Cal. 154, 50 P. 376, 377, the court said: 'If this indictment had simply charged an "unlawful killing," without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary.' Even before the rules of pleading in criminal cases were relaxed by the amendments of 1927 and 1929 it was held sufficient to allege an offense in the language of the statute except in cases where fraud was an essential element of the crime. In *re Berto*, 195 Cal. 774, 235 P. 735. In many cases, before and after those amendments, it was held that a general charge of manslaughter was sufficient to uphold a conviction of either voluntary or involuntary manslaughter, that it was not necessary to allege in the information which of the two kinds of manslaughter were charged against the defendant, and that no recital of the precise facts that would be relied upon is necessary."

[24] Therefore, in the instant case the indictment would appear to be sufficient in pleading, under the above rule.

[25] Furthermore, defendant did not demur to the indictment nor did he make a motion in arrest of judgment; hence he may not urge any defect appearing on the face of the indictment for the first time on appeal. *People v. Reimringer*, 116 Cal. App.2d 332, 253 P.2d 756; *People v. Hinshaw*, 194 Cal. 1, 9, 227 P. 156; *People v. Ahern*, 113 Cal.App.2d 746, 750, 249 P.2d 63.

[26, 27] Defendant contends that the verdict is insufficient to support the judgment in that he was found guilty only of

"Felony, to wit: Manslaughter, as charged in the indictment." Defendant argues that since the verdict did not specify the degree of manslaughter of which he was found guilty a judgment could not be supported thereby. However, the point raised was decided contrary to defendant's contention in the case of *People v. Bones*, 35 Cal.App. 429, 170 P. 166. In that case the defendant was charged by information substantially the same as the instant defendant was charged by indictment. In that case the defendant made the same objection to the form of the verdict returned by the jury as did the defendant in the instant case. In that case the verdict of the jury was also that the defendant was guilty of manslaughter, without specifying the degree. There, however, the court rejected the defendant's contention, saying, 35 Cal.App. at page 434, 170 P. at page 168:

"We think the evidence was such as to have justified the court in submitting to the jury a form of verdict for both voluntary and involuntary manslaughter; but it cannot be said that the defendant was prejudiced by the failure of the court to do so. The punishment for manslaughter of either kind is the same, viz. by punishment in the state prison not exceeding 10 years (Pen. Code, § 193), and we cannot say that the punishment imposed upon the defendant would have been any less than or different from that meted out by the court had the jury found and returned a verdict specifically finding the defendant guilty of involuntary manslaughter."

We therefore conclude that defendant's contention that the verdict is insufficient is without merit. Moreover, it should be

noted that no objection to the form of the verdict was made by way of motion for a new trial and hence such objection may not now be raised for the first time on appeal. *People v. Caberera*, 104 Cal.App. 414, 286 P. 176; *People v. Chiappelone*, 90 Cal. App. 472, 265 P. 976; *People v. Cornell*, 29 Cal.App. 430, 155 P. 1026; *Curtis v. San Pedro Transp. Co.*, 10 Cal.App.2d 547, 52 P.2d 528; *Johnson v. Visher*, 96 Cal. 310, 31 P. 106.

[28] In view of the earnest and able arguments presented by defendant's counsel in their briefs aggregating 160 pages, and of the numerous contentions made by them we have made a careful study of the entire record. We are convinced that the defendant was given a fair and impartial trial, that he was ably defended, that the instructions given to the jury by the court were full, fair and complete, and that the record is singularly free from error. As hereinbefore pointed out we are convinced that the judgment of conviction is amply supported by the record. Having in mind the provisions of section 4½ of Article VI of our state Constitution that no judgment shall be set aside on the ground of misdirection of the jury or error in the introduction or rejection of evidence or for error as to any matter of pleading, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice", we believe that, even if defendant is correct in some of his claims of error, no miscarriage of justice has resulted.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

BRUCE v. BRUCE.

Civ. 19657.

District Court of Appeal, Second District,
Division 3, California.

Dec. 3, 1953.

Rehearing Denied Dec. 28, 1953.

Hearing Denied Jan. 27, 1954.

Action for divorce on ground of wilful desertion. The Superior Court of Los Angeles County, Irvin Taplin, J., entered interlocutory judgment of divorce for plaintiff and defendant appealed. The District Court of Appeal, Vallée, J., held that where defendant moved to Los Angeles in 1938, and refused to return to plaintiff, despite fact that plaintiff obtained five room house, evidence was sufficient to support findings of wilful desertion and that place of living provided by plaintiff was reasonable.

Affirmed.

1. Divorce ⇨133(1)

In action for divorce for wilful desertion, evidence that wife left husband in 1938 and refused to return to him despite repeated requests supported finding of wilful desertion. Civ.Code, §§ 95, 96, 100, 103.

2. Divorce ⇨133(3)

In action by husband for divorce for wilful desertion, evidence that husband had obtained partly furnished five room house complete with electric stove and electric heater supported conclusion that husband had selected reasonable place of living. Civ.Code, §§ 95, 96, 100, 103.

3. Divorce ⇨104, 184(5)

Where divorce complaint and answer were filed in 1950, and cause came on for trial in 1952 and at opening of trial defendant asked leave to file amended answer, whether defendant should have been allowed to amend her answer was within discretion of trial court, and in absence of abuse of discretion, trial court's denial of permission would not be disturbed on review.

4. Divorce ⇨124

Evidence supported finding that husband had been resident of California one year and of County of Los Angeles at least three months preceding commencement of

divorce action. Civ.Code, § 128; Code Civ.Proc. § 1875, subd. 8.

5. Evidence 10(1, 2)

The Superior Court and the District Court of Appeal take judicial notice that San Francisquito Canyon and Saugus, California are in Los Angeles County. Code Civ.Proc. § 1875, subd. 8.

6. Divorce ⇨223

During pendency of an action for divorce, the court may in its discretion require husband or wife to pay as attorney's fees any money necessary for prosecution of the action. Civ.Code, § 137.

7. Divorce ⇨182

Attorney's fees for purpose of prosecuting appeal from divorce decree would not be allowed in absence of application to trial court for such an allowance. Civ. Code, §§ 95, 96, 100, 103, 137; Rules on Appeal, rule 15(a).

8. Divorce ⇨223

Where plaintiff in divorce action stipulated that court might allow defendant attorney's fees if it deemed such allowance proper, but no evidence was introduced with respect to services performed by defendant's attorney or their value or with respect to need of defendant for such award, it was not abuse of discretion for trial court to deny attorney's fees. Civ.Code, § 137; Rules on Appeal, rule 15(a).

Grainger, Carver & Grainger, Kyle Z. Grainger, Jr., Los Angeles, for appellant.

Ralph W. Miller, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an interlocutory judgment adjudging that plaintiff is entitled to a divorce. The court found that on September 23, 1946, defendant willfully and without cause deserted plaintiff, and that the desertion continued more than one year.

The specifications of error are: 1. The findings are not supported by evidence. 2. The place of living chosen by plaintiff was not reasonable. 3. The court should have

permitted the answer to be amended. 4. Plaintiff failed to prove and corroborate jurisdictional grounds. 5. "Attorney's Fees."

[1] The parties were married in 1918. They have two boys. From 1938 to the trial, plaintiff was employed in San Francisquito canyon in Los Angeles county. In 1938, the parties with their boys resided a few miles away. Their youngest boy was then seventeen years of age; the other, twenty. In December 1938 defendant and the boys moved to Los Angeles for better educational facilities. On his days off, plaintiff visited them. In 1942, a house at plaintiff's place of employment in San Francisquito canyon was made available to him and the family. It consisted of five rooms and a bath; was electrically equipped; and partly furnished. Plaintiff moved in, described the house and surroundings to defendant and asked her to go from Los Angeles to San Francisquito canyon and live with him there. He repeated the request a number of times until September, 1946. Defendant refused to go on each occasion. One of the boys married in 1943; the other, in 1944. The parties did not live together after September 24, 1946. The foregoing evidence is sufficient to support the finding of willful desertion. Civ.Code, secs. 95, 96, 100, 103; *Brown v. Brown*, 92 Cal.App. 276, 268 P. 401; *Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Goucher v. Goucher*, 82 Cal.App. 449, 255 P. 892; *Mohn v. Sumner*, 48 Cal.App. 314, 191 P. 991.

[2] Whether the plaintiff selected a reasonable place of living was a question of fact. The home selected was a five room house, with two bedrooms, a kitchen, a large living room, and a den. It had an electric stove, electric heaters, and was partly furnished. The parties owned other furniture which the defendant was using in Los Angeles. The house was surrounded by trees and flowers. There was evidence that the house was superior to that occupied by defendant in Los Angeles. The evidence was sufficient to warrant the conclusion that plaintiff selected a reasonable place of living.

[3] The complaint was filed April 19, 1950. The answer was filed May 1, 1950. The cause came on for trial on September 5, 1952. At the opening of the trial, defendant asked leave to file an amended answer "setting up the defense of incrimination, cruelty and desertion, and asking for attorney's fees and asking for relief in case the divorce is denied." The request was denied. No excuse was offered for the long delay—about two years and four months—in requesting leave to file an amended answer. The proposed amended answer is not part of the record and we cannot determine its sufficiency and, hence, cannot determine whether the trial court should have permitted it to be filed, or whether its refusal to do so was error. There was no showing that if the proposed amendment was allowed it could have been sustained by evidence. Whether such an amendment should be allowed is a matter in the discretion of the trial court, and its ruling will not be disturbed on review unless that discretion has been abused. *Davidson v. National, etc., Inc.*, 122 Cal.App. 720, 10 P.2d 491; *Roger Brothers Co. v. Beck*, 43 Cal. App. 110, 112, 184 P. 515; *Betzer v. Olney*, 14 Cal.App.2d 53, 60, 57 P.2d 1376. No abuse of discretion is shown.

[4,5] Defendant claims there was no proof that plaintiff had been a resident of the state one year and of the county of Los Angeles three months next preceding the commencement of the action. Civ.Code, sec. 128. The point cannot be sustained. In 1938, plaintiff went to work for the city of Los Angeles at its power plant in San Francisquito canyon, Saugus, California. He worked there continuously to the time of trial. From 1942 to the time of trial, he lived in the house we have described, on the plant property. A corroborating witness testified he lived at the power plant for six years ending in March 1951 and that plaintiff was living there during that time. The trial court and this court take judicial notice that San Francisquito canyon and Saugus, California, are in Los Angeles county. Code Civ.Proc. sec. 1875, subd. 8; *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 582, 300 P. 34; *Rogers v. Cady*, 104 Cal. 288, 290, 38 P. 81; *Cole v. Se-*

graves, 88 Cal. 103, 105, 25 P. 1109; Wahr-
enbrock v. Los Angeles Transit Lines, 84
Cal.App.2d 236, 239, 190 P.2d 272; Sayles
v. County of Los Angeles, 59 Cal.App.2d
295, 302, 138 P.2d 768. The jurisdictional
facts were established.

[6-8] Under the heading "Attorney's
Fees," defendant merely says her attorney
has received nothing in the way of attor-
ney's fees for representing defendant in
the action, and requests that she be allowed
a reasonable attorney's fee from plaintiff.
No reference to the record is made. De-
fendant has not complied with the Rules on
Appeal, and the point should not be con-
sidered. Rule 15(a) of the Rules on Ap-
peal provides that each point in a brief
shall appear under an appropriate heading
which shall be generally descriptive of the
subject matter covered, and that the state-
ment of any matter in the record shall be
supported by an appropriate reference to
the record. 36 Cal.2d 15. So far as ap-
pears no application was ever made by de-
fendant to the superior court for an allow-
ance of attorney's fees. Plaintiff says
present counsel for defendant was her at-
torney of record for one year and eight
months prior to the trial and that during
that time defendant made no application
for fees. This is not denied. At the com-
mencement of the trial, plaintiff stipulated
that the court might, in its judgment, allow
defendant attorney's fees if it deemed such
an allowance proper. Nothing further was
said about fees. No evidence was intro-
duced or offered with respect to the services
performed by defendant's attorney, or their
value, or with respect to the need of de-
fendant for such an award. During the
pendency of an action for divorce, the
court may, in its discretion, require the hus-
band or wife to pay as attorney's fees any
money necessary for the prosecution of the
action. Civ.Code, sec. 137. The matter
was one in the sound discretion of the trial
court. Whelan v. Whelan, 87 Cal.App.2d
690, 692-693, 197 P.2d 361; Sharpe v.
Sharpe, 55 Cal.App.2d 262, 265-266, 130 P.
2d 462. No abuse of discretion is shown.
If defendant had desired an allowance of
attorney's fees for the purpose of prosecut-
ing her appeal and could have made a suf-

ficient showing, she should have made ap-
plication to the trial court for such an al-
lowance. Newlands v. Superior Court, 171
Cal. 741, 154 P. 829; Proper v. Proper, 102
Cal.App.2d 612, 617-619, 228 P.2d 62.

Affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



121 Cal.App.2d 601

MELOY et al. v. TEXAS CO.

Civ. 19318.

District Court of Appeal, Second District,
Division 3, California.

Dec. 4, 1953.

Rehearing Denied Dec. 28, 1953.

Hearing Denied Jan. 27, 1954.

Action by employees of maintenance
company against oil refinery company for
injuries resulting from explosion that oc-
curred while plaintiffs were cleaning pipes
in crude oil heater of oil refinery. The Su-
perior Court, Los Angeles County, Vernon
W. Hunt, Judge pro tem., entered judgment
for plaintiffs, and defendant appealed. The
District Court of Appeal, Parker Wood, J.,
held, inter alia, that evidence presented
question of fact as to whether plaintiffs
were special employees of refinery so as to
be limited to recovery under Workmen's
Compensation Act.

Affirmed.

1. Workmen's Compensation ⇐2134

In action by employees of maintenance
company against oil refinery company for
injuries resulting from explosion that oc-
curred while plaintiffs were cleaning pipes
in crude oil heater of oil refinery, burden
was upon oil refinery company to prove its
allegation that plaintiffs were its special
employees and thus were limited to recov-
ery under Workmen's Compensation Act.

2. Evidence ⇐78

In action by employees of maintenance
company against oil refinery company for

injuries resulting from explosion that occurred while plaintiffs were cleaning pipes in crude oil heater of oil refinery, in view of fact that oil refinery company did not offer written contract with maintenance company in evidence in support of its contention that plaintiffs were special employees of the refinery and thus limited to recovery under Workmen's Compensation Act, it could be inferred that provisions of contract were contrary to interests of oil refinery.

3. Workmen's Compensation ⇨2138

In action by employees of maintenance company against oil refinery company for injuries resulting from explosion that occurred while plaintiffs were cleaning pipes in crude oil heater of oil refinery, evidence presented question of fact as to whether plaintiffs were special employees of refinery so as to be limited to recovery under Workmen's Compensation Act.

4. Explosives ⇨7

Where complicated system or mechanism of towers, pipes and valves which regulated flow of oil into and from crude oil heater of oil refinery was under exclusive control of oil refinery during period employees of maintenance company were cleaning pipes in the heater, doctrine of res ipsa loquitur was applicable for injuries resulting from explosion of heater.

5. Explosives ⇨7

In action by employees of maintenance company against oil refinery company for injuries resulting from explosion that occurred while plaintiffs were cleaning pipes in crude oil heater of oil refinery, evidence presented question for jury as to whether employees were contributorily negligent in continuing their work after seeing vapors escaping from the pipes and after being told by refinery controlman that it was all right to continue.

6. Explosives ⇨7

In action by employees of maintenance company against oil refinery company for injuries resulting from explosion that occurred while plaintiffs were cleaning pipes in crude oil heater of oil refinery, evidence presented question for jury as to whether employees had assumed risk of the employ-

ment in continuing their work after seeing vapors escaping from the pipes and after being told by refinery controlman that it was all right to continue.

7. Trial ⇨260(7)

Where instructions given in negligence action were adequate to cover defense that plaintiffs at time of injury were special employees of defendant, refusal of defendant's requested instruction on such matters was not error.

8. Appeal and Error ⇨1060(1)

In view of admonition of court that financial ability of defendant was not to be made test of any award that might be made, statement by plaintiff's counsel to effect that defendant was a big industrial organization and that any award against it would be nothing compared to the loss to plaintiff if jury did not make award was not prejudicially erroneous.

9. Appeal and Error ⇨207

Where no objection to statements of plaintiffs' counsel was made at trial, it would be deemed on appeal that misconduct, if any, by reason of the statements was waived.

10. Appeal and Error ⇨1058(1)

Defendant was not prejudiced in personal injury action by ruling sustaining objection to certain question, where after such ruling defendant was permitted to ask without objection questions which were in substance the same as the question to which the objection had been sustained.

11. Appeal and Error ⇨205

Where defendant made no offer of proof after sustaining of objection to his questions, and questions did not indicate answers favorable to defendant, it could not be said on appeal that the rulings were prejudicial.

12. Damages ⇨95

The standard for awarding damages is such amount as a reasonable person would estimate as fair compensation for the injuries.

13. Damages ⇨132(7)

Award of \$65,000 to maintenance company pipe fitter and crew foreman who was

engaged in cleaning pipes in crude oil heater of oil refinery at time of explosion and who at such time was 48 years of age, was earning about \$3,700 a year, and had a life expectancy of approximately 21 years, for heel bone injury which permanently limited lateral mobility of heels so that walking was hindered, and which permanently prevented him from doing heavy work, for burns about face, ears, arms, and hands, and for medical expenses of \$2,013.03 was not excessive.

14. Damages $\hookrightarrow$ 132(8)

Award of \$20,000 to pipe fitter's helper who at time of injury had take-home pay of about \$2,800 a year and who had a life expectancy of approximately 14 years for 20% limitation of flexion of wrist and weakness of arm and hand so that he could not perform his regular work and for medical expenses of \$498.29 was not excessive.

15. Damages $\hookrightarrow$ 130(3)

Award of \$10,000 to pipe fitter's helper for burns about face, arms, and neck, dislocated coccyx, and fracture of lower sacral segment, which injuries made him discontinue his regular work because of strain on back, and for medical bill of \$209.36 was not excessive.

Clock, Waestman & Clock, Los Angeles, Henry H. Clock, Long Beach, and Iverson & Hogoboom, Los Angeles, for appellant.

Ball, Hunt & Hart, and Joseph A. Ball, Long Beach, for respondents.

PARKER WOOD, Justice.

Action for damages for personal injuries resulting from an explosion that occurred while plaintiffs were cleaning pipes in a crude oil heater of an oil refinery. Judgments, entered in accordance with verdicts, were as follows: \$65,000 for plaintiff Meloy; \$20,000 for plaintiff Evans; and \$10,000 for plaintiff Bucci. Defendant appeals from the judgments.

Appellant contends that the plaintiffs were special employees of appellant as a matter of law, and that their remedy was a proceeding before the Industrial Accident

Commission; appellant was not negligent and the doctrine of *res ipsa loquitur* is not applicable; plaintiffs were guilty of contributory negligence; plaintiffs assumed the risk; the court erred in rulings as to admissibility of evidence, and in refusing to give an instruction; plaintiffs' counsel committed misconduct in his argument; and the damages were excessive.

Defendant owned and operated an oil refinery in Los Angeles County. A part of the refinery apparatus was a crude oil heater, which was a part of "Vertical Still No. 2." The still was connected by pipes and conduits with other stills and parts of the refinery that contained inflammable and explosive vapors and fluids, which vapors and fluids circulated through those pipes and conduits into pipes of the heater. About every six months it was necessary to clean the heater pipes.

Petroleum Maintenance Company, which was in the business of repairing and maintaining various oil refineries, had an office on defendant's premises and had a contract with defendant to make repairs on defendant's refinery at places directed by defendant. When defendant wanted employees of said maintenance company to perform services at defendant's refinery, the customary practice was that defendant's engineering department would send a work order to the office of the maintenance company, and the foreman of that company would send a crew of its employees to perform the services.

Plaintiffs were employees of the maintenance company and had been such employees for three or four years prior to the accident. Meloy was a pipe fitter and a foreman of a crew of workmen. Plaintiffs Evans and Bucci were pipe fitter's helpers.

On September 6, 1949, pursuant to a written work order issued by defendant on September 5, the maintenance company sent a crew of six employees, including plaintiffs, to clean the pipes in Vertical Still No. 2. Meloy, the foreman of the crew, was directed orally by Mr. Coats, the foreman of the maintenance company, to unhead and clean the black oil section and heater of said still.

Still No. 2 is one of several oil cracking units in the refinery. The heater is a box-like building with a furnace in the lower part thereof and tubes in the upper part. Oil circulates through the tubes. A highly inflammable oil, referred to as clean oil, flows through a section of the tubes which is directly above the furnace. A heavy black residue of oil, referred to as black oil, flows through a section of the tubes which is above the clean oil tubes. The temperature of the clean oil when flowing through the tubes is about 985° Fahrenheit. The oil products pass from the heater through three towers in which the refining process is completed. Preparatory to cleaning the tubes it is necessary to shut down the operation of the still. The work of shutting down the operation and preparing the tubes for cleaning was done by the defendant. The usual procedure in doing the preparatory work is to shut down the furnace, insert blinds in the pipes leading to the heater, disconnect the pipes between the heater and the towers, and remove the residue of oil from the tubes by a flushing process which requires five hours and consists of using light clean oil, then steam, and then water. The heat in the fire box or furnace prior to shutting down is usually about 1500°, and after the preparatory work is finished the heat in the fire box (which has thick brick walls) is about 600°. The bricks in the fire box might be very hot. If inflammable and explosive vapors and fluids are present in the tubes, the work in cleaning the tubes is dangerous. The cleaning operation which follows the preliminary work consists of removing the bends or fittings which connect the tubes, and then knocking the coke and other accumulations out of the tubes. Meloy and the men in his crew did not know anything about the engineering features or the operation of the refinery or what might be in the lines which connect the heater and other parts of the refinery.

On September 6, Meloy asked an employee of defendant, who was in the control room of Still No. 2, if the heater was ready to be opened. Another employee, who was in the control room and was reading the log book, said that it was in proper shape

to work on. The tubes extended through the still in an east-west direction in horizontal layers. The ends of the tubes (outside the still) are connected by "U-tubes," known as bends or fittings. Plaintiff Meloy and his crew removed the bends from the clean oil section on the west side of the still. There were about four rows of those tubes, with twenty tubes in each row. The work in removing those bends required about 2½ hours. Nothing unusual occurred while they were doing that work. Then they went to the east end of the still and removed some of the bends from the bottom row of tubes. Meloy smelled gas when they disconnected a line. He thought the gas was coming out of the line at the place where they disconnected it. Other members of his crew noticed vapor coming from the line. Meloy then stopped the work. Sudduth, a foreman for defendant, also noticed the vapor. Then Meloy and Sudduth went into the control room and Sudduth talked with Nance therein, who was a control man. Meloy testified that Sudduth and Nance went to the heater, looked it over, and Nance pulled some of the valves; then Nance told Meloy "to go back to work on it, it was all right." Meloy and his crew then continued the work of removing the bends. They were standing on a platform which was about 12 feet above the pavement and were removing bends which were above the fire box. Meloy testified that after some of the bends were removed, an oil which appeared to be a light oil ran out of the tubes. Then there was an explosion, and flames burst out and went up from the fire box and seemed to cover the platform. Meloy jumped from the platform to the ground. Evans was blown off the platform. Bucci fell over or was blown over the railing of the platform. They suffered personal injuries.

[1-3] As above stated, a contention of appellant is that plaintiffs were special employees of appellant and their sole remedy was for workmen's compensation. It argues that appellant had the right to control and did control the plaintiffs in the work of cleaning the heater; that by reason of such right of control appellant became the special employer of plaintiffs. The burden

was upon appellant to prove its allegation that plaintiffs were its special employees. See *Popejoy v. Hannon*, 37 Cal.2d 159, 174, 37 Cal.2d 159, 231 P.2d 484. There was a written contract between the Petroleum Maintenance Company and appellant with respect to the method of compensating the maintenance company. Since the contract was not offered in evidence, it might be inferred that the provisions thereof were contrary to the interests of appellant. If appellant was doing its own maintenance work with borrowed employees, there would have been no occasion for a contract with the maintenance company. The maintenance company does maintenance and repair work for other refineries such as Wilshire Oil Company, Standard Oil Company, Associated Oil Company, and Stauffer Chemical Company. It furnishes an identification badge to each of its employees, which badge bears the name of the maintenance company and the number assigned by that company to the employee. Their employees, when reporting for work, go to a building on appellant's premises bearing the sign "Petroleum Maintenance," and they check in on the maintenance company's time clock. Those employees are paid by the maintenance company. Meloy, who had been a pipe fitter for twenty years, was a skilled workman. On September 6 prior to the accident the foreman of the maintenance company gave Meloy, the foreman of a crew of workmen, a written order from appellant for the repair work. The foreman of the maintenance company also gave him oral instructions to do the work and assigned a crew of employees to assist him. Meloy testified that he had never been assigned to his work by any one except a maintenance company officer; he had never worked in a mixed crew or crew made up of employees of appellant and the maintenance company; only maintenance company employees had been assigned to his crews; the policy of the appellant is the same as in other oil refineries—that the operating department of the refinery never directs them (maintenance employees) as to the manner in which they should do their work—the department tells them what to do and when to do it, but not how to do

it. It was the duty of the operating department of the appellant to close all valves that permit petroleum products to enter the heater. The employees of the maintenance company were not permitted to close or open a valve. There was testimony by Mr. Noble, the superintendent of the maintenance company (called as a witness by appellant), that the employees of the maintenance company worked in a mixed crew with employees of the appellant on the day of the accident; that all the men working with Meloy were on the payroll of the maintenance company; that by the expression "mixed crew" he meant that the heater was not all the unit—it did not include the whole unit—that appellant had some men working on the unit. Employees of appellant, who had duties in connection with the operation of said unit or Still No. 2, were a still man, a control man, and a fireman. Mr. Bishop, an assistant supervisor of appellant for the area in which said unit was located, testified to the effect that said employees of appellant worked under the direction of a foreman, and that their work pertained to the operation of the unit—the actual running of petroleum through the still and vats—and had nothing to do with the repair or maintenance of the plant. It was a question of fact whether plaintiffs were special employees of appellant. The court gave instructions properly defining an independent contractor, employee, and special employee. The evidence was sufficient to support findings that plaintiff Meloy, the foreman of the maintenance company's crew, was a skilled pipe fitter, and it was not necessary for any one to direct him as to the manner in which he should do his work; that appellant did not control or have the right to control said crew as to the manner or method in which it performed the work of cleaning the heater; and that plaintiffs were not special employees of appellant.

[4] Appellant also contends that the doctrine of *res ipsa loquitur* is not applicable. It argues that the still had been turned over to Meloy and his crew and there was no evidence that the still was under the control of appellant. Meloy and his crew knew nothing about the engineer-

ing features of the still. The maintenance company employees were not allowed to close or open a valve; their work pertained only to the cleaning, repair, and maintenance of the heater, which was a part of the still or unit. Employees of appellant did the work preparatory to closing the heater, such as shutting down the operation of the unit, closing valves, and inserting blinds in lines connecting the heater with towers and other parts of the unit. The maintenance company did not have any control, or the right to any control, over that work. Although the employees of the maintenance company were in charge of the work of cleaning the heater after it had been prepared by appellant, they were not in charge of, and they did not have any connection with, any other work pertaining to the unit. They had no control over the mechanism of the refinery which allowed oil to flow to or from the heater. Employees of appellant; namely, a still man, a control man, and a fireman (who were under the supervision of a foreman), remained in charge of the other parts of the unit, such as towers and the lines leading to and from the heater. There was evidence that appellant, in preparing the heater for cleaning, placed blinds in all the lines leading to or from the heater with the exception of one clean oil line leading to the heater. In that line, in which there was no blind, there were two block valves and between those valves there was a bleeder (an outlet or drain to the sewer). Mr. Jones, the operating supervisor of oil cracking equipment for appellant, testified that there were two ways in which it would have been possible for oil from the tank to back up into the tubes of the heater, assuming that the heater had been steamed out properly; one of those ways was that if the steam pressure inside the tubes had been reduced to approximately zero before the block valve to the tank was closed, it would have been possible for oil to back up into the tubes; the other way was that oil could have leaked from the fractionating tower through the two block valves (if the bleeder was closed); he checked both valves and the bleeder (after the accident) and found that the valves were closed and the bleeder

was open; and it is the duty of the operating department of appellant to see that those valves are closed and that the bleeder is open. He testified further that if the valves are closed properly at the proper time and the valves are in good shape, then oil could not get into the heater; that if the valves were not closed, obviously oil could have leaked into the heater from the tower if there was any pressure in the fractionating tower; there was no pressure in the tower. Mr. Palmer, a still man for appellant—on the day shift, testified that the night shift still man for appellant had not put a blind in a clean-oil outlet line; that Mr. Russell (a pipe fitter foreman for the maintenance company) discovered that the blind was not in. Russell testified that after the accident he found that the bleeder was closed. The maintenance company did not have any control, or the right to any control, over the work in preparing the heater for cleaning. It cannot be said that the maintenance company, in performing the work of cleaning the heater after the heater had been prepared for cleaning by appellant, had exclusive or any control, or the right to any control, over the part of the refinery unit from or through which oil could enter the heater. In *Hinds v. Wheadon*, 19 Cal.2d 458, 121 P.2d 724, an employee of an independent contractor (who conducted a welding business) went to the premises of defendant (who conducted a business of treating crude petroleum) for the purpose of welding a steel dehydrating tank. An employee of the defendant therein told the welder that the tank (which was used in treating crude petroleum) had been washed out and filled with water. While the welder was finishing the top weld, the tank exploded and he was killed. The court held that the doctrine of *res ipsa loquitur* was applicable therein, and said, 19 Cal.2d at page 461, 121 P.2d at page 726: "The evidence introduced by plaintiffs, however, indicates that the explosion was caused by the unexplained absence of water at the top of the tank behind the spot where the welding was to be done. The work done by deceased on the outside of the tank had no relation whatever to the complicated system of

valves and pipes which regulated the water level within the tank and, insofar as the matter can be determined upon the evidence introduced by plaintiffs, such matters were within the exclusive control of the defendants." In the present case the work done by plaintiffs in cleaning the heater had no relation to the complicated system or mechanism of towers, pipes, and valves which regulated the flow of oil into and from the heater. That system or mechanism was under the exclusive control of appellant. The doctrine of *res ipsa loquitur* was applicable herein.

[5] Appellant also contends that plaintiffs were guilty of contributory negligence as a matter of law. It argues that Meloy had seen vapors escaping from the pipes, and that all the plaintiffs were aware of the dangerous situation; they continued working and using equipment known by them to be dangerous; their conduct in remaining at work cannot be justified upon any theory of reliance upon assurance by Nance that the heater was all right to work on—especially in view of the perfunctory examination by Nance of a certain valve. Whether or not plaintiffs were justified in relying upon such statement of Nance was a question of fact for the jury. They were not guilty of contributory negligence as a matter of law.

[6] Appellant also contends that as a matter of law plaintiffs assumed the risk of the employment. It argues that the plaintiffs, with knowledge of the dangerous condition of the heater, voluntarily remained in the dangerous area. The statements made herein with respect to the question of contributory negligence are applicable here. It cannot be said as a matter of law that plaintiffs assumed the risk.

[7] Appellant also contends that the court erred in failing to give an instruction requested by it. That instruction was to the effect that if the jury found that plaintiffs were the general employees of the maintenance company, and that on the day in question said employees were hired by appellant to do certain work on appellant's premises, and that plaintiffs were directed by agents of appellant with respect to when the work was to be performed, the manner of performance, the safety precautions to be exercised, the number of employees to be utilized in performing work, and that appellant directed or controlled the work done by plaintiff, then the jury should find that plaintiffs were special employees of appellant. The court gave six instructions, requested by appellant, with respect to the subject of special employees.¹ Those instructions which were given were adequate

1. The instructions so given were to the following effect:

1. If any plaintiff was a special employee of appellant, then such plaintiff is not entitled to prosecute this action for damages and the exclusive jurisdiction of actions arising from such injury is in the Industrial Accident Commission; and, if the jury should find that any plaintiff was such a special employee, the verdict should be for appellant.

2. In this instruction the terms "special employee" and "independent contractor" were defined, and then the jury was instructed that in determining whether any plaintiff was a special employee of appellant, the following rules are requisite for establishing such employment: That the appellant had the right to control and direct the activities of some of the plaintiffs or the manner in which the work of some of the plaintiffs was performed, whether or not such right of control was exercised.

3. That the test whether a person is

an employee or independent contractor is whether the principal has the right of control over the manner of the performance of the services; the use or the lack of use of such right of control is not important in deciding that issue.

4. That a person may be both a general employee of one employer and a special employee of a special employer if the following requisites are present: A loaned employee situation in which an employee of one is sent to perform labor for another. A joint participation in the work and benefit to each from its rendition. Some power "of direction and control of details in each."

5. That if the jury should find that plaintiffs were special employees of appellant, then the exclusive remedy of plaintiffs is to proceed under the industrial compensation laws, and the jury should return a verdict for appellant.

6. This instruction contained definitions of independent contractor and employee.

to cover the matters included in said refused instruction. It was not error to refuse to give the instruction.

[8,9] A further contention of appellant is that plaintiffs' counsel committed misconduct in his argument to the jury. Plaintiffs' counsel said, in referring to appellant: "They are in business. They are an industrial organization. They sell products all over the country. The amount that would be awarded against them is nothing compared to the loss to Meloy if you don't award it. Now, as I say, if you are going to make somebody gamble in this case on what the damages should be, I ask you if it is not fair not to make Meloy gamble." Counsel for appellant cited that statement as misconduct on the ground that the ability to respond in damages may not be used as a basis for the amount of damages. Counsel for plaintiffs then said that that is correct, and the financial responsibility of the defendant should not be considered. The court said: "Well, yes. I think the jury should be admonished that the financial ability of the defendant is not to be made the test of any award that might be made here * * *." In view of the admonition of the court, it cannot be said that counsel's statement was prejudicially erroneous. Other statements of plaintiffs' counsel, referred to on appeal as statements constituting misconduct, are set forth in the margin below.² No objection was made to said statements at the trial and there was no citation of misconduct regarding them. It might well be that no objection was made to them because the statements when heard as a part of the whole argument, and not out of context, did not seem to carry the meaning now assigned to them by appellant. Immediately following

the second statement appearing in the margin, plaintiffs' counsel said: "When damages are awarded to an individual, that is compensation for something you can't give back, a couple of good feet, a good arm, a good back. It is hard to measure that [in] money. The only way you can measure it in money is to try to give them bread-and-butter money over the long period, and give them something for pain and suffering." Preceding the third statement appearing in the margin, plaintiffs' counsel had made statements to the effect that the 1931 dollar had shrunk so that now it would buy about one-third as much as it bought in 1931, and that is the reason he was saying that a verdict of \$25,000 or \$30,000 would be inadequate—it would be 1931 prices against a 1951 injury; that \$75,000 is not a lot of money if you spread it over the lifetime that is left. Since no objection to the statements was made at the trial, it may be deemed on appeal that misconduct, if any, by reason of the statements was waived. See *Paul v. Key System*, 80 Cal.App.2d 21, 26-27, 180 P.2d 940, 944.

[10] Appellant contends further that the court erred in rulings as to admissibility of evidence. Objections were sustained to certain questions which appellant asked its witnesses Coats, Noble, and McAllister in an attempt to show that appellant had the right of control over plaintiffs. Appellant argues that the witnesses held positions of supervisory responsibility and had knowledge of the relationship between the two employers; that the answers to the questions, if allowed, might have shown who gave the orders and who had the right of control.

Witness Coats, a foreman of the maintenance company (called as a witness by ap-

2. Statements of plaintiffs' counsel:

1. "Now, whether The Texas Company is a large or small organization makes no difference essentially, ladies and gentlemen, in determining damages, but I simply say this: Who should bear the risk, who should bear the risk of whether or not Meloy is going to work seven and a half years? The plant, the organization, the defendant who caused the injury, or Meloy, because if you don't give him an adequate amount he bears 100 per

cent of his loss now and he is the fellow that lost the feet, not The Texas Company."

2. "Furthermore, when damages are awarded against a defendant and he has paid, that is a cost of doing business."

3. "These are days when you pay \$50,000 for one little broadcast. They pay some silly fellow to make monkeyshines \$10,000, to stand up and make a speech. Bob Hope and those fellows get out there and they make lots of money."

pellant), testified that on September 6, 1949, it was the duty of Meloy and his crew to unhead the heater and clean the tubes. Thereupon counsel for appellant asked, "Now, who were they to take orders from?" An objection by counsel for plaintiffs was sustained on the ground that the question called for a conclusion. Appellant argues that said question called for a factual answer which was within the knowledge of the witness; and that under the case of *Majors v. Connor*, 162 Cal. 131, 121 P. 371, the question was proper. In said case a witness was asked: "When you produced the labor, the men, and put them on the job, under whose control and management were they?" and "Under whose control did you do the work?" It was held therein that those questions were proper—they were tantamount to an inquiry, "Who gave the orders?" In the present case, after said objection was sustained, counsel for appellant asked the witness if, during the time he (witness Coats) was in charge of Meloy and his crew, he gave any instructions to them as to whom they were to take orders from on that job. The witness replied, "I don't remember that I gave them instructions." Appellant then offered to prove by said witness that the supervisor for appellant had the right to tell the employees of the maintenance company what to do, and how, where, and when to do it; that the maintenance company employees were under the supervision of appellant's supervisor; and that the supervisor had the right to discharge maintenance company employees from the job. The judge said that he would not reject that offer of proof, but he said that evidently appellant could not make the proof with said witness, since the witness did not remember what instructions he gave. Thereafter, counsel for appellant asked: "When Petroleum Maintenance crews were unheading The Texas Company heater in September of 1949, under whose direct supervision were they working?" Counsel for plaintiffs said that he had no objection to that question. The witness replied, "Well, they could be working under my supervision or The Texas foreman's supervision." Counsel for appellant asked the witness: "If Petroleum Maintenance

crews, in unheading a heater in September of 1949, had any questions as to procedure, whom were they to go to to take that up?" The witness replied, "If I wasn't there they could ask The Texas Company foreman." Counsel for appellant thereafter asked if the maintenance company in September, 1949, had any regulations as to the manner in which its employees "would be directed while working" at appellant's refinery. The witness replied, "You know, I don't remember that." Counsel for appellant then asked, "As foreman, had you received any instructions from your superiors as to whom or from whom your employees were to take directions while working at The Texas plant?" The witness replied, "I would rather not answer that. I don't remember." It thus appears that after the offer of proof had been made, counsel for appellant asked questions which were in substance the same as the question to which the objection had been sustained; and that the court permitted those subsequent questions to be answered. Those answers were to the effect (1) that the maintenance company employees would be working under the supervision of the foreman of the maintenance company or the foreman of appellant; or (2) that the witness (Coats) did not remember whether he had received any instructions as to whom the maintenance company employees were to take directions from while working at appellant's plant. Appellant was not prejudiced by the ruling sustaining the objection.

Witness McAllister, chief engineer for appellant, was asked by appellant if the plaintiffs were subject to any direction or supervision by The Texas Company when they (plaintiffs) were working the day shift. An objection thereto was sustained on the ground that the question called for a conclusion. Appellant then asked the witness if he had any personal knowledge as to whether the plaintiffs took orders from employees of The Texas Company in September, 1949. The witness replied: "On this particular day they were working on a job that was directly under the supervision of Texas Company supervisors." The answer was stricken out on the ground that it was a conclusion. Thereafter counsel for

appellant asked the witness whether any of the plaintiffs took orders from appellant's employees on September 6, 1949. He replied, "No"—that he had "no personal knowledge." It thus appears that, after the objection was sustained and the motion to strike was granted, a question similar to said previous questions was asked and the answer thereto was permitted to stand. The said rulings were not prejudicial.

[11] Witness Noble, superintendent of the maintenance company, was asked by appellant if in September, 1949, The Texas Company had "the right to direct you to remove workers and replace them with other workers?" and "Do you know of your own knowledge if The Texas Company had any right to require you to replace workers at their property and replace them with other workers?" Plaintiffs objected to those questions on the ground that they called for conclusions. The objections were sustained. There was no offer to prove by the witness that the appellant had such right as that referred to in those questions. The questions did not indicate that the answers thereto would be favorable to appellant. Since there was no offer of proof, and since the questions did not indicate answers favorable to appellant, it cannot be said that the rulings were prejudicial. See *Newton v. Los Angeles Transit Lines*, 107 Cal.App.2d 624, 626, 237 P.2d 682.

Appellant also contends that the amounts awarded as damages were excessive. Mr. Meloy sustained a comminuted compression fracture of the heel bones of both feet—the heel bones were pushed together and crushed upward. He was in a hospital about four months. There was evidence that said injury was permanent; by reason of the injury there is a loss of lateral mobility of the heels and he walks by turning his right foot out and swinging from the hip; he will suffer pain from the injury for the remainder of his life; the pain would be relieved if an operation were performed on the heels, but he would be in a hospital one month, in a wheel chair two months, and he would have to walk in a cast

about four months; also, as a result of surgery his ankles would be stiff—but there would be a chance for some improvement in the motion; he will never be able to do heavy work; at the time of the injury he was 48 years of age and was earning about \$3,700 a year; he had a life expectancy of approximately 21 years. Also he suffered burns about the face, ears, arms, and hands; and the amount of his medical expenses was \$2,013.03.

Mr. Evans sustained a fracture of the fibula of his left leg and a comminuted fracture of his left wrist; he was in a hospital about thirty days; as a result of the injury his wrist was permanently malformed; flexion of his wrist was reduced about 20 per cent; when he resumed work after three months, he helped with janitor work; he was lame in his ankle; when he went back to work, his wrist hurt all the time; the pain might be relieved by surgery—removing a section of the ulnar, but the stability of the wrist joint would not be normal; his left arm was weak and he had no grip in his left hand; he could not do his share of the work as a pipe fitter's helper—he did the lightest work; he had a life expectancy of approximately 14 years; at the time of the accident his take-home pay was about \$2,800 a year. The amount of his medical expenses was \$498.29.

Mr. Bucci sustained burns about the face, arms, and neck, a dislocated coccyx, and a fracture of the lower sacral segment. He was in a hospital eight days and saw his doctor regularly thereafter for a month. There was evidence that at the time of trial he still suffered pain in the lower part of his back—a dull ache was there about all the time; after sitting about an hour, the left side of his back gets a little numb and the numbness creeps down his leg; there has been no improvement during the last year; he did not continue his work as a pipe fitter's helper because the work strained his back; he became a painter for the maintenance company. The amount of his medical bill was \$209.36.

[12-15] One of the grounds upon which the motion for a new trial was made was that the damages were excessive. That mo-

tion was denied. In *Roedder v. Lindsley*, 28 Cal.2d 820, at pages 822-823, 172 P.2d 353, at page 354, it was said: "Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as a reasonable person would estimate as fair compensation." The evidence supports the awards of damages.

The judgments are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



121 Cal.App.2d 720

JONES et al. v. MCGINNIS et al.
Civ. 4719.

District Court of Appeal, Fourth District,
California.

Dec. 4, 1953.

Rehearing Denied Dec. 22, 1953.

Hearing Denied Jan. 27, 1954.

Action for injuries and damages arising out of automobile collision which occurred in San Bernardino County, against administratrix of estates of decedents. The administratrix filed demurrer and notice of motion for change of place of trial from San Bernardino County to Los Angeles County. The Superior Court, San Bernardino County, Martin J. Coughlin, J., granted motion and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where defendant was sued in her official capacity as administratrix and it was alleged in complaint that action was founded upon claims for money presented to defendant administratrix and county of Los Angeles had jurisdiction over estates of decedents, proper place for trial was in Los Angeles County.

Order affirmed.

1. Executors and Administrators ⚡436

Where defendant was sued in her official capacity as administratrix in action

for injuries and damages arising out of automobile collision which occurred in San Bernardino County and it was alleged in complaint that action was founded upon claims for money presented to defendant administratrix and county of Los Angeles had jurisdiction over estates of decedent, proper place for trial was in Los Angeles County. Code Civ.Proc. §§ 395, and (1), 395.1.

2. Executors and Administrators ⚡436

Quoted words in statute relating to "all other cases" refers to cases other than those described in statute relating to venue of action against executor, etc., in official capacity. Code Civ.Proc. §§ 395, and (1), 395.1.

See publication Words and Phrases, for other judicial constructions and definitions of "All Other Cases"

3. Statutes ⚡85(1)

Statute relating to venue of action against executor, etc., in official capacity, is not unconstitutional as a special law. Code Civ.Proc. § 395.1; Const. art. 4, § 25.

Harold Payne, Needles, for appellants.

H. T. Ellerby, Los Angeles, for respondent.

MUSSELL, Justice.

The complaint, in this action to recover for injury to persons and personal property arising from a collision between automobiles which occurred on the Twentynine Palms highway in San Bernardino county on November 10, 1951, was filed in the Superior Court of said county on July 22, 1952. In this collision Raymond S. Schieldge, Sr. and Sophie Schieldge, his wife, driver and passenger respectively in one of the automobiles involved, lost their lives.

Marilyn S. McGinnis, who was appointed administratrix of the estates of the decedents, is a resident of Los Angeles county and the estate proceedings of the named decedents are pending therein. Defendant Marilyn S. McGinnis was served with process and is being sued not as an individual but in her capacity as administratrix. In reliance upon the provisions of section

395.1 of the Code of Civil Procedure, defendant-respondent filed a demurrer and notice of motion for change of the place of trial to Los Angeles county. This motion was supported by an affidavit of merits further alleging that the estates of said decedents are situated in the county of Los Angeles. The trial court granted the motion and plaintiffs appeal from the order granting it.

Section 395.1 of the Code of Civil Procedure was added by Statutes of 1943, Chapter 1043, Section 1, and provides as follows:

"When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

[1] Defendant was sued in her official capacity as administratrix and it is alleged in the complaint that the action is founded upon claims for money presented to the defendant administratrix. The county of Los Angeles has jurisdiction over the estates involved herein. Clearly, the action falls within the definition of actions described in said section and the proper place for the trial of said action is in Los Angeles county. *Abbey v. Schaefer*, 108 Cal.App.2d 554, 239 P.2d 44.

[2] Plaintiffs argue that under the provisions of section 395, subdivision 1, of the Code of Civil Procedure, the proper county for the trial of the instant action is either the county where the injury occurred or the county in which the defendants or some of them resided at the commencement of the action. However, when this statute was last amended in 1951, section 395.1 was in effect and section 395 does not purport to prescribe the proper county for the trial of cases for which specific provision has been made in the code. A reference in section 395 to "all other cases" is to cases other than those described in section 395.1. Moreover, section 395 is expressly made subject to the power of the court to transfer

actions or proceedings as provided in Part 2, Title 4 of the code, and section 395.1 is included in said title.

[3] Plaintiffs contend that section 395.1 is unconstitutional because it violates Article 4, section 25 of the State Constitution prohibiting special laws. This contention is without merit. Section 395 was held to be constitutional in *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 P. 239, and *Gridley v. Fellows*, 166 Cal. 765, 768-769, 138 P. 355, 356, where the court, in considering the 1911 amendment providing for the trial of actions such as we have before us, said:

"The provision of the amendment of section 395 in question, it is true, applies only to specified classes of cases. But it applies alike in every part of the state to all actions embraced in the classes described. Consequently it is not a local law. It cannot be deemed a special law forbidden by the Constitution if it is addressed to a class or classes based on some natural, intrinsic, or constitutional distinction or difference, reasonable and substantial, between these actions and others not included and sufficient, in some reasonable degree, to account for or justify the making of the different rule. Statements of this proposition have been made, in different words but substantially to the same effect, in many decisions. The leading case is [*City of Pasadena v. Stimson*, 91 Cal. [238] 251, 27 P. 604. The latest enunciation of the rule is that set forth in *Ex parte Miller*, 162 Cal. [687] 698, 124 P. 427, where many other cases on the subject are cited."

The same reasoning as there set forth applies to the constitutionality of the provisions of section 395.1 of the Code of Civil Procedure.

The order granting the motion for change of place of trial to the county of Los Angeles is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

121 Cal.App.2d 717

PEOPLE v. SUSSMAN.
Cr. 5046.

District Court of Appeal, Second District,
Division 3, California.
Dec. 4, 1953.

Defendant was convicted of driving while intoxicated and proximately causing injury to two persons. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., rendered judgment and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to support findings that defendant, while intoxicated, entered intersection at excessive rate of speed without stopping at stop sign, and that defendant's intoxication and negligence in driving proximately caused bodily injuries.

Judgment affirmed.

Automobiles $\S$ 355(6)

In prosecution for driving while intoxicated and proximately causing injury to two persons, evidence sustained finding that defendant, while intoxicated, entered intersection at excessive rate of speed without stopping at stop sign and struck left-turning automobile approaching from opposite direction and proximately caused bodily injuries to driver of on-coming vehicle and occupant in defendant's automobile. Vehicle Code, $\S$ 501.

Horace Appel, Los Angeles, for appellant.
Edmund G. Brown, Atty. Gen., and
Norman H. Sokolow, Dep. Atty. Gen., for
respondent.

PARKER WOOD, Justice.

Defendant was charged in Count I with violating section 501 of the Vehicle Code, a felony, in that on October 14, 1952, he drove an automobile, while under the influence of intoxicating liquor, proximately causing bodily injury to Clelland E. Beltz. In Count II the charge against defendant was the same as the charge in Count I except that the person alleged to be injured was Sam W. Winick. Trial by jury was waived.

Cal.Rep. 263-264 P.2d—25

Defendant was adjudged guilty as charged in both counts. Judgment was that he be imprisoned in the county jail for one year on each count, said terms to run concurrently. Probation was granted and the execution of the sentences was suspended upon condition that he serve six months in the county jail. He appeals from the judgment.

About 2:00 a. m. on October 14, 1952, defendant and one Winick met Miss Arnold in a cafe at La Brea Avenue and Rodeo Road. About 2:30 a. m. they (all three) left that place in Winick's automobile, which was driven by him, and went to an "after-hours spot" (a place where alcohol is sold), arriving there about 3:00 a. m. At that place defendant had five drinks of double shots of Scotch over ice. Winick and Miss Arnold each had one and one-half drinks. They (all three) left that place about 5:00 a. m. in appellant's automobile, which was driven by him. Miss Arnold testified that when defendant backed his automobile, as they were leaving the parking lot, she saw that he was drunk "because he slammed on the brakes." The automobile driven by defendant and the automobile driven by Mr. Beltz collided within an intersection where four streets join at approximately right angles. The street east of the intersection is Rodeo Road. To the west (the continuation of Rodeo) is Jefferson Boulevard. To the north is also Jefferson Boulevard. (In other words, Jefferson makes a right angle turn at the intersection—extending west and north from the intersection.) On the south side is Moynier Lane. There were boulevard stop signs and flashing red lights at each corner of the intersection. Defendant was driving west on Rodeo, and immediately before the accident he was traveling faster than 30 miles an hour. He did not stop or decrease his speed before entering the intersection. Mr. Beltz, who was driving east on Jefferson—going in the direction opposite the direction in which defendant was going, made a left turn in the intersection. The impact was northwest of the center of the intersection. There were skid marks about 30 feet long leading to appellant's automobile. Those marks began approxi-

mately 5 feet east of the "intersection side" (west side) of the marked crosswalk (at the east side of the intersection) and they ended 23 feet east of the west curb of Jefferson.

Mr. Schechter testified that about 5:50 a. m. on said October 14, after he had delivered newspapers at a gasoline station on the northeast corner of said intersection, he proceeded (south) in his automobile out the driveway of the station and turned left onto Rodeo; at that time he saw defendant's automobile, which was about 125 feet from the intersection, coming toward him at the rate of approximately 35 miles an hour; he (witness) drove across Rodeo and stopped, and at that time (just before the collision) he heard brakes screeching and he saw defendant in the intersection; and he saw the automobiles come together.

Mr. Beltz and Winick received bodily injuries as a result of the collision.

A police officer testified that he arrived at the intersection about 6:00 a. m. on said day; he was present when sobriety tests were given defendant at the scene of the accident; in his opinion the defendant was under the influence of alcohol; when a doctor told the officer, in the presence of defendant, that Mr. Beltz had a very slight chance of living, the defendant said, "God, I have killed the man."

Miss Arnold also testified that as they (she, defendant, and Winick) were approaching the intersection, she saw an automobile coming south on Jefferson (the part of Jefferson north of the intersection) and the automobile made a left turn and the driver did not make a signal; then the other automobile (automobile of Mr. Beltz) which was coming "in the opposite direction of us" made a left turn.

Defendant did not testify.

Defendant argues that the evidence does not show that he "proximately" caused bodily injury; that Miss Arnold in testifying that "He is the one that did not make the signal" was referring to Mr. Beltz; and that it could be inferred that any one of the three cars was the proximate cause of the injuries. Miss Arnold's testimony to the effect that a signal was not made was

not a reference to Mr. Beltz. She said that an automobile was going south and that the driver of that automobile did not make a signal. The trial judge could have inferred that she was referring to Mr. Schechter, who drove south across Rodeo. The evidence was sufficient to support findings that defendant did not make the boulevard stop; that he entered the intersection at an excessive rate of speed; that he was under the influence of intoxicating liquor; and that defendant's intoxication and negligence in driving proximately caused the bodily injuries.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



121 Cal.App.2d 682

DE VALL et al.

v.

SECURITY-FIRST NAT. BANK OF
LOS ANGELES.

Civ. 19800.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1953.

Rehearing Denied Dec. 23, 1953.

Hearing Denied Jan. 27, 1954.

Action against administrator appointed by Probate Court of Orange County for alleged malfeasance. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered an order denying administrator's motion for change of venue to Probate Court of Orange County, and administrator appealed. The District Court of Appeal, McComb, J., held, inter alia, that the suit was exclusively within jurisdiction of Probate Court of Orange County.

Reversed.

I. Appeal and Error ⇐106

Order denying motion for change of venue was appealable. Code Civ.Proc. § 963.

2. Courts ⚡475(2)

A controversy between administrator and heirs of decedent relating to conduct of such administrator in administration of estate, can, so long as probate court has jurisdiction, be determined only by judgment or order of such court.

3. Courts ⚡475(2)

Venue ⚡46

Suit against administrator appointed by Probate Court of Orange County, for alleged malfeasance was exclusively within jurisdiction of Probate Court of Orange County and administrator's motion for change of venue to such court should have been granted. Code Civ.Proc. § 396.

Osborne, Solomon & Fitts, Laguna Beach, for appellants.

A. W. Brunton, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs filed an action in the superior court of Los Angeles County as the heirs at law of Jane F. deVall, deceased, against defendant, Security-First National Bank of Los Angeles, individually, and not as an administrator. The bank was the special administrator of the estate of Jane F. deVall, deceased, with general powers appointed by the probate court of Orange County. The action is based on the alleged malfeasance of defendant in the performance of its duties as special administrator, consisting in consenting to the sale of certain assets of the estate and in failing to rent certain other property of the estate. Defendant made a motion for change of venue of the action to the probate court of Orange County. This motion was denied. A judgment has not been entered against defendant. Defendant has appealed from the order denying the motion for a change of venue.

[1] *Questions: First: Was the order denying the motion for a change of venue an appealable order?*

Yes. There is no merit in plaintiffs' contention that the order denying a motion

for change of venue is not appealable but can be reviewed only on an appeal from a judgment.

Section 963 of the Code of Civil Procedure provides in part thus, " * * * An appeal may be taken from a superior court in the following cases: * * * From an order * * * changing or refusing to change the place of trial". Clearly the foregoing provision is here applicable, and the order was appealable.

[2,3] Second: *Did the probate court of Orange County have the exclusive jurisdiction of the action against defendant instituted by heirs of decedent because of alleged maladministration?*

Yes. A controversy between an administrator and the heirs of a decedent relating to the conduct of such administrator in the administration of the estate, can, as long as the probate court has jurisdiction, be determined only by the judgment or order of such court. (Spencer v. Crocker First National Bank, 86 Cal.App.2d 397, 402 et seq., 194 P.2d 775 [hearing denied by the Supreme Court].) In the Spencer case, Mr. Justice Bray, 86 Cal.App.2d at page 404, 194 P.2d at page 779, says: "Thus, during the pendency of the probate proceedings, all questions between the executor and the beneficiaries concerning its acts as executor and its relationship with them, are within the exclusive jurisdiction of the probate court.

"While there is only one superior court, and the probate court is merely a part thereof, that does not change the fact that where, as here, the parties are all 'interested' in the estate and are already before the probate court, that court has exclusive jurisdiction of all questions concerning the conduct of the estate and their interests therein. Here the real question is whether the executor has fraudulently withheld a portion of the distributive shares of plaintiffs—beneficiaries of the estate."

The analogy between the case of Spencer v. Crocker First National Bank, supra, and the instant case is apparent. In both plaintiffs are heirs of the respective dece-

dents and defendant is the estate's administrator or executor. In both the defendant is purportedly sued in its individual capacity, though in actual fact the causes arise out of the alleged malfeasance of the administrator or executor in the performance of their fiduciary duties to the alleged damage of the heirs.

1. Section 396, Code of Civil Procedure reads:

"If an action or proceeding is commenced in a court which lacks jurisdiction of the subject matter thereof, as determined by the complaint or petition, if there is a court of this State which has such jurisdiction, the action or proceeding shall not be dismissed (except as provided in Section 581b, and as provided in subdivision 1 of Section 581 of this code) but shall, on the application of either party, or on the court's own motion, be transferred to a court having jurisdiction of the subject matter which may be agreed upon by the parties, or, if they do not agree, to a court having

Therefore under the provisions of section 396 of the Code of Civil Procedure, the trial court erred in not transferring the cause to the probate court of Orange County.¹

Reversed.

MOORE, P. J., and FOX, J., concur.

such jurisdiction which is designated by law as a proper court for the trial or determination thereof, and it shall thereupon be entered and prosecuted in the court to which it is transferred as if it had been commenced therein, all prior proceedings being saved. In any such case, if summons is served prior to the filing of the action or proceeding in the court to which it is transferred, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from service upon such defendant of written notice of the filing of such action or proceeding in the court to which it is transferred. * * *

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41 Cal.2d 712

LEO v. DUNHAM.

L. A. 22613.

Supreme Court of California.

In Bank.

Dec. 4, 1953.

Action for injuries sustained by pedestrian in collision with truck while pedestrian was crossing highway. The Superior Court, Los Angeles County, Clarke E. Stephens, J. pro tem., entered judgment on a verdict for defendant, and plaintiff appealed. The Supreme Court, Edmonds, J., held that whether truck driver was negligent in failing to anticipate until 60 to 80 feet from pedestrian that pedestrian would not yield right of way was a question of fact for jury and that hence truck driver was entitled to instruction on imminent peril.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 248 P.2d 935.

1. Negligence ⇨12

Under "imminent peril" doctrine, also known as "sudden peril" rule and "emergency doctrine", a person who without negligence is suddenly and unexpectedly confronted with peril arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not required to use the same judgment and prudence required of him in the exercise of ordinary care in calmer and more deliberate moments.

See publication Words and Phrases, for other judicial constructions and definitions of "Emergency Doctrine", "Imminent Peril" and "Sudden Peril".

2. Trial ⇨251(1)

An instruction should be given only when it is applicable to the issues raised by

the pleadings or pertinent to some issue or theory developed by the evidence.

3. Negligence ⇨136(14)

Whether a person has been suddenly confronted with imminent peril is ordinarily a question of fact for jury.

4. Automobiles ⇨160(4)

Truck had the right of way as against pedestrian crossing highway at a point not within a marked crosswalk or an unmarked crosswalk at an intersection. Vehicle Code, § 562(a).

5. Negligence ⇨68

Every person has a right to presume that every other person will perform his duty and obey the law, and in absence of reasonable ground to think otherwise, it is not negligence to assume that one is not exposed to danger which results only from violation of law or duty by some other person.

6. Automobiles ⇨217(1)

A reasonably prudent person might well anticipate an existent danger from the approach of a truck only 300 feet away at time he starts to cross a street and will not ignore its presence.

7. Automobiles ⇨245(6)

Whether truck driver, seeing pedestrian start across highway after observing truck 300 feet away approaching from his right at speed of approximately 35 miles per hour, was negligent in failing to anticipate until truck was 60 to 80 feet from pedestrian that pedestrian would not yield right of way was a question of fact for jury. Vehicle Code, § 562(a).

8. Automobiles ⇨246(50)

Where evidence presented a question of fact for jury as to whether truck driver was negligent in failing to anticipate until

truck was 60 to 80 feet from pedestrian that pedestrian, crossing highway, would not yield right of way or whether at such instant truck driver without negligence on his part was confronted unexpectedly with sudden and imminent peril, truck driver was entitled to instruction on "imminent peril" in action against him for injuries sustained by pedestrian in collision with truck. Vehicle Code, § 562(a).

A. J. O'Connor and H. K. Lyle, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly and Jean Wunderlich, Los Angeles, for respondent.

EDMONDS, Justice.

A Ford tank truck operated by Rufus A. Dunham struck and seriously injured Wilard A. Leo. Upon his appeal from the judgment in favor of Dunham, Leo charges that the instructions to the jury upon the doctrine of imminent peril were prejudicially erroneous.

The accident occurred when Leo walked across a highway running north and south. On each side of the highway, which had lanes 10-feet in width, there was a six-foot improved shoulder but no curbs. As Leo started to cross from east to west, he looked to his right and observed Dunham's truck approaching in the far lane and about 300 feet to the north. Upon the assumption that he had time to cross the highway, Leo attempted to do so, and did not thereafter look in the direction of the approaching vehicle.

In the meantime, Dunham saw Leo begin to walk across the highway, looking in the opposite direction. Nevertheless, Dunham continued his approach at about 35 miles per hour, but not until he had reached a point some 60 or 80 feet away did he conclude that a collision was imminent. He applied his brakes, "hollered", and swerved to his right. Leo did not look around until the truck suddenly "showed up in front" of him. In fact, there is evidence that he walked into the side of the truck.

The point of impact is the subject of some uncertainty. Dunham testified that the collision occurred "six feet west of the westerly edge of the traveled portion of the highway". Leo told the jury that he was in the left-hand lane of traffic at the time he was struck. The traffic officer who investigated the accident also placed Leo in that lane at the time of the collision. According to the officer, the point of impact was one foot east of the west line of the left lane.

The jury was given the usual instructions concerning negligence, contributory negligence and proximate cause. In addition, at the request of Dunham, the rule as to the doctrine of imminent peril was stated.

[1] The doctrine has been variously characterized as the "sudden peril rule", *De Ponce v. System Freight Service*, 66 Cal.App.2d 295, 301, 152 P.2d 234, 237; *Uhl v. Fertig*, 56 Cal.App. 718, 724, 206 P. 467, the "imminent peril doctrine", *Stickel v. Durfee*, 88 Cal.App.2d 402, 407, 199 P.2d 16; *Yates v. Morotti*, 120 Cal.App. 710, 716, 8 P.2d 519, and the "emergency doctrine", *Rest., Torts, Vol. II, Negligence* [1934] § 296, p. 796; *Prosser on Torts* [1941] § 37, p. 242. However, under the cases and the authorities, a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. *Stickel v. Durfee*, supra, 88 Cal.App.2d at pages 407-408, 199 P.2d at pages 19-20; *Gamalia v. Badillo*, 53 Cal.App.2d 375, 378, 128 P.2d 184; *Graham v. Consolidated Motor Transport Co.*, 112 Cal.App. 648, 652, 297 P. 617; *Rest., Torts, supra, Vol. II, Negligence* [1934] § 296, p. 796; *Prosser on Torts, supra* [1941] § 37, p. 242; and see *Bosserman v. Olmstead*, 77 Cal.App.2d 236, 240, 175 P.2d 49.

[2] An instruction should be given only when it is applicable to the issues raised by the pleadings or it is pertinent to some issue or theory developed by the evidence.

Sills v. Los Angeles Transit Lines, 40 Cal. 2d 630, 633, 255 P.2d 795; Garcia v. Conrad, 40 Cal.App.2d 167, 170, 104 P.2d 527; Arundel v. Turk, 16 Cal.App.2d 293, 297, 60 P.2d 486. The decisive factor here is the time when Dunham knew, or should have known, that an accident would occur unless preventive steps were taken. Dunham takes the position that the evidence reasonably supports the inference that he was suddenly and unexpectedly confronted with an emergency when, for the first time, he realized that Leo would not keep out of the line of the truck's travel. As he presents the facts, it cannot be said, as a matter of law, that he had previously been guilty of any negligence. Under such circumstances, he says, he is entitled to the benefit of the doctrine of imminent peril.

Leo argues that there was nothing sudden or unexpected about his own conduct, and Dunham's "sudden realization" was in fact nothing more than belated awareness of an error in judgment. Dunham's responsibility, it is argued, is determined by his conduct viewed in its entirety from the moment he first sighted Leo and continuing until the collision. Based upon that premise, Leo asserts, any imminent peril was occasioned by Dunham's negligence, and the doctrine is inapplicable.

[3-6] Ordinarily, whether a person has been suddenly confronted with imminent peril is a question of fact to be submitted to the jury. Kehlor v. Satterlee, 37 Cal. App.2d 116, 119, 98 P.2d 759; and see De Ponce v. System Freight Service, supra, 66 Cal.App.2d at page 301, 152 P.2d at page 237. Although the evidence here justifies an inference of negligence on the part of Dunham, it also reasonably supports the jury's implied finding that he was not negligent until the time he concluded that Leo was not going to look around again. Cf. Varner v. Skov, 20 Cal.App.2d 232, 238, 67 P.2d 123. Both parties saw each other when they were 300 feet apart. Leo was crossing a roadway at a point not within a marked crosswalk nor within an unmarked crosswalk at an intersection. Dunham had the right of way. Vehicle Code, § 562(a). "The general rule is that every person has a right to presume that every

other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person." Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, 1156, L.R.A.1917C, 477; Dickinson v. Pacific Greyhound Lines, 55 Cal. App.2d 824, 827, 131 P.2d 401; and see Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 665, 182 P.2d 337. Moreover, a reasonably prudent person might well anticipate an existent danger from the approach of a truck only 300 feet away at the time he started to cross a street and would not thereafter ignore its presence. Fischer v. Keen, 43 Cal.App.2d 244, 249, 110 P.2d 693. Dunham, therefore, reasonably might expect Leo to take further care for his own safety by again looking toward the approaching truck during the crossing.

[7,8] For these reasons, it cannot be said, as a matter of law, that Dunham was negligent in failing to anticipate until the truck was some 60 to 80 feet from Leo that Leo was not going to yield the right of way. At that instant Dunham reasonably may be said to have been confronted unexpectedly with a sudden and imminent peril, and a deliberately calculated and cool choice was no longer possible. Accordingly, the record shows adequate basis for the instruction on imminent peril.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I feel that there was no basis in the record for the instruction on imminent peril and that the giving of that instruction constituted reversible error within the meaning of article VI, § 4½, of the Constitution of California.

Defendant saw the plaintiff start to cross the highway when he was 300 feet away; he knew plaintiff was looking in the opposite direction, but he continued his approach at the same speed at which he had been proceeding. Not until he was from

60 to 80 feet away from the plaintiff did he decide that he was going to hit the plaintiff. At this time he applied his brakes, called out, and swerved to the right. The evidence on the point of impact was in conflict and is, according to the majority opinion, "the subject of some uncertainty." Defendant realized that the plaintiff was unaware of his danger and yet he continued on his course, waiting for the plaintiff to look in his direction and stop, until it was too late to stop the truck. The defendant knew that the danger of the situation continued as long as the plaintiff was looking in the opposite direction and simply took the chance that plaintiff would look and see the truck approaching. The emergency was caused by defendant's negligence, and the doctrine has been held not available to one in such a position, *Yates v. Morotti*, 120 Cal.App. 710, 716, 8 P.2d 519; *Dodds v. Gifford*, 127 Cal.App. 629, 632, 16 P.2d 279; 65 C.J.S., Negligence, § 17, page 412. In *Wright v. Sniffin*, 80 Cal.App.2d 358, 181 P.2d 675, the doctrine of imminent peril was held inapplicable to the conduct of a driver who voluntarily and wrongfully placed himself in a dangerous position by attempting to pass a bicycle within 100 feet of an intersection. Defendant had seen the child on the bicycle while he was some distance away; had sounded his horn when he was within 200 feet of the child who apparently did not hear the warning. The defendant there then attempted to pass when the child veered her bicycle to the left and was instantly killed in the resulting collision. There, as here, the defendant was at all times aware of the plaintiff's danger. There, as here, defendant assumed that the plaintiff would realize the danger. There, as here, the emergency was created by the defendant.

In *Fraser v. Stelling*, 52 Cal.App.2d 564, 567, 126 P.2d 653, 654, the defendant saw the plaintiff, who was riding a bicycle, about 1000 feet ahead of him. When he was about 50 feet behind the plaintiff, he sounded his horn which was not heard by the plaintiff. When defendant was from two to five feet to the rear of the bicycle, the plaintiff swerved his vehicle across the path of the defendant's truck. It was there

held that the refusal of the trial court to give an instruction on the doctrine of sudden emergency was not error because the defendant had the rider in view for 1,000 feet as shown by his own testimony, and that "[f]urthermore the case was tried by the parties each claiming the accident was caused by the negligence of the other. The jury was fully instructed on the rules of law applicable to the respective theories of the alleged negligence of the defendant and the contributory negligence of the plaintiff."

In *Rhodes v. Firestone Tire & Rubber Co.*, 51 Cal.App. 569, 197 P. 392, the doctrine of sudden emergency was held inapplicable where the driver of defendant's truck had ample time and space to avoid the collision with plaintiff's truck.

In *Stealey v. Chessum*, 123 Cal.App. 446, 11 P.2d 428, where defendant driver saw the plaintiff's decedent, a pedestrian, when she was from six to ten feet ahead of him, the appellate court held it was reversible error to give an instruction on sudden emergency without the qualification that defendant must have been free of negligence.

In *Gootar v. Levin*, 109 Cal.App. 703, 293 P. 706, it was also held reversible error to give the instruction without the qualification; in *Jones v. Heinrich*, 49 Cal.App.2d 702, 122 P.2d 304, the same rule was set forth.

In the present case, the pleadings put in issue the questions of negligence and contributory negligence. There was no evidence to support an instruction which told the jury that "[a] person who, *without negligence on his part*, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. * * *" (Emphasis added.) This instruction had no place in the case, and could have had no other effect than to confuse the jury. The majority in an endeavor to hold that no prejudicial error was present because of the giving of the instruction suggests that Dunham, "there-

fore, reasonably might expect Leo to take further care for his own safety by again looking toward the approaching truck during the crossing" and concludes that "it cannot be said, as a matter of law, that Dunham was negligent in failing to anticipate until the truck was some 60 to 80 feet from Leo that Leo was not going to yield the right of way." The fact remains that it cannot be said as a matter of law that defendant was *not* negligent. Plaintiff's failure to watch for approaching vehicles goes to the issue of contributory negligence. In order for the doctrine to apply to defendant's conduct, there must have been no negligence, as a matter of law, on his part until he was confronted with the sudden emergency. Under the facts presented here, it cannot be said, as a matter of law, that defendant was exercising the care of the ordinarily prudent man in *assuming* that plaintiff would turn and see his vehicle approaching. And, the fact does remain that defendant was at all times aware that plaintiff was walking across the roadway without looking in his direction. As a result, there was no basis in the evidence of the instruction. The giving of an instruction which is unsupported by the evidence has been held to constitute reversible error, *Scandalis v. Jenny*, 132 Cal.App. 307, 22 P.2d 545; *Davenport v. Stratton*, 24 Cal. 2d 232, 149 P.2d 4. The instruction on sudden emergency, under the facts of this case, was inconsistent with the instruction on negligence as it applied to the defendant. It is impossible to ascertain here whether the jury found that plaintiff was contributorily negligent, or that defendant was free from negligence, or that defendant was excused from the consequences of his negligence because he was confronted with a sudden emergency. Instructions contradictory in essential elements may warrant a reversal on the ground that it cannot be ascertained which instruction was followed by the jury, *Carlson v. Shewalter*, 110 Cal.App.2d 655, 243 P.2d 549; *Rackson v. Benioff*, 111 Cal.App.2d 124, 244 P.2d 9; *Cannis v. Di Salvo Trucking Co.*, 111 Cal.App.2d 893, 245 P.2d 365. Without the instruction on sudden emergency "a different verdict would not have been

improbable." *Delzell v. Day*, 36 Cal.2d 349, 351, 223 P.2d 625, 626.

I am in full accord with the views expressed in the learned and able opinion of the District Court of Appeal, Second Appellate District, Division Three, prepared by Mr. Presiding Justice Shinn when this case was before that court, 248 P.2d 935, 937. By unanimous decision of that court a reversal was ordered because "the instruction [sudden emergency] should not have been given and we have no way of knowing that the jurors were not misled, or that the verdict would have been the same if the instruction had not been given. See *Wright v. Sniffin*, supra, 80 Cal.App.2d 358, 365, 181 P.2d 675."

I would, therefore, reverse the judgment.



41 Cal.2d 785

AETNA CASUALTY & SURETY CO.

v.

PACIFIC GAS & ELECTRIC CO. et al.

S. F. 18792.

Supreme Court of California.

In Bank.

Dec. 18, 1953.

Action by compensation carrier for employer whose employee sustained an industrial injury allegedly caused by negligence of two third party defendants, wherein complaint contained four causes of action, including those for compensation benefits paid to employee and for general tort damages suffered by employee. The Superior Court, San Francisco County, Theresa Meikle, J., dismissed cause of action for employee's general tort damages against one of third party defendants. Compensation insurance carrier appealed. The Supreme Court, Spence, J., held that one year statute of limitations as to personal injury action was applicable to statutory action by insurance carrier against third party tort-feasor for employee's general tort damages and not three year stat-

ute of limitations as to liabilities created by statute.

Judgment affirmed.

Carter, Shenk, and Traynor, JJ., dissented.

Prior opinion, 251 P.2d 762.

1. Limitation of Actions ◊31

One year statute of limitations as to personal injury actions was applicable to statutory action by insurance carrier against third-party tort-feasor for injuries to employee of insured and not general three year statute of limitations as to liabilities created by statute. Code Civ.Proc. §§ 338, subd. 1, § 340, subd. 3; Labor Code, §§ 3850, 3852.

2. Appeal and Error ◊79(1)

Nonappearance of one alleged third-party defendant in action against two third-party defendants did not preclude judgment with respect to the appearing third-party defendant from being a final appealable judgment. Code Civ.Proc. § 963.

3. Workmen's Compensation ◊2242

Where causes of action for compensation benefits paid to employee who allegedly sustained an industrial injury caused by negligence of two third-party defendants and causes of action for employee's general tort damages were brought by employer's compensation insurance carrier against each of two third-party defendants and a demurrer to cause of action for employee's general tort damages brought against one third-party defendant was sustained, resulting judgment of dismissal was a final judgment and was therefore appealable. Code Civ.Proc. §§ 338, subd. 1, 579, 963; Labor Code § 3854.

Belli, Ashe & Pinney and Van H. Pinney, San Francisco, for appellant.

Partridge, O'Connell & Whitney and Wallace O'Connell, San Francisco, for respondent.

SPENCE, Justice.

Plaintiff is the compensation insurance carrier for an employer whose employee sustained an industrial injury allegedly

caused by the negligence of third party defendants. In its fourth cause of action plaintiff sought to recover the employee's general tort damages. The action was brought more than one year but less than three years after occurrence of the accident which caused the injury. A demurrer to this fourth cause of action was sustained without leave to amend, and from the judgment of dismissal accordingly entered, plaintiff appeals.

[1] The determinative question is whether the fourth cause of action is governed by the one-year statute of limitations applicable to an action for damages "for injury to * * * one caused by the wrongful act or neglect of another", Code Civ.Proc. sec. 340, subd. 3, or the three-year statute applicable to an action "upon a liability created by statute", Code Civ. Proc. sec. 338, subd. 1. The Labor Code authorizes the employer or its insurance carrier to bring an action against the third party tort-feasor, secs. 3850, 3852, and to include therein the general damages to the employee as well as the special damages to the employer for compensation and medical benefits, sec. 3854. Assuming without deciding, that this liability of the tort-feasor to the employer or its insurance carrier for the employee's general damages is one created by statute, cf. *Limited Mutual Comp. Ins. Co. v. Billings*, 74 Cal.App.2d 881, 884-885, 169 P.2d 673, nevertheless under settled legal principles the trial court correctly concluded that the one-year statute applied.

The employee's general damage claim, whether prosecuted by the employee personally or by his employer or its insurance carrier on his behalf, is solely one in tort for personal injuries arising out of the negligence of the third party tort-feasor; hence the cause of action accrues at the time of the negligent act. No matter who may be the party plaintiff, the cause of action is one within the express terms of subdivision 3 of section 340 of the Code of Civil Procedure. That section is a special statute controlling the time within which any action covering such injury may be commenced, and it prevails over the general statute applicable to actions based upon a "liability created by statute". Code Civ.

Proc. sec. 338, subd. 1. In line with this principle, the one-year statute has been held applicable to an action for personal injuries based upon the liability of the owner of an automobile for imputed negligence of the driver thereof under section 402 of the Vehicle Code, *Franceschi v. Scott*, 7 Cal.App.2d 494, 495-496, 46 P.2d 764, and to an action for personal injuries based upon the liability of the driver's parents who had signed and verified the driver's application for an operator's license as required by section 352 of the Vehicle Code. *McFarland v. Cordiero*, 99 Cal.App. 352, 354-355, 278 P. 889. Certainly if such principle applies in cases where a new person, by virtue of statutory authority, may be sued on a personal injury claim, see *Ridley v. Young*, 64 Cal.App.2d 503, 509, 149 P.2d 76, it should apply here where a new person, under statutory authority, may sue on a personal injury claim. There is nothing in the Labor Code, secs. 3850-3863, which would indicate an intention to impose a greater burden on the tort-feasor if recovery on the employee's damage claim is sought by the employer or its insurance carrier rather than the injured employee insofar as the time of suit is concerned. The tort liability to respond in general damages on the personal injury claim remains the same. To hold otherwise would produce the anomalous result whereby the employee's tort action would be barred if he undertook to prosecute it and yet the employer or its insurance carrier could recover damages at a later date for the employee on that same cause of action. Accordingly, plaintiff unavailingly argues that its "fourth cause of action" is governed by the general three-year statute of limitations applicable to a "liability created by statute". Code Civ. Proc. § 338, subd. 1.

[2,3] During the pendency of the appeal it was suggested that the judgment of dismissal of the fourth cause of action was not a final judgment, and was therefore not appealable. Code Civ.Proc. § 963. Counsel were then asked to stipulate regarding the status of the record. According to their stipulation, the complaint was filed with one plaintiff and two defendants and embodied four causes of action: the

first is against the Pacific Gas and Electric Company to recover on plaintiff's own behalf the sum of \$1,684.12, being the alleged amount of compensation benefits paid by it to the injured employee; the second is against the Pacific Gas and Electric Company to recover as statutory trustee for the injured employee, Labor Code, § 3854, the sum of \$50,000, being the alleged general damages suffered by the injured employee; the third is similar to the first but against Bechtel Corporation to recover on plaintiff's own behalf the same alleged amount of compensation benefits paid by it to the injured employee; and the fourth is similar to the second but against Bechtel Corporation to recover as statutory trustee for the injured employee the same alleged general damages suffered by him. Defendant Pacific Gas and Electric Company has never appeared in the action.

The nonappearance of defendant Pacific Gas and Electric Company in this action does not preclude the judgment with respect to the other appearing defendant from being a final appealable judgment. *Rocca v. Steinmetz*, 189 Cal. 426, 428, 208 P. 964; *Howe v. Key System Transit Co.*, 198 Cal. 525, 529, 246 P. 39; *Young v. Superior Court*, 16 Cal.2d 211, 215, 105 P.2d 363; *Weisz v. McKee*, 31 Cal.App.2d 144, 147, 87 P.2d 379, 88 P.2d 200. While there appears to be no authority on the effect of the admitted nonadjudication of the third cause of action in relation to the finality of the judgment entered on the fourth cause of action in favor of the same defendant, Bechtel Corporation, practical considerations and legal principles sustain the propriety of treating these two causes of action as separate matters for litigation in the discretion of the court. See Code Civ. Proc. § 579.

The judgment on the fourth cause of action was a final determination of the rights of plaintiff as statutory trustee seeking to recover general damages for the benefit of the injured employee. As a final determination of the rights of plaintiff *in that capacity*, such judgment should be regarded as having the same measure of finality as would a similar judgment in an action in which there were two plaintiffs seeking

their respective damages from the same defendant on two severable causes of action: (1) the insurance carrier for recovery of its own compensation expenditures; and (2) the injured employee for recovery of his own general damages. Such cases as *Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174, and *Greenfield v. Mather*, 14 Cal.2d 228, 93 P.2d 100, involve an entirely different situation in that there each of the successive judgments left undetermined between the same parties in their same individual capacities another alleged cause or causes of action for the same identical relief. Under the circumstances here, we conclude that the judgment of dismissal of the fourth cause of action is a final judgment within the meaning of section 963 of the Code of Civil Procedure and is therefore appealable.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The appeal in this case should be dismissed as there is no final judgment, but if the case is to be decided on its merits, the 3-year statute of limitation for a liability created by statute is applicable, and the judgment should be reversed. Code Civ. Proc., § 338(1).

On the question of appeal, it appears that there is yet no final judgment in the action from which an appeal may be taken. The record shows that the complaint on file purported to state four causes of action. The first asserts negligence on the part of one defendant, Pacific Gas and Electric Co., resulting in injury to Cabella, an employee of plaintiff's insured, in the course of his employment and the payment of workmen's compensation to him. The second re-alleges the allegations of the first and claims Cabella was damaged by the injury in the sum of \$50,000. In the third, the allegations of the first are again adopted and it alleges another defendant, Bechtel, was also negligent, and claim is made for payments made for workmen's compensation. The fourth, re-alleges the

third and claims damages to Cabella of \$50,000.

Apparently defendant Pacific Gas and Electric Co. did not demur. At any rate, that is not here important. The third and fourth causes of action were for defendant Bechtel's negligence in injuring Cabella, the employee, the third asking as damages only the amount paid by plaintiff to Cabella for workmen's compensation and the fourth for additional damages suffered by Cabella. The demurrer was sustained as to the fourth cause only and the judgment entered dismissed that cause of action *only*. The appeal was taken from that judgment. That judgment is *not appealable* for there can be but one judgment in an action. After trial on the third cause of action is had, another judgment would be entered. That is to say, there cannot be separate judgments on different causes of action where the same parties are involved. The judgment dismissing the fourth cause of action is interlocutory and hence not appealable. *Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174; *Bank of America Nat. Trust & Savings Ass'n v. Superior Court*, 20 Cal.2d 697, 128 P.2d 357; *Greenfield v. Mather*, 14 Cal.2d 228, 93 P.2d 100; *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668. The rule is stated in *Bank of America v. Superior Court*, *supra*, 20 Cal.2d 697, 701, 128 P.2d 357, 360: "They assume that there can be a piecemeal disposition of the several counts of a complaint. They assume, when there is more than one count in a complaint, and a demurrer is interposed and sustained, and a judgment of dismissal entered, that there are as many separate judgments as there are counts in the complaint. That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains. *De Vally v. Kendall De Vally O. Co., Ltd.*, 220 Cal. 742, 32 P.2d 638; *Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174; *Potvin v. Pacific Greyhound Lines, Inc.*, 130 Cal. App. 510, 20 P.2d 129. In the *De Vally* case, *supra*, a demurrer was sustained and a judgment entered dismissing two counts

of a four-count complaint. The court held that the judgment was premature, and dismissed the appeal from it, and stated (220 Cal. at page 745, 32 P.2d at page 639): 'Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of *Nolan v. Smith*, 137 Cal. 360, 361, 70 P. 166, quoting from *Stockton Combined Harvester & Agricultural Works v. Glen Falls Ins. Co.*, 98 Cal. (557) 577, 33 P. 633: "There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy." This language was approved in the *Potvin* case, *supra*, where the court said (130 Cal.App. at page 512, 20 P.2d at page 130): 'Since a final judgment in an action contemplates a complete adjudication of the rights of the parties and a final determination of the matter in controversy, it is apparent that the so-called judgment rendered upon the sustaining of a demurrer to one cause of action of a complaint without leave to amend, leaving five other causes of action unimpaired presenting matters to be litigated during a trial of the issues of fact, cannot be regarded as a final determination and disposal of the cause.'"

The majority seeks to escape this rule by stating that because plaintiff was suing in one capacity in the third count of the complaint, that is, in his own right, and in the fourth count, as trustee for his injured employee, the judgment entered on the fourth count is a final judgment. That is to say, there could be two final judgments in the case, one on the third count and the other on the fourth count. The reason given is that it would be like a case where two plaintiffs, each seeking damages from the same defendant on "severable" causes of action, one being by the insurance carrier for its compensation expenditures and the other by the employee for his personal injuries.

The reasoning is faulty. The basic notion of one single judgment as stated in all the cases hereinabove cited is that all the factual issues should be settled in one judgment, unless on a collateral matter one of several parties presents issues which are finally adjudicated as to him. In the instant case there are not two parties plaintiff in any true sense because the recovery by plaintiff on either cause of action rests upon identical issues: Was the defendant negligent? Was plaintiff's injured employee contributively negligent? If defendant was negligent and plaintiff's employee not, how much damages has the latter suffered? Plaintiff as employer is not entitled to recover any amount on his own behalf unless he is entitled to recover on behalf of his employee, and if he is entitled to recover on behalf of the latter, the right of the employer to recover what he has paid in compensation and medical expenses follows as a matter of course; there is really no issue on the right to recover those two items of damage. Hence there cannot be any finality to a judgment as to the employer and not as to the employee or vice versa, whether either or both or one or the other is suing. Thus, this is not in fact a severable action to the extent at least that two judgments are required or proper.

The law authorizes these causes of action to be joined, and it is at least doubtful that they could be brought separately. Certainly, if they were brought separately, a judgment on one as to liability would be res judicata as to the other. Suppose the statute of limitation had not run, could plaintiff now bring another action on behalf of the employee? It seems obvious to me that it could not. Then how can separate judgments be rendered in this action if only one action could be brought?

With reference to the statute of limitation, the majority holds that inasmuch as a personal injury is involved the 1-year statute, Code Civ.Proc. § 340(3), applies rather than the 3-year period for a statutory liability. That conclusion is reached by construing the provision relating to an injury to a person as being special or

particular whereas the one dealing with statutory liability is general and the particular controls over the general. The effect of this holding is that *every action or proceeding mentioned in the limitation statutes* prevails over the statutory liability provision regardless of whether the liability is or is not created by statute. This is true because all of them would be particular, like an injury to a person, and thus controlling over the statutory liability section. The result is to give to the statutory liability section no more effect than if it were an omnibus or catch-all provision. That it was not intended as such is plain. The Legislature has expressly enacted such a statute. Code Civ.Proc. § 343. The statutory liability section is read out of the books as the test is no longer whether or not the liability is created by statute, as all the previous authorities supposed, it is whether there is some other provision fitting the case.

There is no basis for the assumption that the personal injury section is particular and the statutory liability general. On the contrary, there are undoubtedly more of the former than of the latter.

The cases demonstrate that the test of whether a liability is created by statute and thus controlled by the limitation statute, is whether, except for the statute there would not be liability; the test is not that stated by the majority. In *Barber v. Mulford*, 117 Cal. 356, 49 P. 206, it was held that a mandamus proceeding to compel the payment of a claim against a county based on *contract* was a statutory liability because it was the county's duty by statute to pay it. Recovery of commissions by the district attorney on moneys collected by him from the county is governed by the 3-year statute, not the 2-year period for liabilities not founded on a written instrument. *Higby v. Calaveras County*, 18 Cal. 176. An action on the official bond of an officer is controlled by the 3-year statutory liability provision although the bond is a contract. *County of Sonoma v. Hall*, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459; *Norton v. Title Guaranty & Surety Co.*, 176 Cal. 212, 168 P. 16; *Hellwig v. Title*

Guaranty & Surety Co., 39 Cal.App. 422, 179 P. 222.

Here it is clear that in the absence of statute the employer would have no cause of action for injuries suffered by his employee, hence, the liability, if any, is created by statute, and the 3-year statute of limitation applies.

SHENK, J., concurs.

TRAYNOR, Justice.

I dissent.

I agree with Mr. Justice CARTER that the appeal should be dismissed for the reasons set forth in his opinion.



41 Cal.2d 729

BERGER v. O'HEARN et al.

S. F. 18539.

Supreme Court of California.

In Bank.

Dec. 15, 1953.

Rehearing Denied Jan. 11, 1954.

Action against administrator of an estate to recover an indebtedness allegedly due from decedent. The Superior Court, San Mateo County, Murray Draper, J., sustained defendant's demurrer without leave to amend, and plaintiff appealed. The Supreme Court, Edmonds, J., held that provision of Code of Civil Procedure that if person against whom action may be brought dies before expiration of time limited for commencement thereof, and cause of action survives, an action may be commenced against his representatives, after expiration of that time, and within one year after issuing of letters testamentary or of administration, gives a claimant a period of grace of one year from the issuance of letters in any case in which general statute of limitations would have expired before end of such period, but such provision is applicable only when necessary to extend a general statute of limitations and cannot be used to curtail it, and could not serve as basis of claim

that death of debtor tolled the general statute.

Judgment affirmed.

Carter, J., dissented.

Prior opinion 253 P.2d 540.

1. Limitation of Actions ⇨83(1)

As a general rule, in the absence of a specific statute to the contrary, the intervening death of an obligor does not toll a general statute of limitations upon an accrued cause of action.

2. Limitation of Actions ⇨83(2)

Provision of Code of Civil Procedure that if person against whom action may be brought dies before time limited for its commencement, an action may be filed within one year after appointment of legal representative, has effect of giving a claimant a period of grace of one year from issuance of letters in any case in which general statute of limitations would have expired before end of such period, but it is applicable only when necessary to extend the general statute and cannot be used to curtail it, with result that it was incapable of aiding a claimant, when the time fixed by the general statute of limitations did not expire until more than one year after debtor's death. Code Civ.Proc. § 353.

3. Limitation of Actions ⇨132

Provision of Probate Code that where a claim is rejected by legal representative of decedent's estate the claimant must bring his action within three months after receipt of written notice of rejection is concerned solely with matters of probate procedure, and it cannot operate to extend the general statute of limitations. Probate Code, § 714.

4. Limitation of Actions ⇨132

Generally, a "nonclaim" statute may shorten, but it cannot lengthen, the general statute of limitations as to the claim involved. Probate Code, § 714; Code Civ. Proc. § 353.

5. Limitation of Actions ⇨132

Action to recover an alleged indebtedness from estate of decedent, when filed more than five years after indebtedness was incurred and seventeen months after issuance of letters of administration, was

barred by four-year statute of limitations, notwithstanding contention that statute of limitations was tolled during period in which claim was not acted upon by administrator. Probate Code, §§ 712, 1026; Code Civ.Proc. §§ 337, subd. 2, 354, 356.

6. Limitation of Actions ⇨132

The filing of a claim with the probate court does not amount to the commencement of an action within the meaning of the statute of limitations, in view of express provision of Code of Civil Procedure that an action is commenced, within meaning of title, when complaint is filed. Code Civ. Proc. § 350.

William Berger, in pro. per., W. L. A. Calder and Abraham Glicksberg, San Francisco, for appellant.

Samuel L. Fendel, Sol Silverman, James A. Toner and William W. Coshow, San Francisco, for respondents.

EDMONDS, Justice.

William Berger, assertedly a creditor of the estate of V. B. McMahan, brought this action after his claim had been rejected. The administrator's demurrer to the complaint was sustained without leave to amend. The question presented for decision upon Berger's appeal from the judgment thereafter entered concerns the applicability of a general statute of limitations.

According to Berger's complaint, in 1945 McMahan became indebted to him upon an account stated, and suit was commenced to recover the amount of the debt. That action since has been dismissed for lack of prosecution. McMahan died in 1947, and letters of administration were issued to Maurice O'Hearn. In February, 1948, within the prescribed statutory time, Berger presented a claim against the estate, based upon the pending suit. No further action in regard to the claim was taken by either party until more than three years later. Berger was then given formal written notice that it had been rejected and shortly afterward he filed the present action.

In support of the demurrer, the administrator asserts that the complaint, on its face, shows the bar of the statute of limitations.

The period of limitation applicable to the debt here concerned is four years, commencing at the time the account was stated. Code Civ.Proc. § 337(2). Unaffected by the intervening death of McMahan, the final date upon which Berger could commence an action upon the debt would have been November 13, 1949.

[1] As a general rule, in the absence of a specific statute to the contrary, the intervening death of an obligor does not toll a general statute of limitations upon an accrued cause of action. See Tynan v. Walker, 35 Cal. 634, 638; Wood, Limitations (4th ed.) § 6; 34 Am.Jur., Limitation of Actions, § 212, p. 170. It has been recognized, however, that such a rule often may result in hardship to creditors whose right of action might expire between the debtor's death and the commencement of administration of the estate. Accordingly, in many states statutes have been enacted which extend the limitation period so as to give the creditor an opportunity to bring an action against the personal representative. See note, 174 A.L.R. 1423.

[2] Section 353 of the Code of Civil Procedure provides: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." In effect, this section gives a claimant a period of grace of one year from the issuance of letters in any case in which the general statute of limitations would have expired before the end of such period.

The administrator correctly contends, however, that section 353 does not aid Berger because the time fixed by the general statute of limitations did not expire until more than one year after the death of McMahan. The provision is applicable only when necessary to extend the general

statute of limitations and cannot be used to curtail it. *Lowell v. Kier*, 50 Cal. 646, 648; *Harris v. Mount Washington Co.*, 55 Cal.App. 144, 146, 202 P. 903.

[3] Berger takes the position that section 714 of the Probate Code also may operate to extend the general statute of limitations. Uniformly, however, the decisions of this state have held that section 353 of the Code of Civil Procedure is the sole provision affecting the period of limitation upon a cause of action in the event of a disability resulting from the death of the person liable. Section 714 and similar provisions of the Probate Code are concerned strictly with matters of probate procedure. *Bank of America v. Thomas*, 7 Cal.2d 154, 156, 59 P.2d 990; *Barclay v. Blackinton*, 127 Cal. 189, 193-194, 59 P. 834; *McMillan v. Hayward*, 94 Cal. 357, 361, 29 P. 774; *Dodson v. Greuner*, 28 Cal.App.2d 418, 421, 422, 82 P.2d 741; See *Scott Stamp & Coin Co. v. Leake*, 9 Cal.App. 511, 515, 99 P. 731.

[4] In *Barclay v. Blackinton*, supra, the decision was based upon facts identical in all material respects with those shown by the present record. It was contended that section 714 of the Probate Code (formerly section 1498 of the Code of Civil Procedure) increased the time for suing upon a claim to three months after its rejection. After a review of the authorities in other jurisdictions, the court pointed to the prevailing rule that general statutes of limitation, and special or "nonclaim" statutes similar to section 1498, serve different functions and operate independently of each other. Citing 2 Woerner's American Law of Administration, § 400; see also *ibid.* (3rd ed.) § 400, p. 1320. A non-claim statute "may shorten, but cannot be held to lengthen, the general statutes of limitations." 127 Cal. at page 193, 59 P. at page 835; accord *Gray Realty Co. v. Robinson*, 111 Utah 521, 184 P.2d 237; *Malone v. Averill*, 166 Iowa 78, 147 N.W. 135.

Relying upon *In re Estate of Caravas*, 40 Cal.2d 33, 250 P.2d 593, Berger argues that the statute of limitations was tolled during the period in which the claim was

not acted upon by the administrator. Apparently his argument is based upon section 356 of the Code of Civil Procedure, which provides: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

In the Caravas case, a nonresident alien, as heir of her son's estate, petitioned to recover certain property which had been distributed to the State Treasurer pursuant to section 1027 of the Probate Code. The trial court denied the petition on the ground that the action was filed more than five years after the distribution of the estate and thus was barred by section 1026 of the Probate Code.

This court reversed the judgment. It was held that during a substantial part of the five-year period the country of the petitioner's residence was occupied by an enemy of the United States and, by the Trading With the Enemy Act, 50 U.S.C.A. Appendix § 2, she was disabled from instituting a proceeding to enforce her rights in the estate. Accordingly under sections 354 and 356 of the Code of Civil Procedure, the period of disablement was excluded from the time fixed by the limitation provision of section 1026.

[5] No such disablement appears in the present case. Berger had more than one year after letters of administration were issued to O'Hearn in which to enforce his claim. He could have presented his claim at any time after letters were issued, regardless of whether notice to creditors had been published, *Janin v. Browne*, 59 Cal. 37, 43, and brought his action after 10 days from the date his claim was presented. Prob.Code, § 712; *San Francisco Bank v. St. Clair*, 47 Cal.App.2d 194, 199-200, 117 P.2d 703; *Ratterree Land Co. v. Security First Nat. Bank*, 26 Cal.App.2d 652, 657, 80 P.2d 102. Although during the 10-day period before an action could be commenced the general statute of limitations would have been suspended, *Nally v. McDonald*, 66 Cal. 530, 532, 6 P. 390, Berger's complaint was filed more than one year and a half after the statute had run.

[6] Berger's final contention is that his filing of a claim with the probate court itself amounted to the commencement of an action within the meaning of the statute of limitations. However, section 350 of the Code of Civil Procedure expressly states that "[a]n action is commenced, within the meaning of this title, when the complaint is filed." *Beckett v. Selover*, 7 Cal. 215, 241, was decided prior to the enactment of section 350, and the contrary dictum in that decision no longer is correct. See *Maurer v. King*, 127 Cal. 114, 117, 59 P. 290; *Barclay v. Blackinton*, supra, 127 Cal. at page 194, 59 P. at page 835; *In re Estate of Garnett*, 126 Cal. App. 344, 346, 14 P.2d 572.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I disagree with the construction placed, by the majority, upon the statutes in question. In the main, that construction is based upon the old case of *Barclay v. Blackinton*, 127 Cal. 189, 59 P. 834, which was decided in 1899 before the amendment to section 1498 (now Probate Code, § 714) of the Code of Civil Procedure.

The chronology of the factual situation as disclosed by the record is as follows:

The obligation here involved was incurred shortly prior to December 6, 1945.

The defendant died in July, 1947.

Letters of administration were issued on his estate in August, 1947.

Plaintiff's creditor's claim was filed February 3, 1948, within the statutory time.

Written notice of the rejection of the claim was given to plaintiff on February 20, 1951.

Present action commenced by plaintiff on claim on April 18, 1951.

General 4-year statute limitation expired in November, 1949.

Section 353 of the Code of Civil Procedure provides that an action may be com-

menced against the legal representative of a deceased person within one year after the issuance of letters testamentary or of administration. Section 712 of the Probate Code provides that if the executor or administrator neglects or refuses to allow or reject a claim for ten days after its filing, it may be deemed rejected on the tenth day. Section 714 of the Probate Code provides that within three months after written notice of rejection of a claim, suit must be brought thereon.

As above seen, a claim was duly filed in the instant case on February 3, 1948; formal notice of rejection of the claim was given to plaintiff on February 20, 1951, some three years after the claim was filed. After receipt of the formal notice of rejection of his claim, plaintiff promptly began his action; the general statute of limitations ran on the obligation in November, 1949. Section 712 of the Probate Code provides that the claimant may at his "option" deem the claim rejected on the tenth day; the section is not mandatory, but permissive. Section 714 of the Probate Code provides that suit must be brought on a claim within three months after formal written notice of rejection. Sections 710 and 711 (claims filed with clerk and claims presented to executor or administrator) provide that the executor or administrator *must* allow or reject the claims. The executor or administrator *must* either allow or reject the claim, but if he does not do so the claimant, at his own option, may await his action which, if it be to reject the claim, then gives the claimant three additional months in which to bring an action. To so construe the sections makes them harmonious. To construe them, as is done in the majority opinion, has the effect of rendering nugatory the optional provision in section 712, the mandatory provisions of sections 710 and 711 and the three months provision in section 714. For example, a claim is filed within the time allowed and is not acted upon by the administrator or executor. If the claimant, at his option, decides not to deem the claim rejected but desires to await the action of the executor or administrator, relying upon the three months provision in section 714, he will, if

the general statute has run in the interim, find himself without a remedy. Since the sections (710 and 711) provide that action *must* be taken by the administrator or executor, section 712, which gives the claimant an option to deem it rejected in ten days, can have no purpose but to permit (not to compel), *if desired*, action for recovery on the claim prior to action by the representative of the deceased rejecting the claim.

Barclay v. Blackinton, *supra*, 127 Cal. 189, 193, 59 P. 834, 835, which is factually similar to the case under consideration, had this to say: "It is said that under Code Civ. Proc. § 1498 [now Probate Code, section 714], the plaintiff had three months after the claim was formally and officially rejected by the administrator in which to bring his action. We do not so construe the statute. The section may shorten, but cannot be held to lengthen, the general statutes of limitations. The special limitations of time within which suit must be brought against the estate of deceased persons are called in many states statutes of nonclaim, or of short or special limitation. These limitations exist independent of and collateral to the general law of limitations. 2 Woerner [American Law of] Adm'n, § 400, and cases cited." Ten years after the decision in the Barclay case was handed down, section 1498 (now Probate Code, section 714) was amended so as to provide that written notice of the rejection of a claim "shall be given by the executor or administrator to the holder of such claim". Prior to that amendment, no written notice of rejection had been provided for before the three months period for suit on the claim commenced to run. In Estate of Wilcox, 68 Cal.App.2d 780, at page 785, 158 P.2d 32, at page 34, it was specifically held that the first part of section 714 of the Probate Code was a statute of limitations. In Fifield v. Bullwinkel, 81 Cal.App. 440, at page 442, 253 P. 962, at page 963, it was held that " * * * it follows that, without regard to the time of publication of notice to creditors, the period of 3 months, as limited by section 1498 [Prob.Code, § 714] of the Code of Civil Procedure, within which the claimant must bring his action upon a rejected

claim, begins to run on the date when the executor *first gives to the claimant written notice of such rejection.*" (Emphasis added.)

This section, Prob.Code, § 714, deals expressly and specifically with the bringing of an action upon a rejected claim in probate. The remedy there afforded is conditioned only upon the claimant commencing his action within three months after receipt of notice of rejection from the executor or administrator. There is no requirement that the action must be brought within one year after the issuance of letters testamentary or of administration. To hold, as is held by the majority, that the action must be brought within a year from the issuance of letters, or within the period of the general statute of limitation, is to render nugatory not only the three-month period provided for by section 714 but the mandatory provisions of section 712 of the Probate Code relating to notice of allowance or rejection of claims by the executor or administrator.

The rule is well established that all of the statutory provisions in all of the codes must be read together and harmonized if possible. As stated by this Court in *In re Porterfield*, 28 Cal.2d 91, at page 100, 168 P.2d 706, at page 712, 167 A.L.R. 675: "It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. [Citing cases.]" It would seem that under this rule the provisions of the Code of Civil Procedure relating to the time within which actions must be commenced should be so construed as to give effect to the above cited provisions of the Probate Code relating to the approval and rejection of claims against estates of deceased persons and the commencement of an action for recovery of a rejected claim. The majority opinion gives no consideration to the above mentioned rule.

In my opinion, the rule of the *Barclay* case which was laid down in 1899, should be restated in the light of the present statutes as well as in the light of present day conditions. It is placing too great a burden on attorneys today to hold that they *must* deem

a claim rejected and commence an action thereon at the close of the ten-day period provided for in section 712 of the Probate Code or run the risk of their client's claim being barred by a general statute of limitation; it is also not in harmony with the provisions of that section and those of section 714 of the same Code.

Under the interpretation placed on the above-mentioned statutes by the majority opinion it would be possible for the general statute of limitation to run either before a claimant had an opportunity to present his claim against the estate of a deceased debtor or before he could bring suit on the claim after presentation of it, but that situation does not exist in this case. However, the statute should be construed so as to afford a remedy to a claimant under any factual situation which might arise.

I would, therefore, reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



41 Cal.2d 738

PEOPLE v. LA MACCHIA et al.

S. F. 18835.

Supreme Court of California.

In Bank.

Dec. 15, 1953.

Proceeding for condemnation of land for purpose of constructing freeway. The Superior Court, Santa Clara County, Burl R. Salsman, J., entered judgment from which the State appealed. The Supreme Court, Edmonds, J., held, *inter alia*, that there had been no procedural errors.

Affirmed.

Prior opinion, 253 P.2d 709.

Traynor, Carter and Schauer, JJ., dissented in part.

1. Witnesses — 330(1)

The field of inquiry in cross-examination for purpose of testing credibility of witness and weight of his testimony is so

extensive that trial court must be given wide discretion in order to keep such examination within reasonable bounds.

2. Appeal and Error ⚡971(3)

Where appellate court is called upon to decide whether trial court has abused discretion in limiting cross-examination, inquiry is whether a sufficiently wide range has been allowed to test credibility of witness and weight of his testimony rather than whether some particular question should have been allowed.

3. Evidence ⚡502

In condemnation proceeding, trial judge allowed wide latitude in cross-examination of witnesses of property owners and did not abuse discretion in bringing certain lines of inquiry to a close.

4. Evidence ⚡502

Witnesses in condemnation proceeding cannot, upon direct examination, testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the condemning party has been compelled to pay in other and like cases, notwithstanding that such transactions may constitute source of witnesses' knowledge, but such testimony is admissible upon cross-examination for sole purpose of discrediting opinion of the witness, but it may not be considered for purpose of fixing value of the land in dispute.

5. Evidence ⚡501(7)

One who has given his opinion in condemnation proceeding as to value of certain property may, upon direct examination, state reasons upon which his opinion rests, but facts stated as reasons do not become evidence in the sense that they have independent probative value upon issue as to market value, but serve only to reinforce judgment of witness.

6. Evidence ⚡558(9)

There is no right in condemnation proceeding to put in evidence of matters which are incompetent as substantive evidence for purpose of fortifying opinion of expert witness, even though they are offered under

guise of reasons for his opinion, and even though they might properly have been admitted on cross-examination to test and diminish the weight to be given his opinion.

7. Evidence ⚡501(7)

The general rule which permits a witness in condemnation proceeding to state reasons upon which his opinion as to value is premised may not be used as a vehicle to bring before the jury incompetent evidence.

8. Evidence ⚡501(7)

In condemnation proceeding, a witness, upon direct examination, should not be allowed to go into details of particular offers for the property being condemned or specific sales or transactions in connection with other like property.

9. Evidence ⚡543(3)

All that is necessary to entitle expert witness in condemnation proceeding to give opinion as to value is to show that he had some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond those means presumed to be possessed by men generally.

10. Evidence ⚡543(3)

The usual expert is qualified to give opinion as to value of property being condemned by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and with sales of similar property in the vicinity.

11. Evidence ⚡474(18)

An owner of property being condemned is generally considered competent to estimate value of his property upon showing that he has resided thereon for a number of years.

12. Evidence ⚡501(7)

Property owner, whose competency was not challenged, was entitled to state upon direct examination in condemnation proceeding the reasons for his opinion as to the worth of his property, but such reasons could be no broader than those of any other witness qualified to state an opinion as to value.

13. Evidence ⇨474(18), 500

Ownership with residence on the land for reasonable time established witness' qualification to testify as to value of property being condemned but did not extend the scope of the inquiry upon direct examination.

14. Evidence ⇨500

In stating his opinion in condemnation proceeding as to value of property, the owner of the property being condemned is bound by the same rules of admissibility of evidence as is any other witness.

15. Eminent Domain ⇨262(5)

Evidence ⇨501(7)

In condemnation proceeding, testimony of owner of property in question that his opinion as to value was based upon described offer to buy portion of property in question was inadmissible on direct examination but, in view of fact that such offer constituted a small part of all the evidence before the jury on value, question of the admission of such testimony was not prejudicial to the state.

16. Evidence ⇨502

In condemnation proceeding, evidence of offer to purchase property in question may properly be presented upon cross-examination for purpose of testing weight to be accorded opinion as to value of the property.

17. Witnesses ⇨248(2)

In eminent domain proceeding, where state on cross-examination of witness for property owner asked witness if it were his opinion that property would be worth specified amount on open market, witness' reply that he had investigated one of the parcels in question and had heard that an offer had been made to buy the property for \$7,000 was not subject to motion to strike out upon ground that it was not responsive. Code Civ.Proc. § 2052.

18. Evidence ⇨142(1)

The rule that witnesses in condemnation proceedings should not be allowed to testify as to particular transactions such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in

question, does not apply where no price is mentioned by the witness.

19. Evidence ⇨558(12)

In condemnation proceeding, where expert witness who had testified for landowner as to value of property and who had been cross-examined on such subject, in testifying on redirect examination that property owner had been approached in negotiations for sale of the property and that other similarly situated owners had refused offers similar to that made to property owner, did not mention prices offered, admission of such testimony did not violate rule that valuation witness should not be allowed to go into details of particular sales or transactions.

20. Evidence ⇨558(12)

In condemnation proceeding, amount paid for other lands similarly situated to that in question may not be presented to jury upon redirect examination of valuation witness where such evidence is offered as independent proof of value of the land in question. Code Civ.Proc. § 2050.

21. Evidence ⇨558(12)

Factors going to weight to be accorded expert opinion constitute "new matter" within statute providing that a witness may be re-examined as to any new matter upon which he has been examined by adverse party. Code Civ.Proc. § 2050.

See publication Words and Phrases, for other judicial constructions and definitions of "New Matter".

22. Evidence ⇨558(12)

Under statute providing that a witness once examined cannot be re-examined as to the same matter without leave of court, but may be re-examined as to any new matter upon which he has been examined by adverse party, it is proper to permit expert witness to state on re-examination facts and circumstances tending to correct erroneous inferences which may have been drawn from his testimony upon cross-examination. Code Civ.Proc. § 2050.

23. Evidence ⇨558(12)

In condemnation proceeding, where state on cross-examination of property owners' expert witness had brought out the

prices at which various other properties in the vicinity had been sold, permitting witness to state on re-direct examination the various factors which, in his opinion tended to reconcile prices paid for other land with valuation he had given for the property in question was not error. Code Civ.Proc. § 2050.

24. Eminent Domain ⇨134

Damages for condemnation of land must be measured by market value of the land at the time it was taken, and the test is not the value of the land for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted.

25. Eminent Domain ⇨202(1, 4)

In ascertaining market value of realty in condemnation proceeding, any evidence which tends to show physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted is competent, but evidence as to what the owner intended to do with the land cannot be considered.

26. Eminent Domain ⇨134

In condemnation proceeding, there can be no allowance for enhanced damage which landowner would suffer by reason of being prevented from carrying out a particular scheme of improvement existing only in contemplation at time of the trial.

27. Eminent Domain ⇨202(4)

In condemnation proceeding, under certain circumstances, evidence that proposed use of land would result in profit is admissible, not for purpose of enhancing damages by showing loss to owner of particular plan of operation, but to show that such proposed plan is a feasible plan and should be considered in fixing market value.

28. Eminent Domain ⇨262(5)

Any prejudice resulting to state from erroneous admission in condemnation proceeding of evidence relating to purpose motivating owners to purchase their properties and to plant certain crops was offset by other testimony similar in character which was received without objection.

29. Eminent Domain ⇨262(3, 5)

In condemnation proceeding, it would be assumed that jury understood and cor-

rectly applied instructions to effect that it was not to consider plans property owners may have had for the properties condemned in determining market value of the properties and, in view of such instruction, admission of evidence relating to purposes motivating owners to purchase their properties and to plant certain crops was not reversible error.

30. Highways ⇨85

The owner of property adjoining public highway has an easement of access to the highway to the extent that such easement is reasonably required in view of the purposes to which the property is adapted.

31. Eminent Domain ⇨222(1)

In proceeding to condemn land for highway purposes, instructions as a whole fairly stated controlling principles concerning easement of owners of abutting land for purpose of access to and egress from the public highway to the land.

32. Eminent Domain ⇨262(5)

In condemnation proceeding, giving of instruction to effect that landowners were presumed to know value of their property and their evidence in that regard was entitled to be weighed and considered by jury was not reversible error, in view of fact that awards were far below values placed by owners upon their respective properties and in view of other instructions to effect that final responsibility for determining amounts to be awarded rested with jurors and that it was their duty to evaluate and weigh testimony of witnesses who stated their opinions as to value, though the word "presumed" should not have been used in the instruction.

33. Eminent Domain ⇨222(4)

In condemnation proceedings, trial court did not err in instructing jury to reconcile, if possible, conflicting testimony as to value of condemned land and to give all testimony due weight, though there was a wide discrepancy in estimates of value of the land.

34. Eminent Domain ⇨221

In condemnation proceedings, responsibility rests upon triers of fact to reconcile, if possible, any apparent conflict, whether the conflict arises upon entire case or in the

testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition.

35. Eminent Domain ⇐130

Compensation for condemnation of property is based on loss imposed on owner of the property, rather than on benefit received by the taker.

36. Eminent Domain ⇐134

The beneficial purpose to be derived by condemnor's use of property is not to be taken into consideration in determining market value of the property condemned.

37. Eminent Domain ⇐134

The market value of condemned property is to be determined with due consideration of all its available uses, but its special value to the state, as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.

38. Eminent Domain ⇐262(5)

In condemnation proceedings, state was not prejudiced by instruction to effect that purpose for which property was being taken could be considered in determining market value, in view of further instruction that special value of the land to the state, as distinguished from others who may or may not possess power to condemn, was to be excluded as an element of market value.

39. Eminent Domain ⇐262(5)

In proceeding for condemnation of land for highway purposes, state was not prejudiced by instruction to effect that purpose for which property was being taken could be considered in ascertaining market value, in view of fact that jury was further instructed to award compensation in accordance with evidence and there was no evidence in regard to value of the use to the state for highway purposes.

Robert E. Reed, Sacramento, Holloway Jones, Jack M. Howard, Roger Anderson and Edward L. Doyle, San Francisco, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein and Goldstein, Barce-

loux & Goldstein, San Francisco, for respondents.

EDMONDS, Justice.

For the purpose of constructing a freeway, the state is condemning certain land bordering the presently existing highway, which is to be widened. Along each side of the freeway there will be a fence cutting off access to it except through 20-foot openings at certain points.

There are five parcels of land involved in the state's appeal from judgment awarding damages to the owners. These parcels have a frontage on the present highway of from 260 to 5000 feet. On the land having the 5000-foot frontage, there are to be three 20-foot openings in the fence at convenient points. One 20-foot opening is to be provided for each of the other parcels. The land to be taken for inclusion in the freeway ranges from less than one foot to 60 feet in width. The area of four of the parcels varies from 10 to 38 acres; the largest one has 1245 acres.

The experts called by the state and those who testified for the owners placed substantially the same values on the land taken. However, they differed markedly on severance damages. That was occasioned principally by a difference of opinion as to the highest and best use of the land along the highway, which was being used for agricultural purposes with the usual improvements related to farming and fruit growing. The state's witnesses based their opinion as to the amount of severance damages primarily upon the loss of agricultural utility and loss of convenience of agricultural operations for 20 feet from the freeway fence, with certain allowances for rearrangements of existing improvements. The owners and their experts testified that at least a portion of the land presently is adaptable and suitable for commercial development but cannot be used for such purpose with the restricted access planned by the state.

According to the state, the severance damages are grossly excessive, and were allowed because of errors in evidentiary rulings and the instructions. The property owners maintain that the rulings and in-

structions were correct, and in any event not prejudicial.

[1-3] One of the issues is whether the trial court erroneously and prejudicially curtailed the state's cross-examination of the property owners' witnesses. "The field of inquiry in cross-examination for the purpose of testing the credibility of a witness and the weight of his testimony is so extensive that the trial court must be given a wide discretion in order to keep such examination within reasonable bounds; otherwise the trial of cases would be overlong. When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed." *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal.App. 240, 261, 278 P. 476, 279 P. 178, 179. The state is complaining of seven rulings in some 240 pages of the cross-examination of three experts. No useful purpose would be served by stating the specific questions which, it is claimed, should have been permitted, for each is peculiar to the circumstances of this case. The record shows that the state's objections are not well taken. The trial judge allowed wide latitude in the cross-examination of the witnesses, and in bringing certain lines of inquiry to a close there was no abuse of discretion.

The state's second contention is that the trial court erred in admitting evidence relating to an offer to purchase a portion of the property owned by Ercole and Rafaella Pelliccione. Upon direct examination Ercole Pelliccione testified that he valued his property before the taking at \$105,000. Asked the "reason for that opinion", he stated, "The reason is the frontage—it's almost 700 feet—I had on Monterey Road, that is all business property. The people, they asked me in 1947, they wanted to buy it." The state interposed an objection upon the grounds of irrelevancy and incompetency, which the trial court overruled. Pelliccione continued: "In 1947 I was contacted by some people, they wanted to buy one acre right there where the big oak tree

was, to build a motel, and they offered me \$7,000. * * *

[4] This answer placed before the jury testimony which may not be elicited upon direct examination. The long established rule in this state is that witnesses "cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the * * * [condemning party has] been compelled to pay in other and like cases— notwithstanding these transactions may constitute the source of their knowledge". *Central Pac. R. R. Co. of California v. Pearson*, 35 Cal. 247, 262. The courts have neither deviated nor retreated from this rule. *City of Los Angeles v. Hughes*, 202 Cal. 731, 736, 262 P. 737; *In re Estate of Ross*, 171 Cal. 64, 65-66, 151 P. 1138; *Atchison, T. & S. F. Railway Co. v. Southern Pac. Co.*, 13 Cal.App.2d 505, 512, 57 P.2d 575; *Hibernia Sav. & Loan Soc. v. Ellis Estate Co.*, 132 Cal.App. 408, 411, 22 P.2d 806; *City of Los Angeles v. Deacon*, 119 Cal.App. 491, 493-494, 7 P.2d 378; *Merchants' Trust Co. v. Hopkins*, 103 Cal.App. 473, 478-479, 284 P. 1072.

In an early case this court pointed out that to allow evidence of particular transactions to be presented on direct examination would open up each transaction as a side issue and the investigation would be rendered interminable. *Central Pac. R. R. Co. of California v. Pearson*, *supra*, 35 Cal. at page 262. Upon cross-examination, however, such evidence is admissible for the sole purpose of discrediting the opinion of the witness, *Central Pac. R. R. Co. of California v. Pearson*, *supra*, 35 Cal. at page 262; *Reclamation Dist. No. 730 v. Inglin*, 31 Cal.App. 495, 500, 160 P. 1098; *Los Angeles Gas & Elec. Corp. v. Etienne*, 83 Cal.App. 645, 647, 257 P. 123, but it may not be considered for the purpose of fixing the value of the land in dispute. *In re Estate of Ross*, *supra*, 171 Cal. at page 66, 151 P. at page 1139; *Reclamation Dist. No. 730 v. Inglin*, *supra*, 31 Cal.App. at page 500, 160 P. at page 1100.

[5,6] The owners assert, however, that evidence of an offer to purchase the property desired by the state may be presented upon direct examination as a reason for the opinion of the witness. It is clear that one who has given his opinion as to value of certain property may, upon direct examination, state the reasons upon which it rests. *Long Beach City High School Dist. of Los Angeles County v. Stewart*, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249. But the facts stated as reasons do not become evidence in the sense that they have independent probative value upon the issue as to market value. *Thornton v. City of Birmingham*, 250 Ala. 651, 35 So.2d 545, 7 A.L.R.2d 773; 32 C.J.S., Evidence, § 521, page 219. Instead, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion. See *Long Beach City High School Dist. of Los Angeles County v. Stewart*, supra, 30 Cal.2d at page 773, 185 P.2d at page 590. As said in *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 77 N.E. 769: "[T]here is no right to put in evidence of matters which are incompetent as substantive evidence for the purpose of fortifying the opinion of an expert witness, even though they are offered under the guise of the reasons for his opinion, and even though they might properly have been admitted on cross-examination to test and diminish the weight to be given to his opinion." 191 Mass. at pages 233-234, 77 N.E. at page 773. The rule is similarly expressed in *United States v. 25.406 Acres of Land*, 4 Cir., 172 F.2d 990, 993, and *Nichols* states it in substantially the same language. 5 *Nichols on Eminent Domain*, 3d Ed., § 18.45[1], p. 181.

[7,8] The general rule which permits a witness to state the reasons upon which his opinion is premised may not be used as a vehicle to bring before the jury incompetent evidence. To so open up the inquiry would create a disastrous break in the dike which stands against a flood of interminable investigation. Upon direct examination, a witness never should be allowed to go into the details of particular offers for the property being condemned or

specific sales or transactions in connection with other property. *Reclamation Dist. No. 730 v. Inglin*, supra, 31 Cal.App. at page 500, 160 P. at page 1100.

[9-11] The property owners urge that a distinction must be made between a witness such as Pelliccione, who is an owner of one of the properties being taken by the state, and the witness who testifies as an expert. They argue that the scope of the direct examination of the expert is more limited than that of a property owner. However, there is no logical ground for any such distinction. "All that is necessary to be shown to entitle a witness to give an opinion is to show 'that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question * * * beyond what is presumed to be possessed by men generally.'" *Spring Valley Water-Works v. Drinkhouse*, 92 Cal. 528, 534, 28 P. 681, 683. The usual expert is qualified by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and of sales of similar property in the vicinity. In *re Estate of Ross*, supra, 171 Cal. at pages 66-67, 151 P. at page 1139. A property owner, on the other hand, is generally considered competent to estimate the value of his property upon a showing that he has resided thereon for a number of years. *Long Beach City High School Dist. of Los Angeles County v. Stewart*, supra, 30 Cal.2d at page 772, 185 P.2d at page 590; *Spring Valley Water-Works v. Drinkhouse*, supra, 92 Cal. at page 534, 28 P. at page 683.

[12,13] The state did not challenge Pelliccione's competency, and he was entitled to state upon direct examination the reasons for his opinion as to the worth of his property. *Long Beach City High School Dist. of Los Angeles County v. Stewart*, supra, 30 Cal.2d at page 773, 185 P.2d at page 590. Those reasons could be no broader than those of any other witness qualified to state an opinion. Ownership with residence on the land for a reasonable time established his qualification to testify, but it did not extend the scope of the in-

quiry upon direct examination. Evidence of an offer to purchase is none the less collateral, and as productive of delay and confusion, when it is brought before the jury by the owner as it would be if it were presented by an expert on land values.

[14] In *Peirson v. Boston Elevated Railway*, supra, a property owner had been permitted to relate upon his direct examination the details of offers to purchase his property. It was held that the rule permitting a witness to state the reasons underlying an opinion did not afford the owner a means for introducing otherwise incompetent evidence on the ultimate question of value, and that the testimony relating to offers to purchase was therefore improperly admitted. Clearly, therefore, a property owner and an expert witness are in a different position only insofar as their qualifications to testify rest upon different bases. In stating his opinion as to the value of property, the owner is bound by the same rules of admissibility of evidence as is any other witness.

Long Beach City High School Dist. of Los Angeles County v. Stewart, supra, does not hold to the contrary. In that case, an objection was sustained to a question asking an owner upon what he based his opinion as to value. "[T]here is not the slightest indication in the record or in the briefs concerning the nature of the testimony which appellant would have given in reply to the question." 30 Cal.2d at page 774, 185 P.2d at page 591. Under such circumstances it was decided that he "should have been permitted to state the reasons for his opinion on market value."

[15] Although the evidence now challenged was inadmissible, the error did not prejudice the state. The offer to purchase constituted a small part of all the evidence before the jury on the value of Pelliccione's property, cf. *Atchison, T. & S. F. Railway Co. v. Southern Pac. Co.*, supra, 13 Cal.App.2d at page 513, 57 P.2d at page 579, and from the record as a whole it does not appear that mention of the offer for only a portion of the land influenced the verdict to any substantial extent. Cf. *Reclamation District No. 730 v. Inglin*, supra,

31 Cal.App. at pages 500-501, 160 P. at pages 1100-1101.

Another asserted violation of the rule prohibiting evidence as to offers to purchase occurred during the cross-examination of the owners' witness Challen. A question of counsel for the state was, "[S]o do I understand that in your opinion this highway frontage on these parcels would be around seven, eight thousand dollars an acre if placed upon the open market for sale?" Challen replied, "I investigated one parcel here that I had heard an offer had been made on * * * as a matter of fact, Mr. Pelliccione was offered \$7,000 for 200 feet." In denying a motion to strike out the statement upon the ground that it was not responsive, the court said, "[I]t's explanatory of his answer."

[16, 17] In its briefs the state challenges this testimony upon the sole ground that it violates the rule against the admission of offers to purchase. But the questioning was upon cross-examination, and evidence of an offer may properly be presented at such time for the purpose of testing the weight to be accorded an opinion as to value. Under the circumstances shown by the record the trial court properly refused to strike the testimony. Cf. *Code Civ. Proc.* § 2052.

Upon redirect examination of Challen, he was interrogated concerning the offer as to the acreage and contemplated use of the property. Over objection upon the ground that the information was incompetent, irrelevant and immaterial, Challen stated that it was for an area about 200 by 200 feet to be used for a service station. That statement added little to the facts brought out on cross-examination. However, Challen also said the Pelliccione had been approached in negotiations for a motel site on the same property. Challen made no mention of the prices offered, but said that all of the owners had refused similar offers "even at the prices they were offered * * * because they wanted that free ingress and egress that they had had prior to the installation of that fence".

[18, 19] Although, as a general proposition, a witness upon his examination in

chief should not be allowed to go into the details of particular sales or transactions, Reclamation Dist. No. 730 v. Inglin, *supra*, 31 Cal.App. at page 500, 160 P. at page 1100, the core of inadmissibility is the consideration. City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 656, 272 P. 585; In re Estate of Ross, *supra*, 171 Cal. at page 67, 151 P. at page 1139. Where no price is mentioned, the rule laid down in Central Pac. R. R. Co. of California v. Pearson, *supra*, does not apply. City and County of San Francisco v. Tillman Estate Co., *supra*, 205 Cal. at pages 656-657, 272 P. at pages 586-587.

Another contention is that evidence of the sales of other property was erroneously admitted. In cross-examination of two of the owners' expert witnesses, the state brought out the prices at which various other properties in the vicinity had been sold. Those prices were considerably lower than the values placed by each of the witnesses upon the land being condemned. Upon redirect examination, and over the state's objection, the witness was permitted to state the various factors which, in his opinion, tended to reconcile the prices paid for other land with the valuation he had given. Such inquiry, it is urged, should not have been allowed.

[20-22] The amount paid for other land may not be presented to the jury upon redirect examination where it is offered as independent proof of value. Reclamation Dist. No. 730 v. Inglin, *supra*, 31 Cal.App. at page 500, 160 P. at page 1100. However, section 2050 of the Code of Civil Procedure provides, in part: "A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party." Certainly, factors going to the weight to be accorded an expert opinion constitute "new matter" within the meaning of this statute. Also, upon general principles, it is proper to permit a witness to state facts and circumstances tending to correct erroneous inferences which may have been drawn from his testimony upon cross-examination. Pedley v. Doyle, 177 Cal. 284, 170 P. 602; Myers v.

Rose, 27 Cal.App.2d 87, 89, 80 P.2d 527; People v. Corey, 8 Cal.App. 720, 725, 97 P. 907; 2 Wigmore on Evidence, 3d Ed., § 463, p. 512.

With one exception, the many cases cited by the state in support of its position do not state a contrary rule. Some of them concerned the propriety of such evidence upon direct examination, City of Los Angeles v. Hughes, *supra*, 202 Cal. at page 736, 262 P. at page 739; In re Estate of Ross, *supra*, 171 Cal. at pages 65-66, 151 P. at pages 1138-1139; Hibernia Sav. & Loan Soc. v. Ellis Estate Co., *supra*, 132 Cal.App. at page 411, 22 P.2d at page 807; City of Los Angeles v. Deacon, *supra*; in another, the court was concerned with the question of whether there was competent evidence of the substantive inquiry as to value. Merchants Trust Co. v. Hopkins, *supra*, 103 Cal.App. at pages 478-479, 284 P. at page 1074, Dickey v. Dunn, 80 Cal.App. 724, 728, 252 P. 770, and Thompson v. Stoakes, 46 Cal.App.2d 285, 292-293, 115 P.2d 830, concerned evidence of sales of the identical property in question, but in Bagdasarjian v. Gragnon, 31 Cal.2d 744, 758, 192 P.2d 935, the Thompson case was expressly overruled on that point.

In Reclamation Dist. No. 730 v. Inglin, *supra*, it does not appear whether the redirect examination was properly limited to the specific sales brought out upon cross-examination. In any event, apparently it was argued on the appeal that such evidence was admissible for the purpose of fixing the value of the land in dispute, and was not correctly tendered for the sole purpose of explaining the factors surrounding the sales which tended to diminish the weight to be accorded the witness' opinion. In Palladine v. Imperial Valley F. L. Ass'n., 65 Cal.App. 727, 756, 225 P. 291, the testimony was elicited upon cross-examination and the question presented was the propriety of refusing an instruction limiting the evidence to the purpose of testing the witnesses' knowledge and discrediting their opinions.

[23] The single case apparently standing for the rule asserted by the state is Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 57 P.2d 575. In that decision the trial judge per-

mitted an expert witness to testify upon redirect examination concerning the significant features of the sales of other properties which had been mentioned during the course of the cross-examination. In addition, the court had allowed "[q]uestions as to whether or not property in the general locality of the property sought to be condemned had increased * * * in value * * *. This class of questions included all property in the general locality in the case of some of the questions, and in the case of other questions involved only particular pieces of property in the locality." 13 Cal.App.2d at page 511, 57 P.2d at page 578. As to the questions which were outside the scope of the cross-examination, it was properly held that the evidence was inadmissible. And upon the assumption that the field of inquiry was the same as upon direct examination, the court included as inadmissible the testimony as to specific sales which was given upon cross-examination. For these reasons the decision does not support the state's contention.

Complaint is also made of the admission of certain evidence relating to the purposes motivating the owners to purchase their properties, and to plant certain crops. Such testimony, it is said, violates the principle that the true and only criterion of damages is market value, and not the value in use to the owner, either actual or prospective.

Upon cross-examination of Challen, he volunteered information that one of the owners "planted diversified fruit for the purpose of selling * * * retailing right from his property there". A motion to strike was denied. Over objection that it was "incompetent, irrelevant and immaterial", owner Ernest Filice was permitted to testify upon direct examination that "the sole purpose" in purchasing the property was the location of the property on U. S. Highway 101. Over the same objection he also was permitted to state that the main reason he purchased the property was "on account of that frontage in front and with the good visibility we had in mind at some future date to take advantage of the uses, commercial uses * * * to erect some kind of a business on that frontage, whether either a gas station or a restaurant or

fruit stand". Ercole Pelliccione, co-owner of another parcel, over objection, was allowed to state his intention to build a motel on his property, and that he planted two acres of cherries in order to sell them at retail to travelers on the highway.

[24-27] This court "has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value". *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 412, 104 P. 979, 981. "In ascertaining the market value of real property, any evidence which tends to show the physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted, is competent." *City of Los Angeles v. Cole*, 28 Cal.2d 509, 518, 170 P.2d 928, 933, quoting with approval from *City of Beverly Hills v. Anger*, 127 Cal. App. 223, 228, 15 P.2d 867.

But evidence as to what the owner intended to do with the land cannot be considered. *People v. Marblehead Land Co.*, 82 Cal.App. 289, 301, 255 P. 553; *City of Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co.*, 15 Cal.App. 676, 677, 115 P. 654. For there can be no allowance for enhanced damage which an owner "would suffer by reason of being prevented from carrying out a particular scheme of improvement, existing only in contemplation at the time of the trial." *City of Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co.*, *supra*, 15 Cal.App. at page 677, 115 P. at page 655. However, under certain circumstances, evidence that a proposed use would result in a profit is admissible "not for the purpose of enhancing the damages by showing the loss to the

owner of a particular plan of operation, but to show that such proposed plan is a feasible plan and should be considered in fixing market value". *City of Daly City v. Smith*, 110 Cal.App.2d 524, 532, 243 P.2d 46, 51; and see *United States v. 25,406 Acres of Land*, supra, 172 F.2d at page 994.

[28] Here, a portion of the testimony complained of was admitted in the course of a line of questioning indicating that it was offered as a description of the uses to which the properties were adaptable. But the majority of it comes squarely within the rule which prohibits the admission of evidence concerning an owner's purposes with regard to his property. However, to a considerable extent, any prejudice resulting from the erroneous admission of the evidence was offset by other testimony similar in character which was received without objection. See *Mullanix v. Basich*, 67 Cal.App.2d 675, 679, 155 P.2d 130. For example, Challen testified: "I happen to know that the owner [of parcel 4] has put in a very diversified orchard in there, in order to sell his commodities on the highway, which proves the fact that that property does have commercial value; and * * [the other landowners] * * * bought their property [for the same reason]."

[29] In this connection, the jury was instructed: "Whatever purpose the Defendants had in connection with the future use of the property, can add nothing to its market value. The fact that this purpose is defeated by condemnation, however much a disappointment, is not a matter of compensation. A use existing or contemplated on property is distinct from the market value of the property itself and is not the conclusive basis for fixing such market value, and is not to be considered as determining the value of the land. Value in use is not to be considered by you as determining the market value of the property. A plan which Defendants may or may not have had for the improvement of the property adds nothing to the market value. The fact that a plan for the improvement, if any, was affected by condemnation, however much a disappointment, is not a matter of compensation." It must be assumed that the jury understood such clear and unam-

biguous language and correctly applied the instructions to the evidence. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 500, 225 P.2d 497; *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 697, 89 P. 976.

[30, 31] Next, the state attacks the instructions concerning the existing right of access to the highway in which the jury was told that the owner of abutting land has a private right in such highway distinct from that of the public for the purpose of access to and egress from his land. This right, the instruction stated, cannot be taken from the landowner without just compensation. The state complains of the trial judge's failure to add that the right of access is limited to that which is reasonable for the purposes to which the property is adapted. Instead, it is argued, the instruction informs the jury that the right of access is an unqualified and unlimited one and not subordinate to normal highway uses.

On this subject the state requested and the court refused an instruction stating that an abutting owner has no right to insist upon the construction of a road in such a manner that he may travel directly from the highway to any portion of his adjoining land. The jurors might well have been told that "[t]he extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." *Bacich v. Board of Control*, 23 Cal.2d 343, 352, 144 P.2d 818, 824. But they were told that only when the condemnation destroys or substantially impairs the right of access is an owner entitled to compensation therefor. Considering the instructions as a whole, they fairly state the controlling principles.

[32] The state also complains of the charge to the jury in which it was told: "Owners are presumed to know the value of their property, and being permitted under the law to testify thereto, their evidence in that regard is entitled to be weighed and considered by the jury." This instruction, as read by the state, informs the jury that the testimony of an owner is entitled to greater weight than that of other witnesses on value. Although the word "presumed" should not have been used, it is significant

that the awards are far below the values placed by the owners upon their respective properties. Moreover, the record shows instructions which state that the final responsibility for determining the amounts to be awarded rests with the jurors, and it is their duty to evaluate and weigh the testimony of witnesses who stated their opinions as to values.

[33, 34] Next, the state maintains that it was error to instruct the jury "if possible, to reconcile the conflicting testimony and to give it all due weight". The state argues that in view of the wide discrepancy in the estimates of value and damage by witnesses for the respective sides, it is clear that the opinions were irreconcilably conflicting, and the effect of the instruction was to tell the jury to "cut somewhere in between" divergent amounts. "Upon the triers of fact rests the responsibility to reconcile, if possible, any apparent conflict, whether the same arises upon the entire case or in the testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition". *Darling v. Pacific Electric Ry. Co.*, 197 Cal. 702, 708, 242 P. 703, 706; *Boens v. Bennett*, 20 Cal.App.2d 477, 483, 67 P.2d 715.

[35-39] Finally, the state contends, the jury was erroneously advised that, in ascertaining market value, the purpose for which the property was being taken by the state could be considered. Compensation is based on loss imposed on the owner, rather than on benefit received by the taker. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725; *Orgel on Valuation Under Eminent Domain*, § 79, p. 257. The beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant. *City of Stockton v. Vote*, 76 Cal.App. 369, 400, 244 P. 609. But the jury in the present case also was told: "Although the market value of the property is to be determined with due consideration of all its available uses, its special value to the State as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." In view of that concise

statement of the law, the erroneous language in the other instruction could not have influenced the awards. Furthermore, and most significant, there is no evidence in regard to the value of the use to the state for highway purposes, and the jury received the usual instruction to award compensation "in accordance with the evidence in this case."

Although some of the rulings and instructions were erroneous, it cannot reasonably be said that, upon examination of the entire record, there has been a miscarriage of justice requiring reversal of the judgment. Cal.Const. art. VI, § 4½.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring and dissenting in part).

I concur in the judgment. Nevertheless I must protest the obsolescent rule, reaffirmed by the majority, that the value of real property cannot be proved by evidence of sales of comparable real property. Only a few courts follow it, and their number diminishes. The most recent to abandon the rule are the Court of Appeals of New York and the Supreme Court of Nebraska. *Village of Lawrence v. Greenwood*, 300 N.Y. 231, 90 N.E.2d 53, 56; *Langdon v. Loup River Public Power Dist.*, 142 Neb. 859, 8 N.W.2d 201, 206. It has withered under the devastating attacks on it. See, 2 Wigmore, Evidence, 3d Ed., § 463, p. 503 et seq.; *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549, 174 A.L.R. 386; 118 A.L.R. 870; 32 C.J.S., Evidence, § 593, page 444 et seq.; *City of Los Angeles v. Cole*, 28 Cal.2d 509, 517, 170 P.2d 928, 934 (dissent); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 760, 185 P.2d 597, 605 (dissent). Why bolster it when it is doomed?

Admittedly such evidence, which everyone uses to determine value, is relevant; so relevant that it is hardly credible that it would be excluded. It is conceded that on cross-examination a witness may be questioned as to his knowledge of sales of comparable property. *City of Los An-*

geles v. Cole, supra, 28 Cal.2d 509, 518, 170 P.2d 928. On redirect examination he may be questioned regarding such sales in relation to the valuation that he gave on direct examination. See majority opinion herein disapproving Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal. App.2d 505, 57 P.2d 575. Why is there no concern about collateral issues on cross or redirect examination and concern of phantom proportions on direct examination? The magnified risk of collateral issues must be balanced against the reality of inevitable confusion when jurors hear evidence of the greatest relevance and are then told that they cannot base the value of the property on that evidence.

The trial court has ample power to keep the trial under control. As the New York Court of Appeals noted in its opinion overruling earlier cases, "Instances there may be where proof of sales of comparable property may prompt a line of inquiry which will develop collateral issues likely to confuse the fact-finders and prolong the trial. We regard such disadvantages, however, as more than compensated by the benefit to be gained by the receipt of such evidence subject to the exercise, by the tribunal which fixes value, of its discretionary power to draw the line of exclusion wherever confusion is created by collateral issues." Village of Lawrence v. Greenwood, supra, 300 N.Y. 231, 90 N.E.2d 53, 56.

In the present case the owner testified, not to an actual sale of comparable real property, but to an unaccepted offer to buy the property in question. Most courts that admit evidence of sales of comparable property hold that evidence of an unaccepted offer is not of sufficient probative value to justify admission. See, Thornton v. City of Birmingham, 250 Ala. 651, 35 So.2d 545, 7 A.L.R.2d 781. Other courts, however, admit such evidence, if the offer is shown to be bona fide and a sufficient foundation is laid. City of Chicago v. Lehmann, 262 Ill. 468, 474, 104 N.E. 829; Tharp v. Massengill, 38 N.M. 58, 62, 28 P.2d 502; see, Union Nat. Bank of Pittsburgh v. Crump, 349 Pa. 339, 343, 37 A.2d 733. It is my opinion that when, as here,

the offer is bona fide and is for the identical property, and is by a purchaser able and willing to buy, evidence of the offer should be admitted. Accordingly, the trial judge ruled correctly that the witness could mention the offer for his property in giving the reasons for his valuation. See Long Beach City High School Dist. of Los Angeles County v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249.

CARTER and SCHAUER, JJ., concur.



41 Cal.2d 778

PEOPLE v. SILVA.

Cr. 5534.

Supreme Court of California.

In Bank.

Dec. 17, 1953.

Defendant was convicted of a violation of Pen.Code, § 4500, prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment imposing death sentence and an order denying motion for new trial and defendant appealed. The Supreme Court, Edmonds, J., held that prosecuting attorney was not guilty of prejudicial misconduct in offering certain evidence or in his remarks to jury.

Judgment and order affirmed.

I. Criminal Law — 404(1), 438

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison, knife wound scars on victim's back and photograph, showing knife protruding from victim's back constituted "real evidence" relevant and admissible to establish the corpus delicti. Pen.Code, § 4500.

See publication Words and Phrases, for other judicial constructions and definitions of "Real Evidence".

2. Criminal Law Ⓒ347, 438

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison, X-ray photographs of knife wound inflicted by defendant and testimony of surgeon attending to establish depth of knife's penetration were admissible for limited purpose of showing malice. Pen.Code, § 4500.

3. Convicts Ⓒ5

Malice aforethought is an essential element of offense defined in statute prescribing death penalty for assault with a deadly weapon committed while undergoing a life sentence in state prison. Pen.Code, § 4500.

4. Convicts Ⓒ5

Statute prescribing death penalty for assault with a deadly weapon committed with "malice aforethought" while undergoing life sentence in state prison uses quoted phrase to denote purpose and design of assaulting party in contradistinction to accident and mischance. Pen.Code, §§ 7, subd. 4, 4500.

See publication Words and Phrases, for other judicial constructions and definitions of "Malice Aforethought".

5. Criminal Law Ⓒ347

The extent and location of a knife wound are pertinent to a determination of the intent with which it was inflicted.

6. Criminal Law Ⓒ1171(3)

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison, prosecuting attorney was not guilty of prejudicial misconduct in the matter of repeated reference to knife wound inflicted by defendant. Pen.Code, § 4500.

7. Criminal Law Ⓒ390

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison, evidence that for two days preceding assault defendant had searched for garlic to rub on knife blade in belief that it would produce a more serious wound was relevant on issue of

purpose and intent of defendant at time of assault. Pen.Code, § 4500.

8. Criminal Law Ⓒ720(1)

Prosecuting attorney may fairly comment upon evidence properly admitted.

9. Criminal Law Ⓒ1037(1)

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergoing life sentence in state prison, reference by prosecuting attorney in opening statement and closing argument to evidence admitted without objection that defendant had tried to obtain garlic to rub on knife blade did not constitute prejudicial misconduct, where such remarks were confined to issue of malice aforethought and no objection was made to such remarks. Pen.Code, § 4500.

10. Criminal Law Ⓒ726, 730(16)

Statement made by prosecuting attorney in closing argument on issue of sanity, that there were quacks in every profession and that if defendant had enough money he could hire a quack did not constitute prejudicial misconduct, where such statement was made in response to argument by defense counsel that he had insufficient funds to hire highly paid expert witnesses, prosecuting attorney immediately denied any intention to impugn the character of defense counsel and jury was properly admonished to disregard any implication of misconduct.

11. Criminal Law Ⓒ730(8)

Statement made by prosecuting attorney in closing argument that in using psychiatric testimony defense attorney was trying to convince jury that because the unconscious mind controls everything one does, the guilty should escape punishment did not constitute prejudicial misconduct, where prosecuting attorney promptly disclaimed any intent to impugn the character of defense counsel and jury was properly admonished not to regard argument of counsel as evidence in the case.

12. Criminal Law Ⓒ722(3)

In prosecution for violation of statute prescribing death penalty for assault with a deadly weapon committed while undergo-

ing life sentence in state prison, statements made by prosecuting attorney at close of trial on issue of sanity and at close of trial on issue of guilt as to possibility that, if not convicted, defendant would kill again constituted legitimate comment upon the character of defendant and not prejudicial misconduct, where such remarks were based upon testimony of defendant, admitted without objection, that he would again commit the same crime under similar circumstances. Pen.Code, § 4500.

Jerome A. Duffy, San Rafael, and Morton R. Colvin, San Anselmo, for appellant.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

EDMONDS, Justice.

While confined in San Quentin Prison under a sentence of life imprisonment, James Francis Silva stabbed and seriously wounded Kenneth King, another inmate. A jury found Silva guilty of a violation of section 4500 of the Penal Code¹ and concluded that he was sane at the time the offense was committed. The statutory appeal, Pen.Code, § 1239(b), is from the judgment imposing the death penalty and from an order denying a motion for a new trial.

On the Monday morning preceding the stabbing, Silva and King were students in a prison bookkeeping class. Silva was having difficulty in the use of an adding machine and suddenly became angry when King intervened and attempted to demonstrate its operation. A quarrel began and was continued during a recess period a few minutes later. At that time a fist fight occurred, in which Silva's nose was broken. The fight stopped quickly, and Silva apologized for having lost his temper. King returned to the classroom and Silva went to the prison hospital for medical treatment.

After receiving medical attention, Silva obtained a pass which enabled him to go

into the prison yard, where he had secreted a knife. Concealing it on his person, he began looking for King but did not find him on that afternoon. At noontime on the following day he observed King, but a prison custodial officer was nearby. Later Silva searched for King in the prison yard and the cell blocks, but he was unsuccessful in locating him until they went to class the next afternoon.

In the classroom, Silva was given a seat about six or eight feet to the rear of the chair occupied by King. He waited until the class was in session, and then walked to the pencil sharpener. The room was quiet and all of the occupants were busily engaged in their work. Silva stepped behind King, withdrew the knife from his belt, and plunged it into King's back. An exclamation by King caused the others in the room to look up as Silva was attempting to withdraw the knife from King's back. Silva then walked swiftly from the room and thereafter surrendered to prison authorities.

Signed statements in accordance with these facts were given by Silva to prison officials and to the district attorney, and at the trial he took the stand and gave a detailed account of the stabbing. He stated that immediately after the fight on Monday morning, he decided to kill King. His decision did not stem from a fit of temper, he explained, but from a "cool, hateful anger" toward King and a desire for revenge. He would have attacked King sooner, he declared, had there been an opportunity to do so at a time when he might have avoided detection. According to his testimony, his apprehension resulted from King's exclamation and his inability to withdraw the knife from the wound, but realizing his failure he decided that the sole remaining course was to confess the crime and accept his punishment. A trial was unnecessary, he said, and the trial judge and his counsel should have permitted him to enter a plea of guilty.

1. "§ 4500. Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of

another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, is punishable with death."

No challenge is made as to the sufficiency of the evidence to support the judgment. Silva's only contention is that the prosecuting attorney in offering certain evidence and in his remarks to the jury was guilty of prejudicial misconduct.

[1] During the course of King's testimony concerning the stabbing, he removed his shirt and exhibited scars on his back which resulted from the knife wound and surgical treatment. Also introduced in evidence was a photograph taken immediately after the stabbing which showed the knife protruding from King's back. These items of real evidence were relevant to establish the corpus delicti.

[2] Other evidence included X-ray photographs of the wound and the testimony of the surgeon who treated King, which tended to establish the depth of the knife's penetration. Over objection of counsel for Silva, the evidence was received for the limited purpose of showing malice. It was not error to do so.

[3-5] An essential element of the offense stated in section 4500 of the Penal Code is that the assault be committed with malice aforethought. As used in section 4500, that term denotes "*purpose and design* in contradistinction to accident and mischance * * *. [I]t is used to denote the purpose and design of the assaulting party". *People v. McNabb*, 3 Cal.2d 441, 456, 45 P.2d 334, 341. The word "malice" imports "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law". Pen.Code, § 7, subd. 4. The extent and location of a knife wound are pertinent to a determination of the intent with which it was inflicted.

[6] The relevancy of none of these items of evidence is challenged by Silva. He asserts, however, that the "continuous and repeated reference to the wound was wholly uncalled for and unnecessary in view of the evidence the District Attorney had at his command". According to his contention, the "sole and only purpose of such conduct was to inflame the jury and appeal to their emotions".

A similar contention was made in *People v. Dunn*, 29 Cal.2d 654, 177 P.2d 553, in which the trial court received in evidence photographs of the body of the victim of a homicide. It was contended that the pictures could serve only to identify the body, a question which was not in dispute, and the only purpose of the prosecution in offering them was to prejudice the jury. This court said: "The prosecution was not required, merely because identification was unquestioned, to withhold cumulative and corroborative evidence otherwise admissible. Defendant was permitted to introduce everything which he felt might tend to favor his cause with the jury, and the prosecution could not rightly be excluded from showing the details of the crime merely because they might have a tendency to influence the jury against the defendant." 29 Cal.2d at pages 659-660, 177 P.2d at page 556.

Silva assigns as prejudicial misconduct a reference by the prosecuting attorney in his opening statement and in his closing argument to attempts by Silva to obtain garlic to rub on the knife blade. Silva stated that his purpose in seeking the substance was that "Garlic causes gangrene. If I had missed the heart, even a slight cut, he would have went". Counsel for Silva asserts that this reference was improper because "there is no proof that garlic rubbed on the blade of a knife will cause a more serious wound".

[7-9] The prosecuting attorney confined his remarks in this connection to the issue of malice aforethought. Evidence that for the two days preceding the assault upon King, Silva searched for a substance *he believed* would produce a more serious wound certainly was relevant to the issue of the purpose and intent of Silva at the time he assaulted King. Evidence properly admitted, fairly may be commented upon by the prosecuting attorney. *People v. Sturman*, 56 Cal.App.2d 173, 182, 132 P.2d 504. This evidence was presented by Silva's own testimony and by similar testimony of witnesses for the prosecution admitted without objection. Furthermore, no objection was made to the district attorney's comments.

[10] Silva also charges that remarks of the district attorney impugned the integrity of his counsel and constituted misconduct. He objects to statements made in the closing argument of that part of the trial in which the issue of sanity was determined to the effect that "there are quacks in every profession, and if [Silva] had enough money he could go out and hire a quack". This remark was in response to argument by Silva's counsel that he had insufficient funds to hire highly paid expert witnesses, which he might do if the defendant were "some rich playboy". When his argument was challenged, the district attorney immediately denied any intention to question the character of defense counsel, and the jurors were properly admonished to disregard any implications of misconduct. The trial judge observed that the comment probably was in response to Silva's argument that he had insufficient funds to engage other medical witnesses.

[11] Another statement of the district attorney, made in his closing argument on the trial of the not guilty plea, was that in using psychiatric testimony, Silva's attorney was "trying to * * * upset our criminal system and criminal law. He is trying to convince you that because of some hypothetical idea that the unconscious mind controls everything we do, that therefore the guilty man should escape punishment". In overruling an objection to this remark, the trial judge said: "I don't think he meant at all that you are prone to assist guilty people to escape punishment. He is merely arguing, he is trying to argue that this man is guilty and you are trying to argue he is not. The jury appreciates it is argument and not evidence in the case." Here also the prosecuting attorney promptly disclaimed any intent to impugn the character of opposing counsel, who, he said, merely was following "his sworn duty to use every argument, every form of legitimate persuasion, which is the only kind he has used, to try to acquit him".

[12] Finally, Silva assigns as misconduct statements as to the possibility that, if not convicted, he would kill again in the future. In the trial of the issue upon the

plea of not guilty, Silva testified, without objection, that he would again commit the same crime under similar circumstances. The court sustained an objection to a similar remark made by the district attorney in his argument at the close of the trial to determine whether Silva was sane, and the jury was admonished to disregard it. Based as they were upon evidence received without objection, the remarks were a legitimate comment upon the character of the defendant and did not constitute prejudicial misconduct. Cf. *People v. Young*, 17 Cal.2d 451, 453, 110 P.2d 392.

The record shows overwhelming proof of an assault by Silva coolly and deliberately perpetrated with the intent to take the life of King. No evidence was presented which would tend to discredit the several witnesses who testified concerning the circumstances under which the crime was committed, or the statements and testimony of Silva. The medical experts agreed that Silva was sane at the time King was stabbed.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE. JJ., concur.



41 Cal.2d 719

PEOPLE

v.

BUILDING MAINTENANCE CONTRACTORS' ASS'N, Inc., et al.

S. F. 18345.

Supreme Court of California.

In Bank.

Dec. 11, 1953.

The State brought action against association of building maintenance contractors and members thereof to enjoin them from violating the chapter of the Business and Professions Code relating to combinations in restraint of trade. The Superior Court, San Francisco County, Sylvain J. Lazarus, J., entered ordered granting association and

members thereof a new trial after judgment was rendered against them, and the State appealed. The Supreme Court, Traynor, J., held that agreement between members constituted a trust with meaning of the Building and Professions Code relating to combinations in restraint of trade.

Order reversed.

Prior opinion 253 P.2d 983.

1. Monopolies ⇨12(18)

Agreement between members of association of building maintenance contractors that if bids are called for by anyone having an existing, unexpired contract with any member of association, and investigation shows that such member has been furnishing satisfactory service for a reasonable price, members must submit bids in excess of current price, constitutes a "trust" within meaning of chapter of the Business and Professions Code relating to combinations in restraint of trade. Business and Professions Code, §§ 16700 to 16758.

See publication Words and Phrases, for other judicial constructions and definitions of "Trust".

2. Constitutional Law ⇨258

Monopolies ⇨10

Section of chapter of the Business and Professions Code relating to combinations in restraint of trade, providing that no agreement, combination or association is unlawful or within provisions of the chapter, the object and purpose of which are to conduct operations at a "reasonable profit" or to market at a "reasonable profit" those products which cannot otherwise be so marketed, is unconstitutional because of vagueness of the phrase "reasonable profit". Business and Professions Code, §§ 16700 to 16758, 16723.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Profit".

3. Statutes ⇨64(2)

Unconstitutional section of chapter of the Business and Professions Code relating to combinations in restraint of trade, providing that no agreement, combination, or association is unlawful or within the provisions of the chapter, the object and purpose of which are to conduct operations at

a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, is separable from the rest of the chapter. Business and Professions Code, §§ 16700 to 16758, 16723.

4. Constitutional Law ⇨42

In action by the the state against association of building maintenance contractors and members thereof to enjoin them from violating the chapter of the Business and Professions Code relating to combinations in restraint of trade, state had standing to attack validity of section of chapter providing that no agreement, combination, or association is unlawful or within the provisions of the chapter, the object and purpose on which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed. Business and Professions Code, §§ 16700 to 16758, 16723.

5. Monopolies ⇨10

Since a chapter of a Business and Professions Code relating to combinations in restraint of trade articulates in greater detail a public policy long recognized at common law, those provisions of the chapter that it is not unlawful to enter into agreements or form associations or combinations which are in furtherance of trade, and defining an invalid trust as one created to carry out restrictions in trade or commerce, must be considered in light of common law precedents. Business and Professions Code, §§ 16700 to 16758, 16720, 16725.

6. Monopolies ⇨12(18)

Agreement between members of association of building maintenance contractors that if bids are called for by anyone having an existing, unexpired contract with any member of association, and investigation shows that such member has been furnishing satisfactory service for a reasonable price, members must submit bids in excess of current price, is not rendered unlawful by section of the chapter of the Business and Professions Code relating to combinations in restraint of trade, providing that it is not unlawful to enter into agreements or form associations or combinations which are in furtherance of trade. Business and Professions Code, §§ 16700-16758, 16725.

7. Monopolies ⇨12(18)

Agreement between members of association of building maintenance contractors that if bids are called for by anyone having an existing, unexpired contract with any member of association, and investigation shows that such member has been furnishing satisfactory service for a reasonable price, members must submit bids in excess of current price, is not valid on ground that it operates only to prevent tortious interference with existing contract rights, since agreement does not so operate. Business and Professions Code, §§ 16700 to 16758.

8. Monopolies ⇨24(15)

In action by the state against association of building maintenance contractors and members thereof to enjoin them from violating the chapter of the Business and Professions Code relating to combinations in restraint of trade, judgment enjoining association and members from formulating, promoting, participating, or combining in any understanding, compact, scheme, plan, or agreement to raise, fix, adhere to or maintain prices for the furnishing of labor, material, and services in the building maintenance industry was not erroneous, on ground that it prohibited association and members thereof from contracting with their customers to provide services at such prices as the customers may agree to pay, since judgment could not be so interpreted. Business and Professions Code §§ 16700 to 16758.

9. New Trial ⇨68

Where facts supported judgment as entered, and there was no evidence that would support a contrary conclusion, order granting new trial was improper.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., B. Abbott Goldberg, Dep. Atty. Gen., Thomas C. Lynch, Dist. Atty., and Gregory Stout, Dep. Dist. Atty., San Francisco, for appellant.

Landels & Weigel, Francis McCarty and Stanley A. Weigel, San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiff appeals from an order granting a new trial after judgment was entered against defendants in an action brought to enjoin alleged violations of the Cartwright Act. Business & Professions Code, §§ 16700-16758.

The facts are stipulated. Defendants are the Building Maintenance Contractors' Association, an unincorporated association, and its members, who are all building maintenance contractors in San Francisco. The building maintenance industry is defined as "all persons, associations, firms, partnerships and/or corporations participating in the maintenance operation (as distinguished from ownership, leasing or managing), cleaning, painting, renovating and supplying of janitorial service for buildings, lofts and stores in San Francisco." Maintenance contractors are defined as "persons, firms, partnerships and/or corporations engaged, in the building maintenance industry in San Francisco, in the business of contracting, for a fixed term, with owners, lessees or managers of buildings, lofts or stores located in San Francisco to do, for designated buildings, lofts or stores so located, part or all of any one or more of the following: Window cleaning, janitor work, providing of elevator operators and starters, providing of building engineers for maintaining heating equipment and for minor repairs, providing of night watchmen and providing of powder room matrons." There are 44 maintenance contractors in San Francisco of whom 30 are not members of defendant association. Members of the association, however, employ approximately 90 per cent of the total number of employees employed by all maintenance contractors in San Francisco and service approximately 90 per cent of all San Francisco buildings, lofts, and stores serviced by maintenance contractors. Maintenance contractors employ approximately 25 per cent of the employees supplied by various unions for building maintenance, and the remainder of the organized employees are supplied directly to owners, lessees, and managers. The terms and conditions of employment of the organized workers are the same whether they are em-

ployed by maintenance contractors or directly by owners, lessees, or managers. All of defendant maintenance contractors service less than one-half of one per cent of the buildings, lofts, and stores in San Francisco.

Defendants have agreed that if bids are called for by any person having an existing, unexpired contract with any member of their association, the members whose bids are solicited will report that fact to the association. The association then makes an investigation to determine whether the price under the existing contract is reasonable, whether the service is satisfactory, and whether the person soliciting bids has any specific reason, no matter how trivial or personal, for dispensing with the services of the current contractor. If the price is found to be reasonable, the service satisfactory, and there is no specific reason for changing maintenance contractors, the members are required to submit bids in excess of the current price. The amount of the excess is determined by a scale ranging from 20 per cent down to 5 per cent of the current price depending on the current job price per month. If, on the other hand, the current price is found to be unreasonable, or the service unsatisfactory, or there is a specific reason for changing contractors, members may submit any bids they see fit. Defendants entered this agreement "with

the intent and for the object and purpose of conducting operations at a reasonable profit, of marketing at a reasonable profit products and services which could not otherwise be so marketed and of acting in furtherance of trade, and with no other intent whatever nor for any other object or purpose whatever. There is no evidence, except as stated in this stipulation, if any is stated herein, that the effect of the admitted agreement has exceeded, exceeds or will exceed the stated intentions, objects or purposes."

[1] It is clear that defendants' agreement constitutes a trust as defined in section 16720 of the Business and Professions Code.¹ Not only have defendants agreed to fix the prices at which maintenance service will be provided, § 16720(d), (e), but they have also undertaken to prevent competition among themselves by forcing their customers to pay higher prices if they seek to change maintenance contractors. § 16720(c). Defendants contend, however, that their agreement is exempted from the prohibitions of the Cartwright Act by virtue of sections 16723 and 16725 of the Business and Professions Code.

[2,3] Section 16723 provides that "No agreement, combination or association is unlawful or within the provisions of this chapter, the object and purpose of which

1. "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

"(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

"(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

"(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

"(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed."

In *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 684, 71 L.Ed. 1146, it was held that the same exemption contained in the Colorado Anti-Trust Act left the whole statute "without a fixed standard of guilt" and thus rendered it unconstitutional. In *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867, we held that because the exemption was added to the statute by amendment it was separable from the rest of the act. Defendants contend, however, that later decisions of the United States Supreme Court indicate that it would no longer follow the *Cline* case, and that in any event the state has no standing to challenge the validity of the amendment upon which defendants rely.

Examination of recent cases upholding statutes attacked on the ground of vagueness does not persuade us that the *Cline* case was wrongly decided or that the Supreme Court would not follow it today. In *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 104, 76 L.Ed. 136, the words "unreasonable waste of natural gas" were found to have an ascertainable meaning in the industry involved. See also, *Kay v. United States*, 303 U.S. 1, 9, 58 S.Ct. 468, 82 L.Ed. 607. In *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, the vague terms of the statute had been given a sufficiently definite and restrictive interpretation by the state court. Cf. *Winters v. People of State of New York*, 333 U.S. 507, 518-519, 68 S.Ct. 665, 92 L.Ed. 840; *Lanzetta v. State of New Jersey*, 306 U.S. 451, 457, 59 S.Ct. 618, 83 L.Ed. 888. In other cases, although the prohibited acts were defined in vague terms, the statutes were upheld because they required the presence of an adequately defined specific intent. *Williams v. United States*, 341 U.S. 97, 101-102, 71 S.Ct. 576, 95 L.Ed. 774; *Dennis v. United States*, 341 U.S. 494, 515-516, 71 S.Ct. 857, 95 L.Ed. 1137; *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 91 L.Ed. 1877; *Gorin v. United*

States, 312 U.S. 19, 27-28, 61 S.Ct. 429, 85 L.Ed. 488; *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 89 L.Ed. 1495; *F. & A. Ice Cream Co. v. Arden Farms Co., D.C.*, 98 F.Supp. 180, 187, and cases cited. Thus a person who undertakes to evade income taxes by padding his expenses has fair warning that he may violate the law even though he may not be sure where a jury may draw the line between reasonable and unreasonable expenses. *United States v. Ragen*, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383. As Mr. Justice Holmes said in sustaining the validity of a statute dealing with contributions for "political purposes," "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk." *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508.

In the present case, however, the vagueness of the words "reasonable profit" infects the whole statutory standard of conduct. An agreement is legal or illegal depending on whether its purpose is to secure reasonable or unreasonable profits. Defendants can know when they have approached the line separating legal from illegal conduct only if they can in some way determine what reasonable profits are. There is no common law background to guide them (cf. *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232), and there is no fund of common knowledge or experience that would allow either them or the court to determine what those words mean. Reasonable profits might be defined as those that would permit the payment of reasonable wages and provide a reasonable return on the capital invested. Such a definition, however, would raise serious difficulties in determining what are reasonable wages and a reasonable return on capital. See, *Connolly v. General Const. Co.*, 269 U.S. 385, 393-394, 46 S.Ct. 126, 70 L.Ed. 322; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516. Moreover, an industry may

be inefficient or producing a product about to be driven from the market by a superior substitute. In such cases to obtain profits sufficient to permit payment of reasonable wages and provide a reasonable return on capital would require suppression of efficient competitors or elimination of the competitive substitute. We do not believe that the Legislature intended that reasonable profits should carry a meaning that would permit such a result. On the other hand, we cannot conclude that reasonable profits should be defined as the actual profits realized in a free market. The amendment presupposes that the free market is to be interfered with by an agreement to secure reasonable profits. It would be superfluous if it permitted only those agreements that have no effect on a free market. It may be assumed that in amending the Cartwright Act the Legislature contemplated that economic considerations may justify restraints of trade in certain circumstances. See, *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 284-285, 208 P. 93; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 362-363, 128 P. 1041. It fell short, however, of expressing its purpose in terms sufficiently clear to be given effect.

[4] Defendants' contention that the state has no standing to attack the validity of the amendment cannot be sustained. It has generally been held that an invalid amendment to a valid statute is ineffective for any purpose. *Frost v. Corporation Commission*, 278 U.S. 515, 526, 49 S.Ct. 235, 73 L.Ed. 483; *Waters-Pierce Oil Co. v. State of Texas*, 177 U.S. 28, 47, 20 S.Ct. 518, 44 L.Ed. 657; *Miller v. Union Bank & Trust Co.*, 7 Cal.2d 31, 36, 59 P.2d 1024; *Commonwealth v. Malco-Memphis Theatres, Inc.*, 293 Ky. 531, 169 S.W.2d 596, 598; see also, *Bacon Service Corporation v. Huss*, 199 Cal. 21, 35, 248 P. 235; Annotation, 66 A.L.R. 1483. If the state could not attack the amendment on the ground that it is unconstitutionally vague, it would remain a part of the statutory standard of conduct, and the resulting uncertainty would necessitate invalidating the entire statute. *Cline v. Frink Dairy Co.*, supra, 274 U.S. 445, 457, 47 S.Ct. 631, 71 L.Ed. 1146. Accordingly, it follows

from the holding that the amendment is separable from the rest of the act, *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 47-48, 172 P.2d 867, that it must be treated as invalid for all purposes. The problem is well illustrated by cases involving amendments that have been held invalid because they would deny equal protection by exempting certain classes from the operation of pre-existing statutes. These cases hold that since the amendments purporting to create the invalid exemptions are void, members of the nonexempted classes are not denied equal protection. *Waters-Pierce Oil Co. v. State of Texas*, supra, 177 U.S. 28, 47, 20 S.Ct. 518, 44 L.Ed. 657; *Ex parte Davis, C.C.*, 21 F. 396, 397-398; *Buffalo Gravel Corp. v. Moore*, 201 App.Div. 242, 194 N.Y.S. 225, 232, affirmed 234 N.Y. 542, 138 N.E. 439; *Gay v. Brent*, 166 Ky. 833, 179 S.W. 1051, 1058; *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N.E. 349, 356; *Bacon Service Corporation v. Huss*, supra, 199 Cal. 21, 35, 248 P. 235. If, however, the state could not rely on the invalidity of the amendments in subsequent litigation against members of the exempted classes, those classes would escape the operation of the statutes and equal protection would be denied to those not exempted.

[5,6] Defendants contend that their agreement is lawful under the provision of section 16725 of the Business and Professions Code providing that "It is not unlawful to enter into agreements or form associations or combinations * * * which are in furtherance of trade." This provision is the converse of subdivision a of section 16720, which defines an invalid trust as one created "to * * * carry out restrictions in trade or commerce." Since the Cartwright Act articulates in greater detail a public policy that has long been recognized at common law, *Speegle v. Board of Fire Underwriters*, supra, 29 Cal. 2d 34, 44, 172 P.2d 867, these provisions must be considered in the light of common-law precedents. Moreover, it may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the

federal Sherman Antitrust Act. See *Standard Oil Co. of New Jersey v. U. S.*, 221 U.S. 1, 60, 31 S.Ct. 502, 55 L.Ed. 619. Under the Sherman Act, however, agreements fixing prices are "illegal *per se*." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386, 71 S.Ct. 745, 95 L.Ed. 1035, and cases cited. Similarly it has generally been held that such agreements are invalid in this state both at common law and under the provisions of the Cartwright Act. *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 44, 172 P.2d 867; *Endicott v. Rosenthal*, 216 Cal. 721, 726, 16 P.2d 673; *People v. H. Jevne Co.*, 179 Cal. 621, 625, 178 P. 517. An exception was recognized permitting a manufacturer to enter valid contracts with retailers fixing the price at which his product might be sold, *D. Ghirardelli Co. v. Hunsicker*, supra, 164 Cal. 355, 362, 128 P. 1041; *Grogan v. Chaffee*, 156 Cal. 611, 614, 105 P. 745, 27 L.R.A.,N.S., 395; see, *Bus. & Prof. Code*, §§ 16900-16905, and in *Herriman v. Menzies*, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L.R.A. 318, it was held that an agreement between stevedoring firms with respect to prices was not invalid when it appeared that the firms in question constituted only an insignificant part of those engaged in the business and had no power to control prices generally.

Defendants contend that the *Herriman* case is controlling here because they service less than one-half of one per cent of the buildings serviced in San Francisco. The *Herriman* case was decided before the Cartwright Act was adopted in 1907, and in view of the specific provisions of the act with respect to price fixing that case is no longer controlling. *People v. H. Jevne Co.*, supra, 179 Cal. 621, 625, 178 P. 517; see, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 71 L.Ed. 700. In any event, defendants do not constitute an insignificant part of the building maintenance industry in San Francisco. That industry consists of those persons and firms who contract to supply building maintenance service to owners, lessees, and managers, and defendants' operations constitute approximately 90 per cent of those of the industry as a whole. It is immate-

rial that the great majority of owners, lessees, and managers maintain their buildings without the assistance of maintenance contractors. In addition to material and labor. Such contractors supply valuable managerial services, and defendants' agreement materially reduces competition in the supplying of such services and affects the prices at which they are available.

[7] Defendants contend that their agreement is valid because it operates only to prevent tortious interference with existing contract rights. They point out that a member of the association is required to submit a higher bid only if the person soliciting the bid has an existing unexpired contract with another member, and contend that the purpose of requiring the higher bid is to avoid inducing a breach of the existing contract. It is unnecessary to decide whether such a purpose or effect would validate an agreement otherwise prohibited by the Cartwright Act. Defendants' agreement goes much further. Ordinarily a person soliciting bids for maintenance service would do so in advance of the expiration date of his current contract, not for the purpose of breaching his contract, but to avoid interruption of service in the event that he should not wish to renew it. Thus in the usual situation defendants' agreement does not operate to prevent interference with existing contract rights, but rather to fix prices and restrict competition in the future.

[8] Defendants finally contend that the judgment is erroneous because it enjoins them from "Formulating, promoting, participating or combining in any understanding, compact, scheme, plan or agreement to raise, fix, adhere to or maintain prices for the furnishing of labor, material and services in the building maintenance industry," without distinguishing between agreements among themselves in restraint of trade and legal contracts with their customers establishing prices for particular jobs. In the commonly accepted sense of the term, however, a price fixing agreement is not one whereby one party merely agrees to supply goods or services to another at a given price, but one whereby the parties seek to determine the price at which goods

or services shall be offered to third parties. See, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386, 71 S. Ct. 745, 95 L.Ed. 1035; *Endicott v. Rosenthal*, 216 Cal. 721, 725-727, 16 P.2d 673; *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 464, 55 P.2d 177; *Bus. & Prof. Code* §§ 16720(d), (e), (1-3); 16902. Thus the injunction cannot reasonably be interpreted as prohibiting defendants from contracting with their customers to provide services at such prices as the customers may agree to pay. It only enjoins defendants from agreeing among themselves to engage in the prohibited activities.

[9] Since the stipulated facts support the judgment as entered and there is no evidence that would support a contrary conclusion, the order granting a new trial is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



41 Cal.2d 770

THORP v. RANDAZZO.

Sac. 6286.

Supreme Court of California.

In Bank.

Dec. 16, 1953.

Action by divorced wife for a declaration of her rights under deceased former husband's life policy included in a property settlement agreement. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment adverse to plaintiff, and she appealed. The Supreme Court, Spence, J., held that property settlement agreement constituted a present waiver by wife of any right in life policy specifically mentioned in agreement and that she was not entitled to proceeds of policy upon death of former husband, though she was still designated as beneficiary therein.

Judgment affirmed.

Prior opinion, 252 P.2d 737.

1. Insurance ◊585(1)

The position of a beneficiary named in life policy subject to change by insured is similar to that of a beneficiary named in will, being a mere expectancy dependent on designation at time of insured's death.

2. Husband and Wife ◊279(1)

Where property settlement agreement covers all property of spouses and wife, in accepting provisions for her benefit, fully releases husband with respect to all other property, such release ordinarily includes her interest as designated beneficiary of husband's life policy, but where language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of settlement, wife may still take as beneficiary if policy so provides at death of insured.

3. Husband and Wife ◊279(1)

Courts weigh carefully the language employed by spouses in property settlement agreement in measure of the renunciation of their respective rights.

4. Husband and Wife ◊279(1)

General expressions or clauses in spouses' property settlement agreement may not be construed as including assignment or renunciation of expectancies, and beneficiary named in spouse's life policy or will retains his status as such, unless it clearly appears from agreement that in addition to segregation of property of spouses, it was intended to deprive either spouse of right to take property under a will or an insurance contract of the other.

5. Insurance ◊585(3)

Failure of husband after divorce to exercise power to change beneficiary of life policy naming former wife as beneficiary ordinarily indicates that he does not wish to effect such change, but each case must be decided upon its own facts.

6. Husband and Wife ◊279(1)

Expectancies under will or life policy of husband may be regarded as waived by property settlement agreement only when it appears that attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in agreement.

7. Husband and Wife ⇨279(1)

Property settlement agreement, by which each spouse waived all right to take any property from the other after death and wife waived all claim to any present or future benefits under specifically identified policy on husband's life and agreed to execute all instruments necessary to effect such release of interest in policy, constituted a present waiver by wife of any right in policy and she was not entitled to proceeds of policy upon death of former husband, though still designated as beneficiary therein, particularly where she had also executed application for change of beneficiary and policy had subsequently lapsed for non-payment of premiums and been kept in force by application of cash surrender values to payment of premiums.

McAllister & Johnson, Chris D. Johnson, Walter C. Frame, and Neil R. McAllister, Jr., Sacramento, for appellant.

Thomas J. Randazzo, in pro. per., and Donald B. Richardson, San Jose, for respondent.

SPENCE, Justice.

Plaintiff appeals from a judgment in an action wherein she sought a declaration of her rights under an insurance policy included in a property settlement agreement executed between herself and her then husband, Nathan B. Thorp, deceased. The insurance company paid into court the money due and was dismissed from the action. Plaintiff contends that the property settlement agreement did not abrogate her right to take the proceeds of the policy as the named beneficiary thereon at the time of her former husband's death. Defendant, on the other hand, maintains that the deceased's estate is entitled to the proceeds on the ground that the agreement between the spouses terminated all rights of plaintiff with respect to the policy, including her right as the beneficiary to receive the insurance money. Defendant's position is well taken.

The deceased died on July 23, 1950. He and plaintiff were divorced in November, 1944. Prior to entry of the interlocutory

decree of divorce and on September 29, 1943, they entered into a property settlement agreement which provided that plaintiff "does hereby waive all claims to any benefits that she may have at present, or which may hereafter be derived from the following described life insurance policies upon the life of the first party (deceased), including the community interest of second party (plaintiff) therein, or in the premiums paid for said policies, and agrees to execute any and all documents that may be required by said insurance companies to complete the release of the interest of said second party in said insurance policies." There then follows two named and numbered insurance policies. Deceased removed plaintiff's name as beneficiary on one of the policies, making it payable to the estate, but he made no change as to the other, which is the one here involved. With respect to this latter policy, plaintiff at the time she executed the property settlement agreement, likewise executed and delivered to deceased or his attorney a printed form entitled "Application for Change of Beneficiary." This application was never signed subsequently by deceased and therefore was never transmitted to the insurance company.

There was evidence to show that the parties remained on friendly terms after their divorce; that deceased had said that he would take care of his former wife, and that he had left an insurance policy for her; and that he had remarried in 1947. On the other hand, there was evidence, admitted over objection, that deceased had discussed with his attorney his intention to change the policy so as to make it payable to his estate; that prior to his death he had considered the policy lapsed and so had taken no further action in regard to it. An officer of the insurance company testified that the policy was cancelled for non-payment of premiums on lapse of the grace period of thirty days from and after February 3, 1948; that no premium payments were thereafter made on the policy, deceased having tendered one for \$75.92 which was refused by the company by letter dated May 26, 1948, with return of his check for the stated amount. This wit-

ness further testified that the company utilized the cash surrender values on the policy to pay the total premiums in arrears and recognized the validity of the policy according to its tenor, except as to the designation of the beneficiary. At its date of lapse the policy had a cash surrender value more than sufficient to pay the premiums due beyond the date of deceased's death.

As here material, the trial court found that plaintiff had received and accepted all benefits to which she was entitled under the agreement; that deceased had performed all acts required of him thereunder; that plaintiff was estopped from asserting any claim to the proceeds of the policy for the reason that the agreement was a complete settlement of all property rights between the parties, and that by the terms thereof plaintiff waived all interest in the policy, its premiums or its proceeds; that by execution of the agreement the parties intended that each relinquished and waived all right to succeed or take any property from the other after death; that such waiver was effective from the date of execution of the agreement, and that defendant Randazzo, as executor of deceased's last will, was the owner and entitled to possession of the proceeds of the policy.

[1-5] Plaintiff makes no claim to the insurance proceeds by reason of her former marital relationship with the deceased or contrary to her waiver of all community interest in the policy, but rather she relies on her distinct status as the named beneficiary on the policy at the time of deceased's death. *Shaw v. Board of Administration*, 109 Cal.App.2d 770, 774, 241 P.2d 635. The position of a beneficiary named in an insurance policy subject to change by the insured is similar to that of a beneficiary of a will, a mere expectancy dependent on designation at the time of the insured's death. *Grimm v. Grimm*, 26 Cal.2d 173, 176, 157 P.2d 841. Where a property settlement agreement covers *all* of the property of the parties and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such release ordinarily would cover and include her interest as the designated beneficiary on an insurance policy;

but where the language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of the settlement, the wife may still take as beneficiary if the policy so provides. *Miller v. Miller*, 94 Cal.App.2d 785, 789, 211 P.2d 357. In interpreting property settlement agreements, courts weigh carefully the language employed by the parties in measure of the renunciation of their respective rights. To this end, it is the settled rule that "general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other." *Grimm v. Grimm*, *supra*, 26 Cal.2d at page 176, 157 P.2d at page 843. The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change. *Shaw v. Board of Administration*, *supra*, 109 Cal.App.2d at page 776, 241 P.2d at page 638; also *In re Estate of Crane*, 6 Cal.2d 218, 221, 57 P.2d 476, 104 A.L.R. 1101, but each case must be decided upon its own facts. *Miller v. Miller*, *supra*, 94 Cal.App.2d at page 790, 211 P.2d at page 360.

The property settlement agreement here is quite comprehensive and establishes that a complete and final settlement was intended. No question is raised as to the fairness of its provisions or the consideration therefor. The agreement, in addition to specific mention of the insurance policy in question, with express recital of plaintiff's waiver of "all claims to any benefits that she may have at present, or which may hereafter be derived" therefrom and her agreement to execute the papers necessary to effect such release of interest in the policy, further provides: "The said parties hereto each hereby waive any right and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by

laws of succession, and said parties hereby release one to the other all right to be the administrator or administratrix or executor or executrix of the estate or will of the other, * * * and from the date of this agreement hereafter said waiver of the other in the estate of the other shall be effective and they shall have the right of single persons and maintain the same relation of such toward each other * * * this agreement is a full and final settlement between said parties and each party hereto has had independent legal advice" thereon.

This language is almost identical with that used in *Sullivan v. Union Oil Co. of Cal.*, 16 Cal.2d 229, 105 P.2d 922, wherein it was held that the property settlement agreement not only terminated the wife's community interest in a certain benefit fund maintained by the husband's employer, but also any rights which she may have had as a named beneficiary in connection with such fund. Practically the same language was construed in *Meherin v. Meherin*, 99 Cal.App.2d 596, 222 P.2d 305, to effect a like release of the proceeds of an insurance policy, which the wife claimed by reason of her continuing designation as beneficiary at the time of her husband's death. As in those cases, plaintiff here of her own free will, with full knowledge of the existence of the policy and of all pertinent facts, acting under independent legal advice, and for full and valuable consideration, expressly agreed with deceased "to forever settle and divide between them *all* their respective properties including that of the community, to waive any right of succession or inheritance with respect to his remaining property and to release him from any and all obligations to her which therefore may have had existence for any reason whatsoever." *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal.2d at page 237, 105 P.2d at page 927.

Plaintiff relies on *Grimm v. Grimm*, supra, 26 Cal.2d 173, 157 P.2d 841. There the property settlement agreement between the spouses gave the husband the right to change the beneficiary on his insurance policy and the wife agreed to execute any document or instrument necessary therefor. He

died without undertaking to make such a change. It was held that there was no immediate release of the wife's interest as such beneficiary, that the agreement left it to the husband to decide in the future whether or not he desired to change the beneficiary, and that not having done so the wife was entitled to receive his bounty to that extent. Moreover, since the wife in the *Grimm* agreement waived all rights of inheritance in her husband's estate "except * * * as may be provided in any will and/or codicil * * * in effect at the date of his death", it was concluded that it was "the intention of the spouses to exclude from the agreement rights that might accrue to [the wife] at the death of the husband as a result of his bounty". 26 Cal.2d at page 179, 157 P.2d at page 844. The court then observed the distinction in the parties' agreement in *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal.2d 229, 105 P.2d 922, where the language indicated a "present" not a possible future "renunciation by the husband of the wife as beneficiary". *Grimm v. Grimm*, supra, 26 Cal.2d at page 180, 157 P.2d at page 845; in accord *Meherin v. Meherin*, supra, 99 Cal.App.2d 596, 598, 222 P.2d 305.

[6] Expectancies under a will or an insurance policy may be regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in their property settlement agreement. In *re Estate of Crane*, supra, 6 Cal.2d 218, 221, 57 P.2d 476, 104 A.L.R. 1101; *Grimm v. Grimm*, supra, 26 Cal.2d 173, 177, 157 P.2d 841. But in the present case specific reference was made in the agreement to the insurance policy, and plaintiff expressly waived all claim to "any benefits that she may have at present, or which may hereafter be derived from" such policy. This language clearly indicates that the parties' attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future. Thus, "the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at

the time of the husband's death." *Grimm v. Grimm*, supra, 26 Cal.2d at page 175, 157 P.2d at page 842. In short, as in *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal.2d 229, 237, 105 P.2d 922, plaintiff agreed to a present divestment of all claims that she might otherwise have in the insurance policy.

It must further be remembered that the policy here lapsed in March 1948, and that the deceased's tender of a premium payment some two months later was rejected by the company, with return of his check therefor. Accordingly, the effectiveness of the policy at the date of deceased's death was not due to reinstatement by payment of additional premiums but because of the company's satisfaction of the arrearage through utilization of the cash surrender values, which values plaintiff had expressly granted to deceased under the terms of their agreement. Moreover, plaintiff's execution of the "Application for Change of Beneficiary" contemporaneously with her execution of the agreement amounted to an effective, positive act in recognition of her immediate transfer of all interests which she might have in the policy. In these circumstances evidencing plaintiff's waiver of her claim to take as a beneficiary of the particular policy in question, it might be reasonably concluded that deceased decided to proceed no further with the matter, and that when notified by the insurance company that his tendered premium payment would not be accepted in reinstatement of the policy, he assumed that the policy was terminated and that it would be an idle act to request the company then to make a change of beneficiary. While ordinarily an insured's failure to change a beneficiary may be said to amount to a confirmation of the designation of the beneficiary as theretofore named, *Shaw v. Board of Administration*, supra, 109 Cal.App.2d 770, 776, 241 P.2d 635; in accord *In re Estate of Crane*, supra, 6 Cal. 2d 218, 221, 57 P.2d 476, 104 A.L.R. 1101, the particular facts here do not come within that principle. Furthermore, in the *Shaw* case the question determined was the effect of a divorce decree, not a property settlement agreement, upon the wife's asserted right to take a death benefit in view

of the deceased's failure to revoke her designation as the beneficiary thereof. See *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal. 229, 237, 105 P.2d 922.

[7] In the light of all the provisions of the agreement in the present case and of plaintiff's contemporaneous execution of the "Application for Change of Beneficiary," the conclusion is inescapable that the agreement was intended to constitute an immediate waiver by plaintiff of any right which she may have had in the insurance policies, including the right as a beneficiary, which right she now asserts. Under these circumstances she cannot prevail in her claim to the insurance proceeds in question. *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal.2d 229, 105 P.2d 922; *Meherin v. Meherin*, supra, 99 Cal.App.2d 596, 222 P.2d 305.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, J., concurs in the judgment.



KESLER et al. v. PABST.

Civ. 15560.

District Court of Appeal, First District,
Division 1, California.

Dec. 3, 1953.

Hearing Granted Jan. 27, 1954.

Action by husband and wife for injuries and damage to automobile sustained in intersectional collision. Subsequent to accident husband relinquished to his wife as separate property all claim to damages recoverable by her. The District Court of Appeal, 262 P.2d 651, held that where husband relinquished his right to his claim for wife's damages, alleged contributory negligence of husband was not imputable to wife. On defendant's petition for rehearing, the District Court of Appeal, held that husband's negligence was imputable as to

wife's cause of action for consequential damages.

Petition for rehearing denied.

1. Husband and Wife ⇨221

Wife has right to recover in personal injury action for consequential damages without joining husband as a party.

2. Negligence ⇨93(2)

Where husband and wife sustained injuries in automobile collision, and after accident, husband relinquished to his wife as separate property all claims to damages recoverable by her, husband's negligence was imputable as to wife's cause of action for consequential damages.

William A. Sullivan, San Mateo, for appellants.

Partridge, O'Connell & Whitney, San Francisco, for respondents.

PER CURIAM.

[1,2] In his petition for a rehearing defendant calls our attention to the fact that plaintiff Bertha Kesler's complaint as amended asked for special damages for her medical, surgical and hospital expenses (a wife may sue for her consequential damages, *Sanderson v. Niemann*, 17 Cal.2d 563, 110 P.2d 1025; *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 184 P.2d 708) and that to withhold imputation to plaintiff Bertha of plaintiff Walter's negligence as regards a recovery by her for these special damages would be relieving him of his liability as her husband therefor, and would, in effect, be permitting him to profit by his own wrong. Nothing in our opinion is intended to effect such result. As to the wife's cause of action for consequential damages, the husband's negligence is imputable.

The last paragraph of the opinion is stricken and in lieu thereof there is inserted the following: "That portion of the judgment in favor of defendant as against plaintiff Bertha for her general damages is reversed; the balance of the judgment is affirmed. Each party shall bear his own costs of appeal."

The petition for rehearing is denied.

PEOPLE v. REYNOSO et al.

Cr. 2411.

District Court of Appeal, Third District,
California.

Dec. 16, 1953.

Defendants were convicted of second degree robbery. The Superior Court, San Joaquin County, Woodward, J., entered judgment and order, and defendants appealed. The District Court of Appeal, Schottky, J., held that evidence sustained convictions.

Judgment and order affirmed.

1. Robbery ⇨24(1)

Evidence sustained convictions for second degree robbery.

2. Criminal Law ⇨1159(2)

After conviction, all intendments are in favor of the judgment, and a verdict will not be set aside unless record clearly shows that on no hypothesis whatsoever is there sufficient substantial evidence to support it.

John L. Briscoe, Public Defender, and Richard J. Gibson, Asst. Public Defender, Stockton, for appellants.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellants Reynoso and Martinez and Luis Romero and Antonio Segura were charged with the crime of robbery. Romero pleaded guilty but Segura and appellants entered pleas of not guilty, and, following a trial before a jury, all three were found guilty of robbery in the second degree. Reynoso and Martinez made a motion for a new trial which was denied, and they have appealed from the judgment entered upon the verdict.

It appears from the record that at about 2:00 o'clock in the morning of May 28, 1952, Fausto Voloria was walking down a street in Stockton when he was hit over the head by two assailants and robbed of clothing and a wallet containing \$40 and pic-

tures. The victim had spent the evening with his former wife and their friend, Mrs. Cordova, and when they left his apartment to walk home he decided to follow them for their protection. When the two women had gone about a block and a half, they noticed an old Ford or Chevrolet car with three men in the front seat circling the block three times, and at about the same time two men walked past them. They became frightened and hurried to Mrs. Cordova's house. Shortly thereafter Mr. Valoria, who had been about a block and a half behind them, arrived and told them he had just been beaten and robbed. His head was bloody and his shoes, jacket, money and wallet were gone. The police were called and went to the Cordova home and arranged for Valoria to be taken to the emergency hospital.

On the sidewalk in front of the Cordova home they observed a large clot of blood extending several inches. There was a gravel driveway covered with a flower-type pollen which had deep indentations about ten to fourteen inches long and about two or three inches deep. There was also blood mixed in with the gravel on the driveway and a large deposit of blood on the sidewalk as well as blood that had been tracked on the sidewalk in a southerly direction. Samples of pollen or the small leaf particles were taken from the tree in the Cordova driveway as well as a sample from the live branch of the tree.

The defendants were apprehended about 3:10 a. m. near the vicinity of the robbery in Stockton: Romero, Segura, Martinez, and Reynoso were in an old Ford car which Romero was driving. Reynoso was sitting next to Romero in the front seat and Segura and Martinez were in the back seat. When a search was made of the car, the officers removed a wallet and clothing which were later identified as Valoria's. These articles were on the floor of the car between the front and back seats, but no money was found in the car. The defendants were taken to the hospital and while in the patrol car the defendant Reynoso was observed licking his right hand where it appeared that he had blood between the knuckles.

When the defendants arrived at the hospital they were required to strip and their clothes were taken from them. Each defendant's clothes were placed in a separate bag and labeled. A sample of pollen or leaf was taken from the floor mat on the right side of the front floor of the car in which the defendants were apprehended.

The testimony of the expert witnesses Roger Greene, criminologist of the Bureau of Criminal Identification of the State of California, and Dr. Kenneth Stocking, an expert on plant identification and associate professor of botany at the College of the Pacific, was to the effect that one of the shoes worn by Martinez contained a small piece of a flower plant in the instep and had small streaks of blood on it; that the flower parts on this shoe were the same as the flower and leaf samples taken from the Cordova driveway, and that the shoe of Reynoso contained the same type of gravel as was found in the driveway of Mrs. Cordova's house.

Dr. Stocking further testified that the tree found in Mrs. Cordova's driveway was a rare type of tree known as the *prunus ilicifolia* or "holly leaf cherry"; that he made an examination of the vicinity of Stockton and found only about four trees of that type in the Stockton area, three of which were on the Stockton College campus. None of the nurseries in the area listed the plant or had it in their nurseries. Dr. Stocking, who also taught courses in science and rock identification, found that the gravel contained on the shoes of two of the defendants was of the same size and crystalline structure as that found in Mrs. Cordova's driveway. The other places where similar plants were found did not contain gravel of the same type as found in Mrs. Cordova's driveway.

The appellants argue that the circumstantial evidence, consisting primarily of their being in the car in which the victim's wallet and clothing were found shortly after commission of the crime, is wholly insufficient to sustain the verdict. They particularly emphasize that Mr. Valoria claimed he was accosted by only two men and that the particle of leaf found on appellant Martinez' shoe could have been picked

up from the floor of the car where it had previously fallen from Romero's or "Frank's" shoe before Segura and appellants entered the vehicle. However, as pointed out by respondent, if Romero and "Frank" had ridden alone in the car after the commission of the robbery, it is more likely that "Frank" and Romero would have shared the front seat rather than for one to have occupied the back seat alone. The appellant Martinez, upon whose shoe was found the incriminating piece of leaf, was seated in the back seat of the car when he and his three companions were arrested. The jury could, therefore, properly conclude that Martinez could not have picked up the leaf from the floor of the back seat of the car but that it became attached to his shoe when he participated in the robbery in the Cordova driveway.

Furthermore, the jury was not required to believe Romero's testimony that there was such a person as "Frank" who assisted him in the robbery. And the jury also could have concluded from the evidence that five men participated in the robbery, namely, the two appellants, Romero and Segura and "Frank," which would explain the three men seen driving around the block at about the same time that the two men passed Mrs. Valoria and Mrs. Cordova.

The jury might also have reached the conclusion that the three men whom the two women observed riding in the car picked up the two men who walked past them after the two men had beaten and robbed Valoria, and that "Frank" could then have separated from them with the missing pictures and money before the other four were apprehended.

The apprehension of appellants and Romero and Segura not far from the scene of the robbery, in an automobile similar in appearance to the one which the two women saw circling the block; the finding of Valoria's wallet and clothing in the car; the blood between the knuckles of appellant Reynoso; the fact that one of the shoes worn by appellant Martinez had small streaks of blood on it and that there was a small piece of a flower plant in the instep which was the same as the flower and leaf samples taken from the Cordova driveway;

the fact that the shoes of appellant Reynoso contained the same type of gravel as was found in the Cordova driveway; the fact that Romero who was driving the car when they were apprehended, was the roommate of appellant Reynoso; together with all of the other facts and circumstances shown by the record were sufficient to support the verdict of the jury, even though the evidence was circumstantial and Valoria did not see the men who attacked him.

There is considerable similarity between the facts of the instant case and the case of *People v. Taylor*, 4 Cal.2d 495, at page 497, 50 P.2d 796, at page 797, where the court said:

"Other than the evidence concerning the correspondence between the imprint of the heel of one of the shoes found in appellant's apartment and the imprint found on the invoice discovered on the floor at the place of the burglary, and the evidence that the shoe was his property, there is no evidence connecting appellant with said burglary. There is no direct evidence that he was in the vicinity of the burglarized premises on the night in question. * * * We can find no ground for holding that the evidence was legally insufficient to sustain the verdict. The most that can be said in favor of appellant's contention in this respect is that the evidence is far from conclusive and that for this reason appellant is the more likely to have been prejudiced by such errors as may have been committed in the course of the trial. But we are not able to discover any errors of sufficient importance to change the result."

Likewise similar is the case of *People v. Mercer*, 103 Cal.App.2d 462, at page 466, 229 P.2d 411, at page 413, where the court said:

"From an examination of the record before us it is apparent that there is ample proof that the footprints made at the scene of the crime were made by the tennis shoes admittedly owned by the defendant; that the holes bored in the roof of the market and in the office door were bored by the same 1 $\frac{3}{8}$ ths inch bit found in the defendant's car; that the defendant, a few months prior to the commission of the crime, purchased and had in his possession the same

kind of dynamite as that found near the safe in the market; that the wood bit and tennis shoes were contaminated with tar such as was found in the tar paper covering the roof of the market. It was also shown that the defendant was familiar with the burglarized premises, a circumstance which may be considered by the jury. *People v. Bennett*, 93 Cal.App.2d 549, 552 [209 P.2d 417]. It was also shown that the defendant was familiar with explosives, having admitted that he learned their use while in the service."

[1, 2] We are satisfied that the circumstances disclosed by the record reasonably justify the verdict of the jury and do not warrant interference with its determination. *People v. Huizenga*, 34 Cal.2d 669, 675, 676, 213 P.2d 710. As was said in *People v. Gutierrez*, 35 Cal.2d 721, at page 727, 221 P.2d 22, at page 25:

"After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."

The judgment and order are affirmed.

VAN DYKE, P. J., and PAULSEN, J.
pro tem., concur.



121 Cal.App.2d 748

TUBBS

v.

LOS ANGELES TRANSIT LINES.

Civ. 19817.

District Court of Appeal, Second District,
Division 2, California.

Dec. 8, 1953.

Action for injuries arising out of allegedly negligent operation of street car of corporate defendant by its employee. The Superior Court, Los Angeles County, Otto J. Emme, J., entered order granting plaintiff's motion for new trial, and defendants appealed. The District Court of Ap-

peal, Moore, P. J., held that where notice of intention to move for new trial was addressed only to corporate defendant and its attorney who represented both defendants, court was without jurisdiction to grant motion for new trial.

Order reversed.

New Trial ◀137

Where notice of intention to move for new trial was addressed only to corporate defendant and its attorney who represented both defendants, Superior Court was without jurisdiction to grant motion for new trial.

Henry R. Thomas, Wayne Veatch and Henry F. Walker, Los Angeles, for appellants.

MOORE, Presiding Justice.

Defendants appeal from an order granting plaintiff's motion for a new trial. The action was for damages claimed to have resulted from personal injuries arising out of the allegedly negligent operation of a street car of the corporate defendant by defendant Gordon, its employee, while acting in the course of his duties.

The notice of plaintiff's intention to move for a new trial was addressed only to defendant corporation and its attorney who represented both defendants.

Appellants contend that the failure to give notice to defendant Gordon prevented the trial court from acquiring jurisdiction to entertain the motion for a new trial. This exact question was considered in an identical factual situation by this court in *Spruce v. Wellman*, 98 Cal.App.2d 158, 219 P.2d 472, 474, wherein it was held that "in the absence of service on the adverse party of notice of intention to move for a new trial the superior court is without jurisdiction to grant the motion" and "an 'adverse party' is one whose interest in the subject matter * * * will be affected by the granting of the motion * * *." *Id.*, 98 Cal.App.2d at page 160, 219 P.2d at page 474. That decision is determinative of this appeal.

The order granting a new trial is reversed.

McCOMB and FOX, JJ., concur.

KUCHEL

v.

**BANK OF AMERICA NAT. TRUST &
SAVINGS ASS'N.***

Civ. 15057.

District Court of Appeal, First District,
Division 2, California.
Dec. 7, 1953.

Hearing Granted Feb. 3, 1954.

Proceedings on objections to report of inheritance tax appraiser determining inheritance tax payable on death of decedent. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered order overruling objections, and appeal was taken. The District Court of Appeal, Goodell, J., held, *inter alia*, that where husband, entirely from community property, created trust providing that upon death of husband trust estate should be divided into two equal parts, that wife should receive income from both parts for life, that wife had right to amend or revoke trust provision relative to one part and to appoint corpus as to such part and that upon death of wife remainder should be conveyed to husband's two sons, transfer was designed in lieu of and to avoid passing of property by will or laws of succession and hence inheritance tax upon death of husband would be assessed under statute providing for tax in case community property is transferred other than by will or laws of succession.

Order affirmed.

Dooling, J., dissented.

1. Husband and Wife ⇨265

Wife's interest in community property acquired prior to enactment of 1927 statute providing that respective interests of husband and wife in community property during continuance of marriage relation are present, existing and equal interests under management and control of husband was substantial and more than that of an heir. Civ.Code, § 161a.

2. Trusts ⇨127

Under trust created entirely with community property and providing that if wife survived husband trust estate should be di-

vided into two equal parts, that wife was to receive income for life from both parts, that wife had power to revoke trust as to one part and to appoint entire corpus thereof and that upon death of wife remainder was to be paid in equal shares to husband's two sons, intent of trustor was that two sons should ultimately own all property in equal shares, but that during wife's life she should have at least a life interest therein, and more than that if she desired or needed it, and that neither on trustor's, nor wife's death, should there be any probate proceedings.

3. Husband and Wife ⇨266

Where corpus of trust which was created by husband and which provided for distribution of income to wife for life if she survived husband, consisted entirely of community property acquired prior to July, 1927 and wife signed formal consent approving agreement, whatever rights wife may have had in community property prior to such consent became totally different thereafter and marital community status was broken up and wife became vested with a new interest in the same property. Civ.Code, §§ 172, 172a.

4. Statutes ⇨223.2(35)

Statute declaring purpose to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession, did not indicate that the law covering *inter vivos* transfers should be read in connection with and as part of taxation statutes dealing with succession and wills. Revenue and Taxation Code, §§ 13551, 13552, 13648.

5. Taxation ⇨881

Where husband, entirely from community property, created trust providing that if wife survived husband trust estate should be divided into equal parts, that wife should receive income from both parts for life, that wife had right to revoke provisions relative to one part and to appoint corpus thereof and that upon wife's death remainder should be conveyed to husband's two sons, transfer was designed in lieu of and to avoid passing of property by will or laws of succession and hence inheritance tax upon death of husband would be as-

* Subsequent opinion 273 P.2d 532.

sessed under statute providing for tax in case community property is transferred other than by will or laws of succession. Revenue and Taxation Code, §§ 13551, 13552, 13554, 13648.

6. Stipulations — 14(1)

In proceeding on objection to report of inheritance tax appraiser determining inheritance tax payable on death of decedent, where parties stipulated that mistake was made in calculation as to tax due in event of affirmance of order overruling objections, trial court upon affirmance could make recomputation in accordance with stipulation.

George H. Koster, Bayley Kohlmeier, San Francisco, for appellant.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Charles J. Barry, Deputy Inheritance Tax Atty., Newell C. Barnett, Asst. Inheritance Tax Atty., San Francisco, Raymond G. LaNoue, Deputy Inheritance Tax Atty., Sacramento, for respondent.

GOODELL, Justice.

This appeal was taken from an order overruling objections to the report of the inheritance tax appraiser determining the inheritance tax payable on the death of Charles Grant Butts.

The decedent and Augusta E. Butts were husband and wife. On January 30, 1948 he, as trustor, executed with his wife's written consent a trust agreement with appellant Bank of America N. T. and S. A. as trustee, wherein he made certain transfers in trust for the benefit of his wife and others.

Decedent passed away on December 22, 1949 leaving his widow, then aged 73, and their two sons William E., and C. Webster Butts, surviving. The appraiser assessed \$5,389.36 as the tax against the widow's interest and \$1,538.55 against the interest of each son, a total of \$8,466.46.

The matter was tried on a written stipulation of facts without any oral testimony.

The corpus of the trust was entirely community property acquired prior to July 29, 1927 (when § 161a, Civil Code, went into effect).

The trust agreement provided for its amendment or revocation by the trustor. On May 14, 1948 the trustor revoked the original articles X, XI, and XII, and substituted new articles X, XI, and XII. Under the original article X if the widow survived her husband she was to receive all the net income from the trust estate during her life. The amended article X provided that if she survived the trustor the trustee was to divide the trust estate into two equal parts designated Part A and Part B. She was to receive during her life all the net income from both parts, with discretion in the trustee, should such income be insufficient for her needs, to resort to the corpus. It provided also that after the trustor's death his surviving wife had the right "to change or amend any provisions of the trust relative to the said Part A, and to revoke the trust as to said Part A in whole or in part and to take out of and remove from the operation of the trust any part or all of said Part A", and she was also to have "the power to appoint the entire corpus of said Part A, including all of the income thereunto pertaining, free of the trust, to the fullest extent required by any law of the United States and/or any amendments thereto so that the estate of her said husband shall have the fullest possible exemption allowed by any such law."

The amended article XII provided that:

"Should the Trustor's said wife predecease the Trustor, then upon the death of the Trustor, the Trustee shall pay, deliver and convey all of the trust estate then remaining in its hands, including all accrued and/or undistributed net income thereunto pertaining and not required for any other purposes of this trust, in equal shares to the Trustor's said sons, William E. Butts and C. Webster Butts, or the survivor of them, and the surviving issue of either of them then deceased by right of representation, and should both of said sons be then deceased, neither of them leaving is-

sue then surviving, then this trust estate shall revert to the estate of the Trustor.

"Should the Trustor predecease his said wife, then upon the death of his said wife, the Trustee shall pay, deliver and convey all of the said Part B then remaining in its hands and that portion of what remains of said Part A over which the Trustor's said wife did not exercise any of the rights of hers set forth in the foregoing Article X hereof, in equal shares to the Trustor's said sons, William E. Butts and C. Webster Butts, or to the survivor of them and the surviving issue of either of them then deceased by right of representation, and should both of said sons be then deceased, neither of them leaving issue then surviving, then this portion of the trust estate shall revert to the estate of the Trustor."

Issue number one:

Appellant states its principal contention as follows: "Upon the death of a husband the widow is entitled to one-half of the community property free from inheritance tax *regardless of whether she takes her statutory interest, elects to take under the terms of her husband's will or takes pursuant to the terms of a revocable trust created with community funds during her husband's lifetime.*" (Emphasis added.) This is a very broad and sweeping statement.

Sections 13551 to 13556 of the Revenue and Taxation Code deal with the subject of community property. In these six sections the legislature has singled out and dealt separately with the different ways of disposing of such property. Section 13551 deals with "Death of husband"; § 13552 with "Election of surviving wife to take under will"; § 13553 with "Death of wife"; § 13554 deals with "Transfers of

community property inter vivos between spouses"; § 13555 with "Personal property acquired out of State", and § 13556 with "Presumptions and proof as to community character of the property."

Appellant concedes "that the trust in this case was of the type which comes within the classification of inter vivos transfers made subject to the tax but contends that there was *no taxable transfer* from the decedent to the widow of *the interest in the community property which already belonged to her.*" (Emphasis added.)

The property which became the corpus of this trust, all of which was admittedly community property, was appraised at \$367,811.04 as of the date of decedent's death. Its net value after deductions, including the portion of the federal estate tax allocated to community property, was \$336,564.40 (half of which is \$168,282.20). Appellant argues that "Although the widow's one-half interest in the net community property was \$168,282.20, the community property exclusion allowed to her by the * * * appraiser and approved by the Court was only \$102,788.50. If the trust had not been created and the widow had taken her statutory portion of the community property or if she had taken exactly the same interest in a testamentary trust created by her husband's will she would have been entitled to and would have been allowed without question a community property exclusion of \$168,282.20."

This argument, which is based on several hypotheses, gets away from the realities of the case. The trust *was* created; there was no will hence no testamentary trust, and the widow did *not* take under the laws of succession.¹

1. If "the widow had taken her statutory portion" it would have been under § 201, Probate Code, reading: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, * * *" and § 13551, Rev. & Tax. Code, would have been applicable, reading: "Upon the death of a husband: (a) At least one-half of the community property is

subject to this part. (b) The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part. (c) All of the community property passing to anyone other than the wife is subject to this part."

Had there been a testamentary trust in substantially similar terms, § 13552 would have been applicable, reading: "When a husband by a will making a testamentary disposition of the community

The widow took under an *inter vivos* transfer (to which she consented) and not in any of the hypothetical ways suggested by appellant.

The most extreme position taken by appellant is its argument "that there was *no taxable transfer* from the decedent to the widow of the interest in the community property which *already* belonged to her." (Emphasis added.)

[1] It is not necessary to attempt to define herein the wife's interest in that which appellant calls "the community property which already belonged to her" *before the creation of the trust*. It is sufficient to say that it was pre-1927 community property and her interest was certainly substantial and more than that of an heir. In *re Estate of Brix*, 181 Cal. 667, 186 P. 135; *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197.

However, the appraiser's problem did not concern the wife's interest in the community property *before the transfer*, but did concern the interest which she received on her husband's death *by virtue of the transfer*.

[2] At the outset we stated the principal provisions of the trust instrument. It appears therefrom that the primary purpose and intent of the trustor was that the two sons should ultimately own all this property in equal shares, but that during their mother's life she should have at least a life interest therein (and more than that if she desired or needed it). It was also his purpose that neither on his death, nor hers, should there be any probate proceedings. The husband was the transferor, see *Strong v. Strong*, 22 Cal.2d 540, 140 P.2d 386; *Riley v. Gordon*, 137 Cal.App. 311, 30 P.2d 617; 3 Cal.Jur. Ten Yr.Supp. 593, with his wife's consent. At the time of the transfer she had the power of restraint, §§ 172, 172a, Civ.Code, but instead of ex-

ercising it by withholding her signature, see *Strong v. Strong*, supra, 22 Cal.2d 540, 544, 140 P.2d 386, she signed the following formal consent with the advice of counsel:

"I, Augusta Eilenberger Butts, wife of Charles Grant Butts, Trustor in the foregoing Trust Agreement, hereby declare that I have read the said Agreement and fully understand the same and approve each and all of the terms and conditions thereof and consent that the property subject to the terms of said agreement shall be held, administered and distributed in accordance therewith.

Dated: this 30th day of January, 1948.

"Augusta Eilenberger Butts

"Approved: George H. Koster

Attorney for Augusta Eilenberger Butts,
San Francisco, Calif."

Attached to the amendment is an approval thereof in substantially similar form, dated May 14, 1948, likewise signed by Mrs. Butts and approved by her attorney.

[3] Whatever her rights might have been in that which appellant calls "the community property which already belonged to her", before the transfer, they became totally different as soon as she signed this consent. The marital community status was thereby broken up and she became vested with a new interest in the same property.

Obviously Mrs. Butts was thoroughly in accord with her husband's plan and design in creating this trust. It accomplished the purpose of ultimately vesting all the property in their two sons; it gave her all the income of a \$336,564.40 corpus as long as she lived (with other valuable rights as well); it disposed of the property in such a way that on her death there would be no inheritance tax to pay,² and it avoided

property forces his surviving wife to elect whether to share in his estate under the will or to take her one-half of the community pursuant to Section 201 * * * and she elects to take under the will, the property thus taken up to a value not exceeding one-half of the value of the community is not subject to this part."

2. In his supplemental memorandum filed December 4, 1952 respondent states:

"We wish to assure the court that in our opinion no tax will be due hereafter from these remaindermen on the death of the widow should she fail to amend, revoke or appoint. The report of the Appraiser as drawn will be final in so far as any transfer of the trust proper-

probate proceedings on the death of both spouses.

If at the time of the widow's death Part A remains as it now stands, it will belong to the two sons in equal shares as transferees of their father by virtue of the terms of the trust, *hence this part of the corpus will not be subject to inheritance tax on Mrs. Butts' death*. The same may be said respecting Part B.² These factors were unquestionably important and persuasive considerations in the conception of the whole trust plan.

[4] Section 13648, Rev. & Tax.Code, declares that it is "the intent and purpose * * * to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession." Such language by no means indicates that the law covering inter vivos transfers should be read, as appellant contends, in connection with and as part of § 13551, dealing with succession, or § 13552 dealing with wills. It would seem rather to indicate the opposite.

[5] The transfer in question was certainly designed in lieu of and "to avoid the passing of property by will or the laws of succession", § 13648, supra, and appellant has supplied neither authority nor convincing argument that the sections dealing with succession or wills have any influence whatever on the operation or interpretation of § 13554, Rev. & Tax.Code, a section designed to govern an altogether different, and wholly unrelated, situation. That section deals with "Transfers of community property inter vivos between spouses" and reads as follows: "Where community property is transferred within the provisions of Chapter 4 of this part *other than by will or the laws of succession* from one spouse to the other: (a) One-half of the property transferred is subject to this part if the wife is the transferee. (b) None of the property transferred is subject to this part if the husband is the transferee." (Emphasis added.) It was

under this section that the tax was assessed.

Appellant argues that the purpose of the legislature in taxing inter vivos transfers is to prevent evasion *and not to impose greater tax burdens upon inter vivos transfers than upon transfers by will or the laws of succession*, and cites Kelly v. Woolsey, 177 Cal. 325, 170 P. 837. The court in that case, however, was not confronted with any such question since there the trial court had found that the transfers were not made in contemplation of death. The court in the Kelly case, 177 Cal. at page 328, 170 P. at page 838, quoting Ross on Inheritance Taxation § 111, says: "It is the purpose of such statutes to preclude, so far as possible, this evasion of taxation, whether with fraudulent intent or not, *and to secure to the state its revenue on all transfers which have their occasion in the death of the transferrer*; but it is not the purpose of the statute to inhibit ordinary transfers, by gift or otherwise, if not made in contemplation of death, or not postponed in enjoyment or possession until after the death of the donor or grantor." (Emphasis added.)

There is nothing in the inheritance tax law indicating that in dealing with inter vivos transfers the legislature is held to any particular standard or must be controlled by the tax on some other type of transfer. For this reason we are not convinced by appellant's unsupported argument that "The tax determined in the present case can be sustained only if it is determined that a greater tax is imposed upon such inter vivos transfers than is imposed upon transfers at death * * *."

Issue number two:

[6] There is a second issue on this appeal arising out of a miscalculation made by the appraiser which is only indirectly related to the first and principal issue just discussed. In the briefs both sides have agreed that this mistake was made, and they have agreed as to its rectification, in

ty by Mr. Butts is concerned, and under no conceivable theory would their interests, when vested, be construed as a transfer from Mrs. Butts. Section

13411, so far as these remaindermen are concerned, will not be involved under any circumstances."

case of affirmance, as follows: the tax against the widow's interest instead of being \$5,389.36 should be \$4,580.17, and against each son's interest the tax instead of being \$1,538.55 should be \$1,769.75, thus reducing the total tax from \$8,466.46 to \$8,119.67. In view of the informal stipulation contained in the briefs there is no necessity to discuss the details of such error in calculation.

In re Estate of Loewenstein, 37 Cal.2d 843, 236 P.2d 566, was also an appeal from an order approving the report of an inheritance tax appraiser. The order was affirmed. There also certain items were miscomputed. The court said, 37 Cal.2d at page 848, 236 P.2d at page 570: "If there are such miscomputations the affirmance herein is not to be deemed to preclude a recomputation to accord with the views expressed herein." In the instant case both sides have stipulated to the correct amounts under the second issue in the event of an affirmance on the main issue, and we see no reason to remand merely to make such rectifications. In accordance with the rule in Estate of Loewenstein a recomputation can and should be made by the trial court in accordance with the stipulation.

The order appealed from is affirmed without costs to either party.

NOURSE, P. J. concurs.

DOOLING, Justice.

I dissent.

Stripped of nonessentials the basic question involved in this case is this: "Did the legislature in adopting section 13554, Rev. & Tax.Code, intend to impose a greater inheritance tax upon a wife to whom or for whose benefit community property is transferred by the husband by an inter vivos transfer to take effect upon his death than it would impose by section 13551 upon a transfer of the same community property to the wife or for her benefit if it occurred upon the husband's death?"

The legislative purpose of the tax upon inter vivos transfers in contemplation of, or to take effect upon, the transferor's death is expressed in section 13648, Rev. &

Tax.Code: "It is hereby declared to be the intent and purpose of this part to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession." It is an "in lieu" tax, and is intended to insure that the state shall not be deprived of the equivalent of the inheritance tax that it would otherwise receive by any inter vivos transfer intended by the transferor as a substitute for a transfer by will or intestate succession. It may reasonably be said of the taxes imposed upon the two types of transfer as has been said of the sales and use taxes (to paraphrase): "(t)hat the two taxes are complementary to each other with the aim of placing (the taxpayers) on an equal footing." Chicago Bridge & Iron Co. v. Johnson, 19 Cal.2d 162, 165, 119 P.2d 945.

As construed by the order appealed from the wife has admittedly had a greater burden of taxation imposed upon her in the case of this inter vivos trust than would have been imposed upon her had the identical trust been created by her husband's will.

The question squarely presented is, did the legislature intend this result when it enacted sec. 13554, Rev. & Tax.Code?

It is only by considering sec. 13554 in a vacuum that this result can be justified, but the accumulation of judicial experience in the field of statutory construction is opposed to this *in vacuo* method of statutory construction. I need only cite a few relatively recent statements of our own supreme court to explode the fallacy of construing a statutory provision in isolation from its context, its purpose and its effect.

"It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863, 865. "A statute should be read and considered as a whole to determine the legislative intent," People v. Trieber, 28 Cal.2d 657, 663, 171 P.2d 1, 4. "(W)hen two constructions appear possible, this court follows the rule of favoring that which leads to the more rea-

reasonable result." Metropolitan Water Dist. of Southern California v. Adams, 32 Cal.2d 620, 630-631, 197 P.2d 543, 549. "The interpretation adopted must be reasonable, and where the language is fairly susceptible of two constructions, one which, in application, will render it reasonable, fair, and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." Warner v. Kenny, 27 Cal.2d 627, 629, 165 P.2d 889, 890.

Standing alone sec. 13554(a) would authorize the tax here imposed on the transfer to the wife: "One-half of the property transferred is subject to this part if the wife is the transferee." But sec. 13554 does not stand alone. It is subject to the qualification of sec. 13551(b) which provides the basic foundation of the tax: "The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part." It is also to be construed in the light of its own purpose as expressed by the legislature in sec. 13648: "to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession."

Having in mind the purpose of the "in lieu" tax imposed by sec. 13554 that a transfer of that sort shall not escape its fair burden of taxation and construing the statute as a whole with its basic exemption of the "one-half of the community property which belongs and goes to the surviving wife", the fair and reasonable construction of sec. 13554 is that the same measure exempting a full one-half of the value of the community property should be applied in laying the tax on those transfers of community property to the wife covered by that section. So construed the tax burden is equally laid on every type of taxable transfer, the legislative purpose expressed in sec. 13648 is fully and fairly accomplished and no unreasonable burden is imposed on any type of transfer subject to the tax. In the absence of clear evidence of an intent to create a discriminatory burden of taxation in certain cases I cannot ascribe such a purpose to the legislature.

The fact that appellant consented in writing to the creation of the trust should not change this result. She consented to an arrangement which resulted in her getting an interest which has been appraised at a value in excess of one-half of the value of all the community property. By law she was entitled to one-half of the community property. To say that by her agreement she subjected herself to a greater tax than if the same provision had been made for her by will and she had then elected to take under the trust rather than under Prob.Code, sec. 201 is to put form above substance.

I would reverse with directions to exclude the value of one-half of the community property in fixing the tax upon the wife's interest.



121 Cal.App.2d 684

GRATTAN v. SILBAUGH.

Civ. 19873.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1953.

Rehearing Denied Dec. 23, 1953.

The Superior Court of Los Angeles County, Walter S. Gates, J., entered minute order denying plaintiff's request for attorney's fees, court costs, allowance for support of illegitimate child, restraining order and medical expenses, and plaintiff purported to appeal. The District Court of Appeal, McComb, J., held that no appeal would lie from the minute order which provided that counsel for defendant was directed to prepare the order.

Purported appeal dismissed.

1. Appeal and Error ☞123

No appeal lies from a minute order which shows on its face that it is a mere preliminary entry authorizing a subsequent order or judgment.

2. Appeal and Error ⇨123

No appeal would lie from minute order which provided that plaintiff's application for attorney's fees and costs was denied and that counsel for defendant was directed to prepare the order.

Nitsch & Snodgrass, El Monte, for appellant.

Jack W. Hardy, Los Angeles, for respondent.

McCOMB, Justice.

This is a purported appeal by plaintiff from a *minute order* dated March 16, 1953, and entered March 18, 1953, denying plaintiff's request for attorney's fees, court costs, allowances for support of an illegitimate child, a restraining order and medical expenses. The minute order, omitting the title of the court and cause, reads:

"It appearing to the court after a perusal of the reporter's transcript of the hearing of December 5, 1952 herein, that the minute orders herein of November 14, 1952, December 5, 1952 were correct as entered, now, therefore, the minute order of March 2, 1953 herein is vacated, and the minute order of February 19, 1953 shall be amended nunc pro tunc as of the same date to read as follows: In the matter of the order to show cause, heretofore submitted as of January 19, 1953, the court now rules as follows: Plaintiff's application for attorney fees and costs is denied. *Counsel for defendant is directed to prepare the order.*" Italics added.)

[1] This is the sole question necessary for us to determine:

Is the foregoing minute order an appealable order?

It is not. No appeal lies from a *minute order* which shows on its face that it is a mere preliminary entry authorizing a subsequent order or judgment. (Butler v. City & County of San Francisco, 104 Cal.App.2d 126, 128 [1], 231 P.2d 75; Kindig v. Palos Verdes Homes Ass'n, 33 Cal.App.2d 349, 354 [4], 91 P.2d 645; Conley v. Apablaza, 42 Cal.App.2d 565, 567 [2], 109 P.2d 367;

Smith v. Smith, 45 Cal.App.2d 212, 213 [1], 113 P.2d 892.)

[2] In the present case the minute order from which the purported appeal is taken was a mere preliminary entry authorizing a subsequent order. This is obvious from the last sentence in the order which we have italicized.

The purported appeal from the order is dismissed.

MOORE, P. J., and FOX, J., concur.



BRADNER v. VASQUEZ et al.*
Civ. 19580.

District Court of Appeal, Second District,
Division 3, California.

Dec. 3, 1953.

Rehearing Denied Dec. 28, 1953.

Hearing Granted Jan. 27, 1954.

Action by executrix of estate of deceased attorney, against clients of such attorney, to recover money alleged to be due on contract of employment between attorney and clients. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that presumptions that defendants entered into contract without sufficient consideration and by undue influence, arising from fact that attorney obtained an advantage from defendants by the contract, were not controverted.

Affirmed.

I. Trusts ⇨231(1)

Under statute providing that all transactions between trustee and his beneficiary during existence of trust, or while influence acquired by trustee remains, by which trustee obtains any advantage from beneficiary, are presumed to be entered into by beneficiary without sufficient consideration

* Subsequent opinion 272 P.2d 11.

and under undue influence, presence of such circumstances renders contract voidable. Civ.Code, §§ 2219, 2235.

2. Attorney and Client ⇨123(1)

Statute providing that all transactions between trustee and beneficiary during existence of trust, or while influence acquired by trustee remains, by which trustee obtains any advantage from beneficiary, are presumed to be entered into by beneficiary without sufficient consideration and under undue influence, applies to all cases of attorney and client where any contract is made whereby attorney obtains any advantage from his client. Civ.Code, §§ 2219, 2235.

3. Attorney and Client ⇨123(1)

Client who, in order to avoid his contract with attorney, wishes to invoke statutory presumption that all transactions between a trustee and his beneficiary during existence of trust, or while influence acquired by trustee remains, by which trustee obtains any advantage from beneficiary, are presumed to be entered into by beneficiary without sufficient consideration and undue influence, has burden of showing that attorney obtained an advantage from him by the contract. Civ.Code, §§ 2219, 2235.

4. Contracts ⇨88

To overcome the presumption of consideration evidenced by a writing, it is not sufficient to show merely that the confidential relation existed, but it must be made to appear that the relationship was used to obtain an unfair advantage. Code Civ.Proc. § 1963, subd. 39; Civ.Code, §§ 1614, 1615, 2219, 2235.

5. Attorney and Client ⇨123(1)

Mere negative conduct on part of an attorney dealing with his client is not sufficient to overcome presumption of fraud and unfair dealing which is automatically raised by law as protection to client when transaction results in attorney's obtaining advantage from client, but attorney must go further and show that his client was given the information which, under similar circumstances, a disinterested legal advisor would have given. Civ.Code, §§ 2219, 2235.

6. Attorney and Client ⇨123(1)

Whether attorney obtained an advantage by contract with clients, and whether the clients entered into contract without sufficient consideration and by undue influence, would be determined on the situation as it fairly appeared to the parties at the time the contract was entered into, and not as subsequent events revealed it to be. Civ.Code, §§ 2219, 2235.

7. Attorney and Client ⇨143

In action by executrix of attorney's estate to recover money alleged to be due on contract of employment between attorney and clients, evidence sustained finding that attorney obtained an advantage from clients by the contract. Civ.Code, §§ 2219, 2235.

8. Attorney and Client ⇨143

Where attorney obtained an advantage from clients by contract of employment between attorney and clients, presumptions arose that the contract was entered into by the clients without sufficient consideration and by undue influence, and mere fact that contract was in writing did not repel these presumptions. Code Civ.Proc. § 1963, subd. 39; Civ.Code, §§ 1614, 1615, 2219, 2235.

9. Attorney and Client ⇨123(1)

If contract between attorney and client is written, and if there is no proof that attorney obtained an advantage from client by contract, presumption that there was sufficient consideration for a written contract overcomes statutory presumption of insufficient consideration, but if there is proof that the attorney obtained an advantage from client by contract, presumption of insufficient consideration remains, and burden is on attorney to overcome presumption by evidence. Code Civ.Proc. § 1963, subd. 39; Civ.Code, §§ 1614, 1615, 2219, 2235.

10. Attorney and Client ⇨143

Presumptions of insufficient consideration and undue influence, attaching to contract of employment between attorney and clients by which attorney gained an advantage from clients, were evidence and were sufficient to support a finding. Civ. Code, §§ 2219, 2235.

11. Evidence Ⓒ85

Presumptions have probative force and may outweigh positive evidence adduced against them. Code Civ.Proc. §§ 1961, 2061, subd. 2.

12. Trial Ⓒ382

Statute providing that jurors are not bound to decide in conformity with declarations of any number of witnesses which do not produce conviction in their minds, against a presumption, and statute providing that a presumption, unless declared by law to be conclusive, may be controverted by other evidence, but unless so controverted the jury are bound to find according to presumption, apply to judge sitting without a jury. Code Civ.Proc. §§ 1961, 2061, subd. 2.

13. Appeal and Error Ⓒ1011(1)

Where presumptions on the one hand and opposing testimony on the other presented a conflict in evidence, finding of trial court in accord with presumptions would not be disturbed on review. Code Civ.Proc. §§ 1961, 2061, subd. 2.

14. Attorney and Client Ⓒ143

In action by executrix of attorney's estate to recover money alleged to be due on contract of employment between attorney and clients, evidence sustained findings that presumptions that clients entered into contract with attorney without sufficient consideration and by undue influence, arising from fact that attorney obtained an advantage from clients under the contract, were not controverted. Code Civ.Proc. §§ 1961, 2061, subd. 2; Civ.Code, §§ 2219, 2235.

Michael F. Shannon, Thomas A. Wood, Los Angeles, for appellant.

Burke, Williams & Sorensen and Landon Morris, Los Angeles, for respondents.

VALLÉE, Justice.

Action for money alleged to be due on a contract of employment between an attorney at law and his clients. Plaintiff appeals from a judgment for defendants. The cause was here before on a question of the construction of the contract. Bradner v. Vasquez, 102 Cal.App.2d 338, 227 P.2d 559.

On November 14, 1941, B. J. Bradner, an attorney at law, and the defendants entered into the following written contract:

"Mr. & Mrs. Anselmo M. Vasquez
3161 Winter Street
Los Angeles

"Dear Mr. & Mrs. Vasquez:

"Relative to our conversation of recent date, it is my understanding that we agreed as follows:

"I am to attend to all of your business affairs connected with the Ohio Oil Company and Havenstrite Operator, together with preparing income tax returns and advice as to investments, for 10% of all the moneys received by you from the Ohio Oil Company and Havenstrite Operator for oil and from casinghead gasoline and dry gas.

"It is realized by me that my compensation in the near future will be rather small, but as more wells are developed, I will be more adequately compensated.

"It is understood that this arrangement shall cease and determine upon my death.

"Will you kindly sign the duplicate copy of this letter and return it to me.

"Very truly yours,
B. J. Bradner
B. J. Bradner

"Accepted:
Anselmo M. Vasquez
Anselmo M. Vasquez
Bertha R. Vasquez
Bertha R. Vasquez"

On August 9, 1949, defendant, Anselmo M. Vasquez, and on August 31, 1949, defendant Bertha R. Vasquez, discharged Mr. Bradner and notified him they were no longer bound by the contract and would no longer make the payments therein provided. All sums which had accrued up to the time of the discharge were paid. The action is for 10% of \$124,187.28 which defendants received thereafter. Mr. Bradner commenced the action, but died on September 7, 1950, prior to the trial.

The court found that: 1. At the time the contract was made, the Vasquezes had complete trust and confidence in Mr. Bradner. 2. Mr. Bradner procured the contract from

them without sufficient consideration and by undue influence in that at the time of its execution the relation of attorney and client existed, and Mr. Bradner obtained an advantage by it.

Plaintiff-appellant contends the findings are not supported by the evidence.

From 1924 to the time the contract was made, Mr. Bradner did whatever legal work defendants had to be done. In 1937, defendants entered into an oil and gas lease with Ohio Oil Company. Mr. Bradner represented defendants in the transaction. Prior to the making of the contract in suit, one well had been placed on production. Mr. Bradner had done other legal work for defendants shortly prior to the making of the contract.

Defendant, Bertha Vasquez, testified that in November, 1941, she made an appointment with Mr. Bradner to see him in his office; that she and Mr. Vasquez went to the office and had a conversation with Mr. Bradner. Mr. Bradner asked them if they still wanted to retain him as their attorney, and they said, "Yes." Mr. Bradner asked them how they wanted to compensate him; he asked them whether they wanted to give him a per cent of their interest in the wells or pay him 10 per cent. They told him, "We will pay you ten per cent. That way you will take more interest in seeing that more wells are drilled on the property." Mrs. Vasquez further testified she was the one who suggested they would rather give him 10 per cent so that he would take more interest in seeing that more wells were drilled, and that Mr. Bradner said it was agreeable. They discussed the amount of oil the property was producing. She could not remember any other part of the conversation. She also testified that Mr. Bradner did not say anything to them about going to see another lawyer or tell them to get advice from anyone else about signing the contract, or say anything to them about what the reasonable value of the services that he agreed to perform would be.

Mrs. Bradner, who was Mr. Bradner's secretary at the time of the conversation referred to by Mrs. Vasquez, testified that she was present at the conversation; it took place on November 7, 1941; Mr.

Vasquez said to Mr. Bradner, "We are very well satisfied with the work that you have done for us and in the past we haven't been able to pay you very much for it. Mrs. Vasquez and I would like to make an arrangement with you whereby you handle all of the affairs, that is, the business affairs in connection with the Ohio and Havenstrite leases, making up income taxes and giving advice as to investments. In time that will give you—and we pay you out of the oil. * * * In time this will give you something for the work that you have done in the past as well as for work to come." Mr. Bradner said in some cases like that some of his clients had assigned a one per cent royalty to him. Mrs. Vasquez said, "Mr. Bradner, we don't want to do that because if you died we don't want a stranger in there." Mr. Bradner said, "Well, suppose then you give me ten per cent for life of all the oil, gas, and casinghead gasoline, and that would amount to just about the same thing." Mr. and Mrs. Vasquez said that would be "Okay." Mr. Bradner said, "Of course, I realize at first I won't be very well paid for my work but as more wells are developed, I will be better paid. * * * I will draw up an agreement and I will send it out for your acceptance."

A few days later defendants received the contract in the mail from Mr. Bradner, signed by him. They signed a copy and returned it to him, retaining a copy.

[1-3] Civil Code, section 2235 provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Section 2219 provides that any one who voluntarily assumes a relation of personal confidence with another is deemed a trustee. If the circumstances stated in the section are present, the contract is voidable. *Magee v. Brenneman*, 188 Cal. 562, 571, 206 P. 37; *Brydonjack v. Rieck*, 5 Cal.App.2d 219, 223, 42 P.2d 336. The section applies to all cases of attorney and client where any contract is made whereby the attorney obtains any advantage

from his client. *Magee v. Brenneman*, supra, 188 Cal. 567, 206 P. 37; *Estate of De Barry*, 43 Cal.App.2d 715, 728, 111 P.2d 728. The burden is on the client to show that the attorney obtained an advantage from him by the contract. *Carlson v. Lantz*, 208 Cal. 134, 139, 280 P. 531; *Magee v. Brenneman*, supra, 188 Cal. 568, 206 P. 37; *Bryan v. Prescott*, 57 Cal.App. 779, 782-783, 207 P. 1028.

[4,5] A contract in writing is presumptive evidence of a good and sufficient consideration. Code Civ.Proc. sec. 1963, subd. 39; Civ.Code, secs. 1614, 1615. To overcome the presumption of consideration evidenced by a writing, it is not sufficient to show merely that the confidential relation existed, but it must be made to appear that the relationship was used to obtain an unfair advantage. In *Estate of Roberts*, 49 Cal.App.2d 71, at page 80, 120 P.2d 933, at page 938, the court stated: "In support of the judgment respondent relies entirely on the presumption of undue influence which, as he claims, arises from the relationship of the parties, and cites section 2235 of the Civil Code in support of his argument. * * * Here we have a written instrument, a promissory note, which erects a counter-presumption of a sufficient consideration (Code Civ.Proc., sec. 1963, subd. 21; Civil Code, secs. 1614, 3105); and the burden of showing a want of such consideration is on the party seeking to invalidate the instrument. Civil Code, sec. 1615. The presumption created by section 2235 of the Civil Code does not overcome this other presumption unless it is shown that the relationship was used by the trustee to obtain an unfair advantage. *Dimond v. Sanderson*, 1894, 103 Cal. 97, 101, 103, 37 P. 189; *Cole v. Wolfskill*, 1920, 49 Cal.App. 52, 55, 192 P. 549; *Estate of Mallory*, 1929, 99 Cal.App. 96, 102, 278 P. 488." Mere negative conduct "on the part of an attorney dealing with his client is not sufficient 'to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client.' *Estate of Witt*, supra [198 Cal. 407, 245 P. 197]. The attorney must go further and show that his client was given the information which, under similar circumstances, a disinterested

legal adviser would have given." *Thornley v. Jones*, 96 Cal.App. 219, 229, 274 P. 93, 97.

If the attorney obtains an advantage from his client in the transaction between them, the burden of showing that the contract was acquired by the attorney for a sufficient consideration and not by undue influence is on the attorney. In *Metropolis Trust & Sav. Bank v. Monnier*, 169 Cal. 592, at page 598, 147 P. 265, at page 268, it was said: "The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly the obtaining of a note for \$20,000, secured by mortgage, is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction." See, also, *Allen v. Meyers*, 5 Cal.2d 311, 315, 54 P.2d 450; *Lady v. Worthingham*, 57 Cal. App.2d 557, 135 P.2d 205.

The finding that the contract was obtained by Mr. Bradner without sufficient consideration and by undue influence must find support in evidence introduced or in the presumption created by section 2235. Since there was no evidence showing insufficient consideration or undue influence, defendants invoke the presumption.

[6] Whether Mr. Bradner obtained an advantage by the contract, and whether the Vasquezes entered into the contract without sufficient consideration and by undue influence, must be determined on the situation as it fairly appeared to the parties at the time the contract was entered into, and not as subsequent events revealed it to be. *Swanson v. Hempstead*, 64 Cal.App.2d 681, 688, 149 P.2d 404.

[7] There was evidence from which the court could reasonably conclude that Mr.

Bradner obtained an advantage from the Vasquezes by the contract at the time it was made. From 1924 to November 10, 1941, the date of the contract, Mr. Bradner had been their attorney handling their legal matters. During that period, because of their financial condition, "he charged them the minimum, or just enough to cover the overhead." He did some work for them "for which he didn't charge them at all." At the time the contract was made, the lease with Ohio was in force; one well was producing; Ohio and Havenstrite were obligated to drill 23 wells. Under the contract, Mr. Bradner was to receive 10% of all moneys received by the Vasquezes from Ohio and Havenstrite for life. The Vasquezes were to receive a one-eighth royalty from Ohio and Havenstrite. They were receiving \$300 or \$400 a month from Ohio at the time. Prior to the contract, Mr. Bradner was subject to discharge at any time, with or without cause. After the contract, he could only be discharged for legal cause. The facts in the present case are not essentially different from those in *Brydonjack v. Rieck*, 5 Cal.App.2d 219, 42 P.2d 336, in which it was held that the trial court was warranted in finding that the attorney had obtained an advantage from his client. We think it manifest the court could reasonably infer that Mr. Bradner obtained an advantage from the Vasquezes by the contract.

[8,9] It having been shown that Mr. Bradner obtained an advantage from the Vasquezes by the contract, the presumptions arose that the contract was entered into by the Vasquezes without sufficient consideration and by undue influence. The mere fact that the contract was in writing did not repel these presumptions, as plaintiff argues. As said in *Estate of Roberts*, 49 Cal.App.2d 71, 80, 120 P.2d 933, 938, "The presumption created by section 2235 of the Civil Code does not overcome this other presumption [sufficient consideration for a written contract] *unless it is shown that the relationship was used by the trustee to obtain an unfair advantage.*" (Emphasis added.) In other words, if the contract is written, and if there is no proof that the attorney obtained an advantage from the client by the contract, the presumption that there was

sufficient consideration for a written contract overcomes the presumption of insufficient consideration created by section 2235; but if there is proof that the attorney obtained an advantage from the client by the contract, the presumption of insufficient consideration remains and the burden is on the attorney to overcome the presumption by evidence. The fact that the contract is written has no effect on the question of undue influence other than that the court might under certain circumstances infer a want of undue influence from the contract itself.

[10-13] The burden was thus on plaintiff to overcome the presumptions—i. e., establish by the evidence that the contract was entered into by the Vasquezes with sufficient consideration and not by undue influence. *Brydonjack v. Rieck*, 5 Cal.App.2d 219, 223, 42 P.2d 336; *Lady v. Worthingham*, 57 Cal.App.2d 557, 560-561, 135 P.2d 205. Plaintiff relied on the testimony of Mrs. Vasquez and of Mrs. Bradner to rebut the presumptions. The presumptions were evidence and they are sufficient to support a finding. *Westberg v. Willde*, 14 Cal.2d 360, 365, 94 P.2d 590. They have probative force and may outweigh positive evidence adduced against them. *Scott v. Burke*, 39 Cal.2d 388, 395, 247 P.2d 313. Section 2061, subd. 2, of the Code of Civil Procedure provides that jurors are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a presumption. Section 1961 provides: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption." These rules apply to a judge sitting without a jury. 10 Cal.Jur. 745, sec. 64. Whether the evidence introduced to controvert the presumptions had sufficient weight to effect that purpose was a question of fact for the trial court to determine. *Halloran v. Isaacson*, 95 Cal.App.2d 357, 360-363, 213 P.2d 19. The presumptions on the one hand and the opposing testimony on the other present a conflict in the evidence, and the finding of a trial court in accord with the presumptions will not be disturbed on re-

view. *French Bank v. Beard*, 54 Cal. 480, 484; *Cox v. Schnerr*, 172 Cal. 371, 378-380, 156 P. 509; *Standard Oil Co. v. Houser*, 101 Cal.App.2d 480, 488, 225 P.2d 539; *Schurman v. Look*, 63 Cal.App. 347, 358-361, 218 P. 624; *Lady v. Worthingham*, 57 Cal.App.2d 557, 561, 135 P.2d 205; *Fowler v. Enriquez*, 56 Cal.App. 107, 109, 204 P. 854; *Piercy v. Piercy*, 18 Cal.App. 751, 755-756, 124 P. 561.

[14] We cannot say as a matter of law that the positive evidence overcame the presumption. The findings that the Vasquezes entered into the contract without sufficient consideration and by undue influence is supported by the evidence—the presumptions. Those findings are adequate to support the judgment.

We are constrained to say that there was no evidence of intentional or actual undue influence on the part of Mr. Bradner. We have no doubt that had he lived to the time of trial he might have given a satisfactory explanation of the transactions with defendants and completely dispelled the severe but essential effects of section 2235.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



121 Cal.App.2d 665

MESMER v. WHITE.

Civ. 19663.

District Court of Appeal, Second District,
Division 3, California.

Dec. 3, 1953.

Rehearing Denied Dec. 28, 1953.

Hearing Denied Jan. 27, 1954.

Action for declaratory relief to determine validity of agreement whereby beneficiary under will of deceased wife waived claim to interest deceased might have had in a business. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for husband, and denied beneficiary's motion for new trial, and beneficiary appealed. The District Court of Appeal, Shinn, P. J., held that where

husband and beneficiary under deceased wife's will were not in a confidential relationship, husband had no duty to disclose to beneficiary any fact concerning wife's interest in the business, and his silence did not permit beneficiary to revoke agreement whereby she waived claim to wife's interest in business.

Appeal dismissed, and judgment affirmed.

1. Appeal and Error ⇐991

In action by husband for declaratory relief to determine validity of agreement whereby beneficiary under wife's will waived claim to interest in business, finding that husband and beneficiary were not in confidential relationship was a reasonable determination of a question of fact, and was conclusive on appeal.

2. Wills ⇐740(3)

Where husband and beneficiary under deceased wife's will were not in a confidential relationship, husband had no duty to disclose to beneficiary facts concerning wife's interest in business, and his silence did not permit beneficiary to revoke agreement whereunder she waived claim to any interest in business.

3. Wills ⇐740(3)

Where husband had no duty to disclose to beneficiary under wife's will, who waived claim to wife's interest in business, the extent of such interest, the fact that husband had superior knowledge did not render his silence fraudulent.

4. Fraud ⇐4, 6, 20

Misstatement or suppression of facts is not fraudulent unless motivated by intent to deceive or to induce another to enter into contract, or unless it amounts to a breach of duty. Civ.Code, §§ 1572, 1573.

5. Appeal and Error ⇐991

In action by husband for declaratory relief to determine validity of agreement whereby beneficiary under wife's will waived claim to interest in business, Superior Court's determination that husband was not guilty of fraud was a determination on question of fact and could not be disturbed, since it was supported by the evidence. Civ.Code, § 1574.

6. Wills ⇨741

In action for declaratory relief to determine validity of agreement whereby beneficiary under wife's will waived claim to interest in business, evidence supported finding that beneficiary was put on notice that the wife actually had an interest inheritable by beneficiary.

7. Wills ⇨740(3)

Where wife's testamentary beneficiary, who by agreement with husband waived interest in business, had actual notice that husband claimed any interest which wife might have had, and where extent of such interest was readily ascertainable by beneficiary, such notice was sufficient to charge beneficiary with notice of the extent of wife's interest in business.

8. Contracts ⇨93(1)

Courts of equity will not encourage the cancellation or revocation of instruments on the ground of mistake where they appear to have been executed by the complainant without the exercise of reasonable care. Civ.Code, § 1577.

9. Wills ⇨740(4)

Agreement between beneficiary and husband, whereby beneficiary waived any interest in business she might have been entitled to under deceased wife's will, was not a transaction between debtor and creditor, nor a release of a "debt," within statutes which provided that release of debt does not release obligation unappreciated by creditor. Civ.Code, §§ 1541, 1542.

See publication Words and Phrases,
for other judicial constructions and definitions of "Debt".

10. Appeal and Error ⇨110

Order denying motion for new trial was not appealable.

Byron R. Bentley, Los Angeles, for appellant.

Hammack & Hammack, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff A. J. Mesmer is the surviving husband of Grace Mesmer, deceased, and

defendant Marie White is her sister. Grace died May 17, 1951, leaving a will dated January 7, 1932, in which she bequeathed all her "worldly possessions" to Marie. On May 21, 1951, Mrs. Mesmer's safe deposit box was opened in the presence of a deputy county treasurer, bank officials, Mrs. White, her counsel Mr. Bentley, and Mr. Mesmer. Mr. Bentley made a list of the contents of the box. In the box, but not listed by the deputy county treasurer or Mr. Bentley, was a carbon copy of a letter addressed to Grace Mesmer, dated December 10, 1939, signed "Father," which stated, in part: "Mother and I are enclosing the following stock certificates: Joseph Mesmer Company, Cert. #70, Class B. Preferred, 6 Shares; Joseph Mesmer Company, Cert. #75, Class B. Preferred, 7 Shares. We intended to give you these stocks at Christmas time, but the transfer was delayed. * * *" Joseph Mesmer, now deceased, was plaintiff's father. The described certificates were in the possession of plaintiff. In the box was a note for \$3,000, payable to Grace Mesmer, signed by Joseph Mesmer Company. At that time there was standing in the name of Grace Mesmer a residence at 5505 Ocean Front, Playa del Rey, California, which residence was fully furnished, and she also owned several pieces of jewelry. Several conversations took place between plaintiff and defendant with respect to the disposition of the property of the estate of Grace. These resulted in the preparation by Mr. Bentley, acting for defendant, of a proposed agreement between the parties which was signed by Mrs. White and forwarded to Mr. Mesmer's attorney. This writing did not mention any interest of Grace Mesmer in the Joseph Mesmer Company, but it provided: "[s]aid A. J. Mesmer waives and relinquishes any rights to and makes no claim to any property standing in the name of Grace Mesmer and acknowledges the same to have been the separate property of said Grace Mesmer which she was entitled to dispose of by will and which she did leave to said Marie White." Upon receipt of this writing Mr. Hammack, plaintiff's attorney, returned to Mr. Bentley the proposed agreement and wrote him to the effect that it was not in

accordance with Mr. Mesmer's understanding with Mrs. White that Mrs. White was to receive the beach property and certain other specified items, and Mr. Mesmer was to receive all interest of Grace Mesmer in and to any other assets, "and particularly any interest in either Joseph Mesmer Company or St. Louis Fire Brick and Insulation Company." Mr. Hammack prepared a revised agreement and sent three copies of the same to Mr. Bentley. Mrs. White signed the agreement and it was returned by Mr. Bentley to Mr. Hammack and thereafter was signed by Mr. Mesmer. The agreement provided in part: "That * * * Marie White will make no claims to and receive no portion of any interest of Grace Mesmer in the Joseph Mesmer Company or the St. Louis Fire Brick & Clay Company, or any interest said A. J. Mesmer may have therein, or in and to any assets standing in the name of A. J. Mesmer, and Marie White recognizes and acknowledges that A. J. Mesmer is either the sole owner thereof or else is entitled to have the same distributed to him. Marie White hereby assigns to A. J. Mesmer all interest she or Grace Mesmer may have in the property listed above."

Mrs. White caused the will to be probated and herself to be appointed as administratrix-with-the-will-annexed. Shortly after her appointment Mrs. White addressed a letter to Mesmer, stating that she had recently discovered that Grace Mesmer at the time of her death owned stock in the Joseph Mesmer Company. At the trial she testified that she had discovered the above mentioned letter in the safe deposit box and had not previously had any knowledge thereof. In her letter to Mr. Mesmer she gave notice of rescission of the agreement upon the ground that ownership of the stock by Grace Mesmer had been fraudulently concealed by plaintiff. This letter was answered by Mr. Mesmer, refuting the charges of fraud. He then brought this action in declaratory relief for determination of the validity of the agreement. Findings and judgment were in his favor and defendant has appealed.

In her answer defendant alleged that she and plaintiff stood in a confidential re-

lationship, and that before the agreement was entered into plaintiff represented to her that Grace Mesmer owned no property other than the residence in which she lived; that said representation was made fraudulently for the purpose of inducing defendant to agree to a division of the property of said decedent; that defendant relied upon the representation in executing the agreement and gave notice of rescission as soon as she discovered the existence of the certificates of stock in Joseph Mesmer Company. As a separate defense the answer alleged that defendant signed the agreement by reason of a threat of plaintiff that unless she did so he would contest the will of Grace Mesmer. It was also alleged that plaintiff took undue advantage of defendant's trust and confidence and that she signed the agreement under a mistake of fact known to and induced by plaintiff that Grace Mesmer had no interest in Joseph Mesmer Company.

The court found that the parties did not stand in a confidential relationship; that they were dealing at arm's length and that neither of them was trusting the other nor relying on any statement made by the other; that plaintiff did not at any time tell defendant that Grace Mesmer did not own any stock in Joseph Mesmer Company or St. Louis Fire Brick and Insulation Company, and did not at any time make any misrepresentation as to what he or Grace Mesmer owned prior to or at the time of her death; that at no time did defendant or her attorney make any inquiry of plaintiff or his attorney as to what, if any, interest Grace Mesmer had in the Joseph Mesmer Company or St. Louis Fire Brick and Insulation Company; that defendant has been at all times a person of mature years, in good health, intelligent, not of a trusting disposition, and has had experience as a personal representative of another decedent's estate. It was found that defendant did not make a mistake of fact respecting the agreement; that she had declared to plaintiff that she did not claim any interest in and did not want any part of the business, meaning any interest in Joseph Mesmer Company and St. Louis Fire Brick and Insulation Company, and that she signed the agreement with the

intention she had previously expressed; that if she acted under a mistake of fact it was due to her neglect of the legal duty to inquire as to the interest of Grace Mesmer in the Joseph Mesmer Company; that although the means of knowledge were open to her and her attorney, neither she nor her attorney inquired into or asked the meaning of Mr. Hammack's letter to Mr. Bentley respecting any interest of Grace Mesmer in the Joseph Mesmer Company, and as to the reasons for the changes made by Mr. Hammack in the terms of the proposed agreement that had been prepared by Mr. Bentley. It was found that defendant negligently failed to make a reasonable inquiry, or any inquiry at all, with respect to the holding of any stock by Grace Mesmer in either of said corporations. It was found that subsequent to the execution of the agreement plaintiff changed his position in that, among other things, he permitted the will of Grace Mesmer to be probated; and that he surrendered possession of the house which defendant received under the agreement, and could not be placed in his former position; that defendant did not offer to restore any of the benefits received by her under the agreement. It was found that defendant did not act under duress. Conclusions of law were made which were appropriate to the facts found, directing judgment that plaintiff was the owner of the stock in question.

As previously stated, the court found that the parties did not stand in a confidential relationship, and that they were dealing at arm's length. Defendant does not question the sufficiency of the evidence to support this finding, but she nevertheless argues that plaintiff had a special duty to make full disclosure because of the existence of a confidential relationship. The trial court said, in its memorandum opinion: "A dispute arose between them almost immediately, and both sought the assistance of separate counsel, they dealt at arm's length, and were represented by their own attorneys during all of the negotiations, and the preparation and execution of the contract."

[1, 2] There was no trustee relationship between the parties as a matter of law. It was a question of fact whether a confiden-

tial relationship existed. It was a reasonable deduction from the evidence that defendant did not repose trust and confidence in plaintiff. The finding is therefore conclusive on appeal. *Silver v. Shemanski*, 89 Cal.App.2d 520, 547, 201 P.2d 418; *Adams v. Talbott*, 61 Cal.App.2d 315, 320, 142 P.2d 775; *Wilson v. Sampson*, 91 Cal.App.2d 453, 460, 205 P.2d 753; *Laherty v. Connell*, 64 Cal.App.2d 355, 148 P.2d 895. Plaintiff therefore had no special duty by reason of the relationship of the parties to disclose any facts concerning Grace's interest in stock in Joseph Mesmer Company.

It is next contended that plaintiff made a partial disclosure of the facts relative to the property owned by Grace, and having done so was guilty of fraud in failing to disclose all the facts that were known to him. The court found that defendant or her attorney made no inquiry as to what interest Grace Mesmer had in either of the two corporations, and that defendant asked only if Joseph Mesmer Company was a stock company. There was evidence that defendant made no inquiry whatever as to the property owned by Grace Mesmer, and that plaintiff made no representation respecting the same, nor any statement which purported to disclose the facts with respect to any property which was owned by Grace Mesmer. Although defendant testified that plaintiff stated to her that Grace Mesmer owned nothing, plaintiff testified that he made no such statement. The court believed him. Moreover, the court found that defendant did not rely upon any statement of plaintiff, and in its memorandum opinion called attention to the testimony of defendant that plaintiff stated to her that Grace Mesmer did not own any separate property, but that she did not believe him. It therefore appears that no facts were established to the satisfaction of the court which would render applicable the rule that one who undertakes to make a disclosure of material facts and discloses some of them is under a duty to disclose the remainder. Both plaintiff and defendant testified that defendant voluntarily stated that she did not want to interfere in the business or with anything that plaintiff and Grace had at the plant, and that she

did not want any part of the business. The court found that when she made the statement that she did not claim any interest in the "plant" or the "business" she intended to disclaim all interest in Joseph Mesmer Company and St. Louis Fire Brick & Insulation Company. It would seem that the trial court would have been justified in regarding this disclaimer of defendant as an important fact in determining whether plaintiff had a duty to disclose Grace's ownership of stock in Joseph Mesmer Company, and in determining whether defendant expected plaintiff to state the facts with reference to said stock or believed that he had done so. Defendant's statement could have been understood as implying that she was not interested in learning whether Grace Mesmer had any interest in the business or the extent of any interest she might have. If it was so understood by plaintiff he could scarcely have been found guilty of a breach of duty in refraining from volunteering information on the subject.

[3-5] Defendant cites the rule that plaintiff's failure to disclose the ownership of the stock was actionable fraud in view of his superior knowledge of the facts. We have seen that plaintiff was under no duty to make such a disclosure, and if he had no duty it is immaterial with respect to the charge of fraud that he had knowledge of facts that were unknown to defendant. The findings acquit plaintiff of the charge of fraud. Misstatement or suppression of facts is not fraudulent unless motivated by an intent to deceive or to induce another to enter into a contract, Civ.Code, sec. 1572, or unless it amounts to a breach of duty, sec. 1573. The question of actual fraud is always one of fact. Civ.Code, sec. 1574. The finding against the charge of fraud may not be disturbed.

The court found that in entering into the agreement defendant did not act under a mistake of fact, but that she acted with the intention previously expressed in her statement that she claimed or wanted no interest in plaintiff's business. The court did not make any finding as to whether defendant had knowledge of the ownership of the stock at the time she entered into the agreement although the court made com-

ment in its written opinion that it was a strange circumstance that the letter signed "Father" was not discovered when the contents of the safe deposit box were examined. The court did find, however, that defendant was put on notice that Grace Mesmer may have had an interest in stock in Joseph Mesmer Company by means of the letter written by Mr. Hammack and the changes which he caused to be made in the agreement that had been prepared by Mr. Bentley. These circumstances were of special importance in considering defendant's claim that she entered into the agreement under a mistake of fact. The court found that if defendant was unaware of Grace Mesmer's ownership of the stock her ignorance was due to her inexcusable neglect of the legal duty to inquire as to any interest Grace may have had in the Joseph Mesmer Company.

[6] The agreement as proposed by Mr. Bentley provided, in part: "That the said Marie White will make no claim to and receive no portion of any assets standing in the name of A. J. Mesmer, including the business known as the St. Louis Fire Brick & Insulation Co., a corporation, or any interest said A. J. Mesmer may have herein, and including all other property standing in the name of said A. J. Mesmer, and Marie White recognizes and acknowledges the same to be the separate property of said A. J. Mesmer in which Grace Mesmer had no interest." This portion of the agreement was rewritten by Mr. Hammack to read: "That the said Marie White will make no claims to and receive no portion of any interest of Grace Mesmer *in the Joseph Mesmer Company* or the St. Louis Fire Brick & Insulation Co., or any interest said A. J. Mesmer may have therein, or in and to any assets standing in the name of A. J. Mesmer, and Marie White recognizes and acknowledges that A. J. Mesmer is either the sole owner thereof or else is entitled to have the same distributed to him. Marie White hereby assigns to A. J. Mesmer all interest she or Grace Mesmer may have in the property listed above." (Emphasis added.) The Bentley draft provided: "[s]aid A. J. Mesmer waives and relinquishes any rights to and makes no claim

to any property standing in the name of Grace Mesmer." As rewritten by Mr. Hammack this portion of the agreement stated: "The said A. J. Mesmer waives and relinquishes any rights to and makes no claim to any interest in the property *hereinafter* described." (Emphasis added.) The Bentley draft continued: "[a]nd acknowledges the same to have been the separate property of said Grace Mesmer which she was entitled to dispose of by Will and which she did leave to said Marie White," which portion was rewritten to read: "[a]nd acknowledges that the said Grace Mesmer was entitled to dispose of by Will and that she did leave the same to said Marie White by the Will hereinabove referred to." Mr. Hammack's letter stated, in part, that Mr. Mesmer was entitled to receive "all interest of Grace Mesmer in an to any other assets, and particularly any interest in either Joseph Mesmer Company or St. Louis Fire Brick & Insulation Company." Mr. Mesmer's position was clearly and frankly stated by Mr. Hammack, who emphasized that Mesmer *particularly* claimed any interest Grace had in the two corporations. It would seem clear that Mr. Hammack understood that Mrs. White had disclaimed any interest in plaintiff's business of which the stock was considered to be a part, and that he was seeking to have the understanding of the parties expressed in writing to avoid any future misunderstanding. And we think it could reasonably have been inferred that Mrs. White did not intend to claim any interest in Joseph Mesmer Company, and was not curious to know what Grace Mesmer's interest may have been at the time she executed the agreement, but developed an interest only when she discovered the number of shares owned by Grace Mesmer and the value thereof. She says in her brief: "The fact that the assets of the Mesmer Company was known to her to have come from Mr. Mesmer's family reasonably caused her to assume that any interest of Grace in them would not be significant, because they would be inherited by him. No reasonable person could have anticipated such a Christmas gift as was later found to exist." The court

was fully warranted in finding that defendant was put on notice by Mr. Hammack's letter and the revised agreement that Grace Mesmer probably had some interest in the business or its assets. We do not see how it could have been assumed that the changes Mr. Hammack made in the agreement were without a definite purpose, or that they did not add provisions which would be of material advantage to Mr. Mesmer. The court found that defendant was guilty of neglect of a legal duty in failing to make reasonable inquiry, or any inquiry, with respect to Grace's ownership of stock to which the Hammack letter and the redrafted agreement called attention. This was, in effect, a finding that defendant had notice of facts sufficient to put her on inquiry as to Grace's ownership of stock in Joseph Mesmer Company. In *Sime v. Malouf*, 95 Cal.App.2d 82, 104, 212 P.2d 946, 958, 213 P.2d 788, where the plaintiff claimed fraudulent concealment of material facts, it was said that "As to the claim of constructive knowledge, the issue was whether plaintiff had notice of facts sufficient to put a prudent man upon inquiry and if so, whether an inquiry, reasonably conducted, would have disclosed to him the true state of affairs. This question, of course, was one of fact for the trial court. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 312, 163 P. 47; *Taylor v. Wright*, 69 Cal.App.2d 371, 384, 159 P.2d 980. The finding that plaintiff had no such notice, if based upon conflicting evidence or reasonable inferences from the evidence, may not be disturbed by this court." See, also, *West v. Great Western Power Co.*, 36 Cal.App.2d 403, 411, 97 P.2d 1014; 20 Cal.Jur. 240, sec. 8.

[7] Defendant had actual knowledge that plaintiff was claiming, and expected to retain, any interest Grace had in the two corporations. The truth was not susceptible of concealment had diligent inquiry been made. The information which defendant possessed was clearly sufficient to charge her with the knowledge she would have gained had she made such inquiry.

[8] Courts of equity will not encourage the cancellation or revocation of instru-

ments on the ground of mistake where they appear to have been executed by the complainant without the exercise of reasonable care. Section 1577 of the Civil Code states the law with reference to mistakes of fact. It limits the mistakes for which relief may be granted to those that are not caused by the neglect of a legal duty. The cases uniformly apply this rule. *Taylor v. Taylor*, 66 Cal.App.2d 390, 398, 152 P.2d 480; *Fraters Glass & Paint Co. v. Southwestern Const. Co.*, 107 Cal.App. 1, 5, 6, 290 P. 45; *Roller v. California Pacific Title Ins. Co.*, 92 Cal. App.2d 149, 153, 206 P.2d 694.

[9] It is further contended by defendant that her agreement with plaintiff was no more than the release of a claim, and that under sections 1541 and 1542 of the Civil Code it did not extend to the stock in question. These sections read: Sec. 1541, "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration." Sec. 1542: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." No authority is cited for the proposition and we consider it to be without merit. The transaction was not one between debtor and creditor, nor was the agreement a mere release of a debt.

There was a finding that after the agreement was made plaintiff altered his position by reason thereof, could not be placed in the position he was in before the agreement was entered into, and, as a conclusion, that it would be inequitable to decree a rescission. It is unnecessary to discuss defendant's contention that this finding lacks support in the evidence.

[10] The order denying motion for a new trial being non-appealable, the purported appeal therefrom is dismissed; the judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

TEMESCAL WATER CO. et al.

v.

DEPARTMENT OF PUBLIC WORKS et al.*

Civ. 4476.

District Court of Appeal, Fourth District,
California.

Dec. 4, 1953.

Rehearing Denied Dec. 22, 1953.

Hearing Granted Jan. 27, 1954.

Proceeding on water company's petition for writ of mandate to have cancelled and withdrawn a permit to appropriate water. The Superior Court, Riverside County, Carl B. Hilliard, Judge assigned, denied the petition and petitioners appealed. The District Court of Appeal, Mussell, J., held that where petition did not set forth terms of permit and there was no showing of failure to perform any required duty, petition did not state facts sufficient to justify issuance of writ of mandate.

Judgment affirmed.

1. Evidence ⇐48, 51

Although District Court of Appeal may take judicial notice of records of public agency in proceeding for writ of mandate to cancel permit to appropriate water issued by Department of Public Works, District Court of Appeal should be furnished with some official information of contents of permit and application involved and of proceedings had thereon. Water Code, §§ 1250 et seq., 1360-1363, 1375(d); Code Civ.Proc. § 1094.5.

2. Waters and Water Courses ⇐133

The Division of Water Resources of Department of Public Works exercises only administrative functions and is without jurisdiction to finally determine existence or nonexistence of water subject to appropriation. Water Code, §§ 1250 et seq., 1360-1363.

3. Waters and Water Courses ⇐133

The existence of water subject to appropriation under a permit is a judicial question. Water Code, §§ 1250 et seq., 1360-1363, 1375(d); Code Civ.Proc. § 1094.5.

* Subsequent opinion 280 P.2d 1.

4. Mandamus ⇨71

Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of contingency a writ of mandate may be issued to control his action. Code Civ.Proc. §§ 1085, 1094.5.

5. Waters and Water Courses ⇨133

Where Department of Public Works issued permit to Water Conservation District to appropriate water, in absence of showing as to terms of permit, it would be assumed that Department made investigations of water resources and that permit was for unappropriated water only and subject to existing rights. Water Code, §§ 1250 et seq., 1360-1363, 1375(d); Code Civ.Proc. §§ 1085, 1094.5.

6. Mandamus ⇨87, 163

Where water company applied for writ of mandate to cancel permit to appropriate water issued by Department of Public Works, on ground that it should have been established that there was unappropriated water before permit could be issued, but department was not required to finally determine that fact, writ of mandate was not proper remedy and court properly sustained demurrer to the petition without leave to amend. Water Code, §§ 1250 et seq., 1250-1253, 1360-1363, 1375(d); Code Civ.Proc. §§ 1085, 1094.5.

Clayson, Stark & Rothrock, Corona, for appellants.

Robert E. Reed, Henry Holsinger, Mark C. Nosler and Gavin M. Craig, Sacramento, for respondents.

William O. Mackey, Leo A. Deegan, Ray T. Sullivan, Jr., and Arthur R. Seidler, Riverside, for plaintiff in intervention and respondent, Riverside County Flood Control District.

MUSSELL, Justice.

This is a petition for a writ of mandate in which petitioners seek to have canceled and withdrawn a permit to appropriate water issued by the Division of Water Resources of the Department of Public Works to the Riverside County Flood Con-

trol and Water Conservation District, plaintiff in intervention and a respondent herein.

The trial court sustained general demurrers to the petition without leave to amend. Petitioners appeal from the judgment which was thereupon entered denying the petition for a writ of mandate and discharging the alternative writ theretofore issued.

It is alleged in the petition that the Temescal Water Company, one of the petitioners and appellant herein, is a mutual water company engaged in furnishing water to the city of Corona and vicinity; that in order to provide an adequate water supply for its shareholders, the company had acquired water rights in and to the flow of the San Jacinto River in Riverside county; that said water rights are based upon appropriative use and upon diversions made pursuant to a permit issued by the Department of Public Works granting the company the right to appropriate "not to exceed thirteen (13) cubic feet per second by direct diversion from about March 1 to about December 15 of each season and throughout the remainder of the year as desired for domestic purposes and fifteen thousand (15,000) acre feet per annum by storage to be collected from January 1 to December 31 of each season"; that the water impounded has been stored in a reservoir behind a dam which the water company constructed in Railroad Canyon in 1927, which water has been placed to beneficial use; that the municipal water district includes within its boundaries the city of Elsinore, Lake Elsinore and the valley surrounding said lake; that the sole source of water to replenish said lake and the underground water supply of said valley, aside from a negligible amount of local runoff is the water flowing in the river; that the maintenance of property values in and the general prosperity of the municipal district depend directly upon the maintenance of an adequate supply of water in the lake and also in the maintenance of underground water levels in said valley; that on June 30, 1951, the Division of Water Resources of the Department of Public Works issued permit No. 8623 to the

Riverside County Flood Control and Water Conservation District (pursuant to application No. 12753) to appropriate not to exceed 3,070⁰ acre feet of water per annum from the water of Bautista Creek (one of the tributaries to the San Jacinto River and which flows in a northwesterly direction from its source in the San Jacinto mountains to its confluence with the river); that the division is authorized and directed, pursuant to the provisions of Division 2, Part 2 of the Water Code, Section 1250 et seq., to issue permits to appropriate waters subject to appropriation in the State of California; that in the performance of said duty the division is specially enjoined by section 1375 of said code which provides, as one prerequisite to the issuance of a permit, that "(d) There must be unappropriated water available to supply the applicant"; that there is no unappropriated water available in the river or its tributary creek to supply the conservation district pursuant to its application, or otherwise; that, to the contrary, there is not now, and for many years last past there has not been, sufficient water in the river system to service or satisfy the vested riparian and appropriative rights of petitioners and of others riparian to said river or possessing vested appropriative rights to the water therein; that the division was without power to issue a permit to the conservation district and the purported permit No. 8623 is void as beyond the jurisdiction of the division; that petitioners have no plain, speedy or adequate remedy in the normal course of the law; and that the conservation district is the real party in adverse interest to this proceeding. The prayer of the petition is for the issuance of a writ of mandate requiring the division to withdraw and cancel said permit No. 8623 and to enter an order denying said application No. 12753.

The principal question to be here decided is whether the petition states facts sufficient to justify the issuance of the writ of mandate. We are of the opinion that the answer to this question must be in the negative.

[1] The petition does not set forth the terms of the permit sought to be canceled or the application No. 12753 referred to therein. It was stated by counsel for respondents in the oral argument before this court that the said permit was granted subject to existing rights and only to unappropriated water and this statement was not denied by counsel for petitioners. While it is true that we may take judicial notice of the records of a public agency, we should be furnished with some official information of the contents of the permit and application involved and of the proceedings had thereon. *McPheeters v. Board of Medical Examiners*, 74 Cal.App.2d 46, 47, 168 P.2d 65; *Adoption of McDonnell*, 77 Cal.App.2d 805, 808, 176 P.2d 778. The respondent department, under the provisions of Division 2, Part 2, of the Water Code, section 1250 et seq., has authority to issue permits for unappropriated water only and may include therein terms and conditions. Under the circumstances shown by the record, we assume that the permit herein was, as stated by counsel for respondents, subject to existing rights and only to unappropriated water.

Sections 1360-1363, inclusive, Division 2, Part 2, Article 3, of the Water Code provide a method of review by the Superior Court ruling, order, decision, or other official action of the department and section 1094.5 of the Code of Civil Procedure provides for inquiry into the validity of administrative orders or decision by writ of mandate.

In *Boren v. State Personnel Board*, 37 Cal.2d 634, 234 P.2d 981, 982, the plaintiff sought to annul an order of defendant state personnel board dismissing him from his civil service position. The complaint was a complaint in a civil action. The court there said:

"Since the enactment of section 1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate 'for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law

a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board of officers * * *,'

* * * * *

"Review of an administrative order by means of mandamus is governed by section 1094.5 of the Code of Civil Procedure, which provides: '* * * (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.'"

In the instant case the petitioners have not attempted to proceed under these methods of review but have based their application on the provisions of section 1085 of the Code of Civil Procedure, which authorizes the issuance of a writ of mandate to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station", and they contend that the respondents cannot finally determine the facts of the existence or nonexistence of unappropriated waters, but, to the contrary, this determination is left to the courts. Citing *Department of Public Works v. Superior Court*, 197 Cal. 215, 221, 239 P. 1076, and *Tulare Water Co. v. State Water Comm.*, 187 Cal. 533, 202 P. 874.

[2] The provisions of the Water Commission Act of 1913, as amended, Deering's Gen.Laws, Act 9091, relative to the appropriation of water subject to appropriation are now contained in Division 2, Part 2, of the Water Code and the purpose of these provisions is to provide an orderly method for the appropriation of the unappropriated waters of the state. There is nothing in these provisions curtailing the rights of appropriators. As was said in *Bloss v. Rahilly*, 16 Cal.2d 70, 75, 76, 104 P.2d 1049, 1051:

"* * * the language employed in the act shows an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights."

The respondent department exercises only administrative functions, *Wood v. Pendola*, 1 Cal.2d 435, 442, 35 P.2d 526, and it is without jurisdiction to finally determine the existence or nonexistence of water subject to appropriation. As was said in *Tulare Water Co. v. State Water Comm.*, supra, 187 Cal. at page 537, 202 P. at page 876; it is manifestly impracticable for the Water Commission to authoritatively determine that there is not water in a given stream subject to appropriation; that what is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations and default in the use of riparian rights; and that it was not intended to grant to the commission in the matter of the preliminary permit to file upon unappropriated water more than a supervisory discretion in the matter of granting such permits.

[3] In *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 840, 123 P.2d 457, the court approved the language in *Tulare Water Co. v. State Water Comm.*, supra, that neither the question of priority between claimants nor the existence or nonexistence of unappropriated waters in a stream were questions to be finally determined by the water commission. In *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 528, 279 P. 128, it is said that the existence of water subject to appropriation under a permit is a judicial question. And in *East Bay Municipal Utility Dist. v. Department of Public Works*, 1 Cal.2d 476, 35 P.2d 1027, a petition for a writ of mandate was dismissed when the Department of Public Works inserted a condition in a permit that "the right to store and use water for power purposes under the permit shall not interfere with future appropriations of said water for agricultural * * * purposes.'" The petitioner therein insisted that to insert this provision in the permit was to exercise a

judicial function which could not be done by said state agency under the decisions. Citing *Tulare Water Co. v. State Water Comm.*, supra; *Mojave River Irr. Dist. v. Superior Court*, 202 Cal. 717, 262 P. 724; and *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 279 P. 128. The court quoted section 15 of the Water Commission Act, as amended in 1921, Stats. 1921, p. 443, reading as follows:

"The state water commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water the commission shall be guided by the above declaration of policy. The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

and held that under the statute unless and until the statutory requirements are met, the applicant obtains no property right or any other right against the state; that if the statutory prerequisites are not present, the application may be rejected in its entirety or a permit may be issued with qualifications as to the use of the water, and under neither hypothesis would it be the exercise of judicial authority; that when an application is filed setting forth the prerequisite facts in the statute, the state agency may not arbitrarily refuse the granting of the permit but may be compelled by mandamus to issue it; but unless all the conditions are present, the water commission may grant a qualified permit consonant with such conditions or may, if justified, reject the application altogether; and that the three cited cases relied upon by the petitioner therein were not at variance with the conclusion reached.

[4] In *Drummev v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 83, 87 P.2d 848, the rule is stated that where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency a writ of mandate may be issued to control his action.

[5] In the instant case it appears that the department had no authority to finally determine the existence or nonexistence of unappropriated water. It is required under the provisions of the Water Code, sections 1250 to 1253, inclusive, to consider and act upon all applications for permits to appropriate water and to do all things required or proper relating to such application. It is further required to make such investigations of the water resources of the state as may be necessary for the purpose of securing information needed in connection with applications for appropriation of water and to allow the appropriation for beneficial purposes of unappropriated water, under such terms as in its judgment will best develop, conserve and utilize the water sought to be appropriated. There is no requirement that the department make a final determination of the existence or nonexistence of unappropriated water nor can it do so under the cases cited. It is assumed that the department complied with these provisions for petitioners have not alleged facts showing a failure to perform a duty required to be performed by the department. The permit is for unappropriated water only and is subject to existing rights. It seems quite clear that the effect of the permit is only to establish a priority of applications in the event that there is in fact unappropriated water available for appropriation. Petitioners' rights are not affected by the granting of the permit. The petition is subject to a general demurrer in that it does not contain facts showing a failure to perform a duty required to be performed by the department.

[6] It is argued that the court erred in sustaining the demurrer without leave to amend. However, petitioners base their application for a writ on the ground that it must have been established that there was

unappropriated water before a permit could be issued. As noted, the department was not required to finally determine this fact. Under the circumstances shown by the record, a writ of mandate is not the proper remedy and it does not appear that the petition for a writ could be amended so as to entitle petitioners to the relief sought.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



121 Cal.App.2d 686

PEOPLE v. CANDALARIA.

Cr. 5084.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1953.

Prosecution for sale of heroin to a minor. Defendant was convicted and he appealed from the judgment and from the order of the Superior Court, Los Angeles County, Mildred L. Lillie, J., which denied his motion for a new trial. The District Court of Appeal, Fox, J., held that testimony of minors who were familiar with heroin and its effects was sufficient to support finding that defendant furnished heroin to the minor.

Judgment and order affirmed.

1. Criminal Law ⇨563

The corpus delicti may be proved by circumstantial evidence.

2. Poisons ⇨9

In prosecution for sale of heroin to a minor, the weight of the evidence as well as the inferences to be drawn therefrom was for the jury.

3. Poisons ⇨9

In prosecution for sale of heroin to a minor, testimony by minors who were fa-

miliar with heroin and its effects, that defendant had furnished them with heroin, was sufficient to support implied finding that defendant had furnished heroin to the minor. Health and Safety Code, § 11714.

4. Criminal Law ⇨1159(2)

On appeal from conviction for sale of heroin to a minor, court could not re-weigh evidence and draw inferences contrary to those drawn by the jury. Health and Safety Code, § 11714.

5. Criminal Law ⇨452(1)

In prosecution for sale of heroin to a minor, admission of testimony of a minor, who was familiar with heroin and its effects, that substance which defendant administered to her was heroin, was within the discretion of the superior court. Health and Safety Code, § 11714.

6. Poisons ⇨9

In prosecution for sale of heroin to a minor, the weight of testimony by a minor, who was familiar with heroin and its effects, that the substance furnished to her by defendant was heroin, was for the jury. Health and Safety Code, § 11714.

7. Criminal Law ⇨1169(2)

Where witness testified without objection that substance administered to her by defendant was heroin, subsequent testimony to the same effect by another witness, even if erroneously admitted, was not prejudicial. Health and Safety Code, § 11714.

8. Criminal Law ⇨1186(4)

In prosecution for sale of heroin to a minor, where there was direct evidence that defendant furnished a substance to minors, although there was only circumstantial evidence that substance was heroin, and where defendant denied the direct evidence, Superior Court's refusal to give requested instruction on circumstantial evidence was not prejudicial and did not result in a miscarriage of justice. Health and Safety Code, § 11714; Const. art. 6, § 4½.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loeb, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of violating section 11714 of the Health and Safety Code in that he sold, furnished and administered heroin to Rosamond, a minor. He appeals from the ensuing judgment and order denying his motion for a new trial.

In January of this year, Bob drove Rosamond and her girl friend, Carol, also a minor, to defendant's home. The latter joined them in Bob's automobile where Rosamond had a conversation with him about the purchase of some heroin from him. Defendant left the car and went to the side of the house and returned with some object in his hand. There was further conversation between the girls and defendant relative to buying "half a cap." Carol asked defendant "if it was good and he said yes." Rosamond gave defendant \$5. The four young people drove to an orange grove on the other side of San Fernando, stopping at a hydrant, however, to fill the top of Carol's make-up case. Upon reaching the middle of the orange grove they stopped. Defendant brought forth a cellophane packet of capsules from his sock. Then "an outfit" consisting of a hypodermic needle, eye-dropper, cotton, matches, and bottle cap was produced. Defendant then emptied a white powder from one of the capsules into the bottle cap, put in a few drops of water, mixed it and "cooked it" by applying a lighted match. By the use of the eye-dropper and cotton the liquid was transferred to the needle, injected into Rosamond's arm and the back of Carol's hand. Defendant also had an injection.

On another occasion, at Carol's home, defendant furnished capsules of light brown powder which were "cooked" in the bath room, where the liquid was injected into the girls' veins. There was testimony that at another time Rosamond gave defendant \$10 for "two caps." Carol never gave defendant any money directly, but she gave it to Rosamond for delivery to him.

Carol testified that she had used heroin at least 30 or 40 times, at irregular intervals,

and had gotten it either by sale or gift from ten to fifteen different people before she met defendant. She had blue needle marks on the back of both hands and wrists when she testified. She described the sensation and testified that she got the same effect from these injections. When she gave up the use of narcotics she suffered certain withdrawal symptoms which she described. Rosamond had used various narcotics for about two years, having used heroin perhaps twenty times during the past year. She, too, described the sensations and effects of these shots. The testimony of the girls as to the method of preparing heroin for injection, its color, the sensation received from it, and the withdrawal symptoms caused by failure to use the drug corresponded very closely to that of an expert on the same subjects.

Defendant's appearance had changed considerably between the time of these incidents and the trial. When he was associating with these girls he had a mustache; at the trial he had no mustache, and his hair was darker.

Defendant not only denied furnishing the girls any narcotics but also denied ever having known either of them. He further sought to establish an alibi by showing that he was working on his uncle's ranch near Lancaster, California, on the crucial date.

Defendant attacks the judgment upon three grounds: (1) that the People failed to prove the corpus delicti; (2) that the court erred in permitting Rosamond to testify that the substance furnished her by defendant was heroin; and (3) that the court erred in refusing to give certain requested instructions. None of these contentions, however, is meritorious.

[1-3] In support of his argument that the corpus delicti was not established, defendant insists it was not shown that the substance he allegedly furnished Rosamond was heroin. Ordinarily, the character of such substance is proved by a trained expert who has made a chemical analysis thereof. Here no such proof was offered because none of the powder was available for analysis. This, however, is not fatal to the People's case for the corpus delicti

may be proved by circumstantial evidence. *People v. Cullen*, 37 Cal.2d 614, 624, 234 P.2d 1; *People v. Ives*, 17 Cal.2d 459, 463, 110 P.2d 408. The jury had for its consideration on this question the testimony that before the quartet drove to the orange grove Rosamond told defendant she wanted to buy some heroin; that she gave him money therefor; the presence of an "out-fit" for its preparation and injection; the description of its preparation; that both girls (as well as defendant) received injections; the exhilarating effect of this, and the later injections in the bathroom at Carol's home; the similarity of the sensations on those occasions with those the girls had experienced from such injections before ever meeting defendant; the withdrawal symptoms; and the similarity of the sensations and effects, both from the injections and the deprivation thereof, with those described by the expert. There was also the testimony of defendant's changed appearance which justified an inference of consciousness of guilt. The weight of the evidence as well as the inferences to be drawn therefrom, was, of course, for the jury. It cannot be said as a matter of law that there was not substantial evidence to support the implied finding that defendant furnished heroin to the minors.

[4] The basic difficulty with defendant's argument on this phase of his case is that he would have this court reweigh the evidence and draw inferences contrary to those drawn by the jury. Under well established principles, we are not at liberty to do so. *People v. Gould*, 111 Cal.App. 2d 1, 243 P.2d 809.

[5,6] In view of the many experiences which Rosamond had had with narcotics in general and with heroin in particular, and in view of the closeness with which her description of the sensations and effects of heroin injections compared to the testimony of the expert on those topics, it was not error to permit her to testify that the substance furnished her by defendant was heroin. The competency of a witness to express an opinion on a matter of

this kind is largely within the sound discretion of the trial court and the ruling thereon will not justify a reversal in the absence of an abuse of such discretion. *People v. Ravenscroft*, 90 Cal.App.2d 543, 547, 203 P.2d 109; *People v. Horowitz*, 70 Cal.App.2d 675, 689, 161 P.2d 833. We find no such abuse here. The weight, of course, to be given this testimony was for the jury.

[7] In this connection it should be pointed out that Carol was on the stand before Rosamond was called, and that she testified without objection that the substance defendant injected into her arm was heroin and that it was the same substance that was injected into Rosamond's arm. Therefore, assuming, *arguendo*, that it was error to admit Rosamond's testimony that the substance was heroin, it could not be considered as prejudicial.

[8] Defendant argues that the court committed prejudicial error in refusing to give requested instructions that the jury could not find the defendant guilty on circumstantial evidence alone unless the circumstances were consistent with the hypothesis of guilt and irreconcilable with any other rational conclusion, and that each fact essential to complete the chain of circumstances establishing guilt must be proved beyond a reasonable doubt. Here, it must be remembered, only a part of the evidence is circumstantial. While the evidence as to whether or not the substance furnished to Rosamond was heroin is essentially circumstantial, that connecting defendant with the crime is direct. The girls testified directly from their observation that defendant furnished them a powdery substance, helped prepare it for use, and administered the resulting liquid to them. Defendant not only denied participating in the events to which the girls testified but denied knowing either of them and claimed an alibi. That the jury did not believe the story told by the defendant is implicit in the verdict. As the jury believed that defendant did furnish the substance to the two girls, a different verdict seems improbable even though the

requested instructions had been given. Hence the failure to give them was not prejudicial and did not result in a miscarriage of justice. *People v. Scott*, 112 Cal. App.2d 350, 352, 246 P.2d 122; California Constitution, art. VI, § 4½.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J.,
concur.



121 Cal.App.2d 616

STOCKTON THEATRES, Inc.

v.

PALERMO et al.

Civ. 8139.

District Court of Appeal, Third District,
California.

Nov. 30, 1953.

Rehearing Denied Dec. 16, 1953.

Hearing Denied Jan. 27, 1954.

Action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment that lessee recover \$13,658.75 from lessor, and both parties appealed. The District Court of Appeal, Van Dyke, J., held that lessee should not have been allowed \$3000 spent in compromising escheat action brought by state after lease had been declared void and should not have been allowed \$29,333.44 paid by him as personal income taxes on receipts from theater.

Judgment modified and, as modified, affirmed, and cause remanded with directions.

1. Appeal and Error ⇨1208(1)

Where a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all things lost by reason of

lower court's judgment, and, accordingly, the courts will, where justice requires it, place such party as nearly as may be in condition in which he stood previously.

2. Appeal and Error ⇨1208(6)

Where judgment or decree of an inferior court is reversed by final judgment upon appeal, restitution may be directed and provided for in the original action or in a separate action instituted for such purpose. Code Civ.Proc., § 957.

3. Appeal and Error ⇨1208(5)

In restitution action by person who has obtained reversal, upon appeal, of judgment or decree of an inferior court, defendant must account for property received under judgment which has been reversed, and rule governing extent of defendant's liability is that applicable to a trustee.

4. Appeal and Error ⇨1208(1)

Where lessor of theater had, under unlawful detainer judgment, taken possession of theater after it had been closed for the night and had caused execution to be levied upon all theater personalty, which lessor thereafter rented at \$25 a month from purchaser at execution sale, and lessor reopened theater for business two weeks later, but, after remittiturs had been received following reversal of judgments for lessor in unlawful detainer action and in action to have lease declared void, theater realty and personalty, restored by lessor to lessees, was properly treated as a unit for purposes of accounting made to obtain restitution for lessees.

5. Appeal and Error ⇨1208(1)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, fundamental purpose of the court was to do equal and exact justice insofar as that could be done to lessee, which, by judicial error, had been deprived of its property, its business, and its business opportunity, and, therefore, it was not unjust to require lessor to ac-

count for all that he had received through his enforcement of such judgments was not unjust.

6. Appeal and Error ⇨1208(1, 6)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, lessee, to make out right of restitution, had only to show that things of value had passed from it to lessee through enforcement of such judgments and that thereafter such judgments had been reversed, and, thereupon, court had duty to place parties back, as nearly as possible, in situation in which each had been when the erroneous judgments were rendered.

7. Appeal and Error ⇨1208(8)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, lessor could not avoid restitution by pleading matter outside issues of action to have lease declared void.

8. Appeal and Error ⇨1179

An appellate court may refuse to grant restitution to successful appellant as part of the proceedings on appeal where to do so would involve taking of account and trial of many issues of fact which would be raised during course thereof.

9. Appeal and Error ⇨1208(2)

Where restitution by means of accounting of profits of theater business conducted by lessor after he had taken possession of theater under judgment declaring theater lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, was justified, taking of such account would be done not as a matter of grace but according to rules governing such accountings, and, therefore, court could not give or withhold allowances arbitrarily but must do so in

accordance with recognized rules of accounting.

10. Attorney and Client ⇨21, 32

Relation of attorney and client is one of highest confidence, and, as to professional information gained while this relation exists, attorney's lips are forever sealed, notwithstanding his subsequent discharge by his client and notwithstanding the lack of any justification for such action, and, therefore, attorney must thereafter refrain from divulging client's secrets or confidences and from acting for others in any matters where such secrets or confidences or knowledge of client's affairs acquired in course of earlier employment can be used to former client's disadvantage.

11. Attorney and Client ⇨21

Test of inconsistency between interests of attorney's former and present clients is not whether attorney has ever appeared for party against whom he now proposes to appear but whether his acceptance of new retainer will require him, in forwarding interests of new client, to do anything which will injuriously affect former client in any manner in which attorney formerly represented former client and also whether attorney will be called upon, in his new relation, to use against former client any knowledge or information acquired through their former connection.

12. Appeal and Error ⇨1208(6)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, evidence was sufficient to sustain allowance to lessor for salaries and wages paid by lessor to theater employees after lessor had turned theater and its business back to lessee.

13. Appeal and Error ⇨1208(6)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor and unlawful detainer action, both of

which judgments were reversed, evidence was sufficient to sustain allowance to lessor for repairs, maintenance, and services, for automobile repairs, insurance, and depreciation, and for supplies, theater insurance, and sundry expenses.

14. Appeal and Error ⇐1208(5)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgments for lessor on unlawful detainer action, both of which judgments were reversed, lessor was not entitled to allowance for \$2,000 paid in settlement of state's claim of escheat which arose after lease had been declared void and of \$1,000 for attorney's fees in connection therewith.

15. Appeal and Error ⇐1208(5)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor and unlawful detainer action, both of which judgments were reversed, allowance to lessor, concerning \$10,000 capital improvements, including an air conditioning system, based on the income tax depreciation rates used by lessor concerning such capital improvements was proper.

16. Appeal and Error ⇐1208(5)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgments, thereafter reversed, declaring lease void and for lessor in unlawful detainer action, allowing lessor rentals which lessee would have been obligated to pay under lease had lessee been in possession did not constitute an abuse of trial court's discretion.

17. Appeal and Error ⇐1208(6)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after defendant had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, allowing

lessor a management fee of 50% of net profits derived during 32 months of his operation of the theater business, amounting to \$52,115.99, presented a factual issue which, being substantially supported by the evidence, would prevail upon appeal.

18. Appeal and Error ⇐1208(5)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, lessor was not entitled to allowance for personal income taxes paid by him on receipts from theater.

19. Appeal and Error ⇐1208(6)

In action by corporate lessee of theater to compel lessor to account for income derived from theater after lessor had taken possession of theater under judgment declaring lease void and under judgment for lessor in unlawful detainer action, both of which judgments were reversed, question of allowance of interest upon amount ultimately found to be due was question for trial court as trier of fact, and denial of such allowance did not constitute an abuse of trial court's discretion or a failure to do equity.

20. Interest ⇐18(2)

Generally, where an accounting is required in order to arrive at a sum justly due, interest is not allowed.

Freed, Gebauer & Freed, San Francisco, for appellant.

Smith & Zeller, Stockton, John A. Montgomery, Jr., Sacramento, for respondents.

VAN DYKE, Presiding Justice.

On November 20, 1944, Stockton Theatres, Inc., a corporation, whose capital stock was almost wholly owned by Japanese nationals, was in possession of certain real property in Stockton, California, upon which it was conducting, in a building designed and equipped for that purpose, a

theater business. Its lease antedated the abrogation by the United States of the treaty with Japan, which had followed the beginning of war between the two countries. On June 5, 1944 Emil Palermo, the owner of said theater property, began an action against Stockton Theatres, Inc., in the form of an action for declaratory relief. He alleged that a controversy existed between the parties as to the validity of the lease in that he contended, and the theatre company denied, that the abrogation of the treaty had terminated the lease. The history of the litigation so begun is sufficiently set forth in the Supreme Court decision reported in 32 Cal.2d 53 et seq., 195 P.2d 1. It is sufficient to say here that on June 11, 1945, a judgment was made and entered by the trial court in the cause, declaring the lease to be void as being in violation of California law governing the ownership and leasing of property by aliens ineligible to citizenship. Immediately Palermo began a second action against the theatre company based on alleged unlawful detention of the real property and on December 1st following he secured a favorable judgment in that action. Pursuant to court order he was placed in possession of the real property and maintained this possession until August 11, 1948. The theatre company had in proper time appealed from both judgments and both judgments were reversed. Since the only issue tendered in the declaratory relief action was the effect upon the lease of the treaty abrogation it followed that the filing of the remittitur ended the litigation as to that issue and had the effect of adjudicating that the lease was valid and that under it the theatre company was entitled to possession as a tenant. The judgment in the unlawful detainer action depended upon the validity of the declaratory relief decree.

Palermo turned back to the theatre company the possession of the real property and likewise returned to it certain personal property, consisting of theater seats, projection machines, screens and other theater paraphernalia. This personal property Palermo had caused to be sold under writ of execution issued in the unlawful detainer suit, the judgment therein having decreed

that in addition to the possession of the real property he recover a sum of money from the theatre company. At this execution sale one Rowan purchased the personal property and later purported to rent it to Palermo in place in the theater as it was when he bought it. Palermo thus restored to the theatre company the real and personal property which he had come into possession of through the two judgments he had secured against his tenant. The theatre company, deeming that restitution to which it was entitled was still incomplete, brought this action for further recovery. During his possession, and by use of the real and personal property, Palermo had conducted a theater business and by this action the theatre company asked that he be compelled to account to it for the income he had derived therefrom. Responsive to this demand, the trial court took an account and as an end result adjudged that the theatre company recover from Palermo the sum of \$13,658.75. Both parties to the action have appealed.

A person whose property has been taken under a judgment "is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." (Restatement of the Law of Restitution, Sec. 74.)

"The law proceeds upon the theory that, in equity, the party who receives money or property in good faith under an erroneous judgment, thereafter reversed, should be required to restore what he has received, and not upon the theory of a supposed wrong committed. Restitution must be made of all that was received under the erroneous judgment, but no further liability should be imposed. After reversal the respondent stands in the position of a trustee for the appellant of the property obtained under the judgment. He must handle that property as an ordinarily prudent man of business would, and is not chargeable with more than he received. Neither is he liable for losses if he acted in good faith and with common skill, prudence, and diligence. But if he converts the property to his

own use, he is liable for its value at the time of the conversion, with interest." (4 Cal.Jur.2d "Appeal and Error" sec. 676.)

[1-3] " * * * Where a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all the things lost by reason of the judgment in the lower court; and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously. * * * The restitution may be directed and provided for in the original action itself (Code Civ. Proc., § 957), or may, as here, be sought in a separate action instituted for that purpose. * * * In such action the defendant must account for the property received under the judgment which has been reversed, and the rule governing the extent of his liability is that applicable to a trustee, * * * "The general doctrine being that trustees ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, they will not be chargeable with more than they have received nor held responsible for losses that may arise, when they have acted in good faith and with common skill, prudence and diligence." Ward v. Sherman, 155 Cal. 287, 291, 100 P. 864, 865.

The foregoing was said in a case wherein under a judgment later reversed possession had been given of a cattle ranch, together with the cattle, horses, mules, wagons, harness, farm tools and machinery thereon and which possession had endured for approximately four years before the judgment was reversed. Our Supreme Court approved the taking of an account respecting the cattle business which the judgment holder had conducted thereon after being placed in possession.

[4] We will treat first of the appeal of Palermo. He contends first that no judgment awarding any restitution or decreeing any recovery of money from him

ought to have been entered, for he says that he had already returned all that he had received, saying that by the writ of possession in the unlawful detainer action he had taken over only the real property which included the theater building and this he says he had returned. In this contention the evidence does not bear him out. Palermo himself testified that when he entered the Star Theatre for the take-over the theater had been showing pictures that day; that he went there with the constable at 11 o'clock at night after everybody had gone and that on the following day he closed the theater down; that he kept it closed for two weeks and then began showing pictures again. It is true that the trial court found that, when Palermo took over, the theatre company had ceased to do business on the premises. In view of the uncontradicted testimony of Palermo himself that finding is without support. Palermo argues further that he did not take possession, under the judgments, of the personal property with which the theater was conducted, but here he turns a very sharp corner. He caused execution to be issued upon the money award decreed in the unlawful detainer judgment, caused it to be levied upon all of the said personal property and, when it had been sold for a nominal price of \$250 to one Rowan, he rented the same from Rowan at \$25 a month and continued to use it in conducting the business. This equipment had not been removed from the theater building. These facts and circumstances, coupled with the acts of Palermo in restoring this property, along with the real property, after the remittiturs had been received, fully supported the trial court in its treatment of the property, both real and personal, as a unit so far as the accounting was concerned.

[5] Palermo contends further that no accounting ought to have been taken and that the recovery should have been limited to the use value of the property, less the agreed rental therefor. There might be circumstances under which such a measure of recovery would not only be necessary but would also be just; but it does not lie in the mouth of Palermo to say that the theatre company either could have been or should

have been limited to such recovery. It was renting the property from Palermo as a moving picture theater and the building was designed and equipped for that purpose. Palermo, therefore, took over something more than bare walls and empty seats. The fundamental purpose of the court in responding to the demand for restitution was to do equal and exact justice in so far as that could be done to the corporation which, by judicial error, had been deprived of its property, its business and its business opportunity. We cannot say on this record that the means adopted, that is, an accounting of the profits of the business, as well as a restitution of the physical property involved, was not fully warranted. On the contrary, it would appear from the record herein that no less a measure of recovery would have been responsive to the just demands of the theatre company. The position of Palermo is well described by Justice Cardozo in *Golde Clothes Shop v. Loew's Buffalo Theatres*, 236 N.Y. 465, 141 N.E. 917, 919, 30 A.L.R. 931, 935, as follows: "The defendant knew, when it made the improvements, that its right to the possession was contested by the tenant. It knew that an appeal was pending. It took the risk, and went ahead." Here Palermo was guilty of no wrongdoing in seeking to acquire the fruits of the judgments he had obtained, yet he knew those judgments were not final and that the basic one had already been made the subject of an appeal. He knew that if that appeal was unsuccessful it would only be because the uncertain question of whether or not his tenant's lease had been made void by the abrogation of the treaty referred to, should finally be resolved in his favor; and he knew that if the appeal was successful he would be subject to a demand by the theatre company that he account for all that he had received through his enforcement of the questioned judgments. We see nothing unjust in the court's holding him to such an accounting.

[6] Palermo contends further that the theatre company in the period between the declaratory relief judgment and the take-over under the writ of restitution had allowed the theater premises to become in

a state of disrepair in violation of a covenant of the lease which required the lessee to keep and maintain the premises and all parts thereof in a clean and orderly manner and condition; that by reason of this breach of the lease the theatre company had no right of restitution. The theatre company could not, he says, compel a performance of the lease which it had breached. This contention, however, misconceives the scope and purpose of the restitution action. To make out the right of restitution it was only necessary for the theatre company to show, what of course could not have been denied, that things of value had been taken from it through the judgments appealed from and through Palermo's enforcement thereof and had passed into Palermo's hands and that thereafter the judgments had been reversed. Immediately the right of restitution arose and it was the duty of the court to place the parties back as nearly as could be in the situation in which each had been when the erroneous judgments were rendered. Says the Restatement, *supra*, Comment b:

"The rule [of restitution] is applicable whether the judgment subsequently reversed was originally valid or was void. Where money has been paid thereunder or property has been transferred, a court issuing such judgment nevertheless has power to remedy the consequences of its error and to order restitution * * *

"* * * Upon a reversal of the judgment anything paid by way of settlement can be recovered from any person not a bona fide purchaser, although the payment was made without duress, although no execution was issued, and although the payor could have obtained a supersedeas or stay of execution * * *

"The fact that the judgment was merely set aside and that no final judgment was entered for the payor does not prevent restitution; if the appellate court vacates the judgment and orders a new trial, a person who has satisfied the judgment vacated is entitled to restitution."

[7] Palermo did not in the original action for declaratory relief seek to have the invalidity of the lease declared upon any ground other than the effect he contended the treaty abrogation had had upon it, and it was by reason of the judgment he secured in the litigation of these issues he had tendered that the property and rights of his tenant passed into his possession. In the restitution action, therefore, he cannot avoid restitution by pleading matter outside the issues of the original suit. Upon this point we quote the following from 5 C.J.S., Appeal and Error, § 1984:

"Matters which might have been pleaded in the original action cannot be set up as a defense in an action or proceeding for restitution; neither is it a defense that the judgment creditor received the money in good faith, or that the next trial or hearing will result in the same judgment or decree as the first.

"* * * no claim outside of the original suit, and not disposed of by the judgment, can be set up."

This contention of Palermo's cannot, therefore, be sustained even though the trial court did permit him to introduce evidence as to whether or not the asserted obligation of the lease had been breached and obtain a finding that it had been. The trial court rightly ignored the finding by concluding that, notwithstanding the same, restitution would be enforced.

[8,9] Palermo further contends that the theatre company cannot attack the accounting for the reason that, as he puts it, "Restitution and damages are entirely discretionary and this is a complete answer to appellant's argument that the trial court erroneously allowed numerous credits to Palermo." To some extent it may be said that whether or not the remedy of restitution will be granted may rest in the sound discretion of the court. Thus an appellate court may refuse to grant it as a part of the proceedings on appeal, where to do so would involve the taking of an account and the trial of many issues of fact which would be raised during the course of such accounting. And circumstances may justifi-

fy the accordance of other remedies than restitution when application for restitution is made in the trial court. But we have already held that restitution through accounting of the profits of the theater business conducted in the premises by Palermo was here justified, and that being so the taking of the account itself must be done, not as a mere matter of grace, but according to the rules governing such accountings as laid down in the authorities, some of which we have hereinbefore referred to. See, for example, *Ward v. Sherman*, supra. In such an accounting the court could not give or withhold allowances arbitrarily, but must give or withhold in accordance with recognized rules of accounting.

[10] Turning now to the appeal of the theatre company, we find it first contending that the trial court erred in holding that Forrest E. Macomber, one of the attorneys of record for Palermo, was not liable jointly with Palermo for all sums of money received by him derived from the proceeds of the theater business which Palermo had conducted. It is claimed that this liability of Macomber ought to have been adjudged for the following reasons: Before Palermo began the action wherein he sought to have the lease declared void, Macomber had acted as the attorney for the theatre company in an action which that company had brought, seeking to enforce against Palermo's predecessor in interest an option for a renewed ten-year term given it in a preceding lease and which option it alleged it had exercised; while so acting as attorney for the theatre company Macomber had obtained confidential information which he used when thereafter he "changed sides", as appellant puts it, and became one of the attorneys representing Palermo in the declaratory and unlawful detainer actions. The applicable rule is stated in *Wutchuma Water Co. v. Bailey*, 216 Cal. 564, 571, 15 P.2d 505, 508, as follows:

"* * * The relation of attorney and client is one of highest confidence, and, as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true, notwithstanding his subsequent discharge by his client and not-

withstanding the lack of any justification for such action.

"The obligation to represent the client with undivided fidelity does not end with the matter in which the lawyer may have been employed. Thenceforth the lawyer must refrain not only from divulging the client's secrets or confidences, but also from acting for others in any matters where such secrets or confidences or knowledge of the client's affairs acquired in the course of the earlier employment can be used to the former client's disadvantage."

Rule 5 of the Rules of Professional Conduct for the California State Bar provides:

"A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

The theatre company further invokes the rule stated in Restatement of the Law of Restitution, Section 197, as follows:

"Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary."

[11] Palermo does not deny that the foregoing authorities properly state the rules governing activities of an attorney who, having represented a client, thereafter represents an adversary, but says that under the facts the rules have no application. Upon these issues the trial court found in effect that Macomber was free from blame in the matter and was not liable to the theatre company. We think the finding is sustained by the evidence. As stated in *Wutchumna Water Co. v. Bailey*, supra, 216 Cal. at page 572, 15 P.2d at page 509, approving a statement by Circuit Judge Morrow in *In re Boone*, C.C., 83 F. 944, 952:

"* * * 'The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection.'"

As we have said before, the unlawful detainer action depended entirely for its justification upon the adjudication obtained in the declaratory action that the lease was void; and the declaratory action presented no issue of fact save only this: Was the theatre company a corporation whose stockholders were Japanese nationals? As to this issue of fact there was never any dispute and the declaratory action presented only issues of law for adjudication. The record of the declaratory action was introduced in evidence and therefrom it appears that Macomber was not an attorney of record, at least until after there had been filed therein by other attorneys representing the theatre company a stipulation that the stockholders of that company were subjects of Japan. Specifically upon the issue of whether or not he had ever obtained any confidential information concerning this sole issue of fact presented by the pleadings in the declaratory action Macomber testified that the nationality of the stockholders of the theatre company was a matter of common knowledge and not the subject of any information either gained or used by him or imparted by him to Palermo. Furthermore, if the theatre company believed that Macomber's accepting adverse employment was detrimental to it or involved a violation of professional ethics by Macomber it could have raised the objection at any time and upon a proper showing the trial court would have granted it preventive relief. *Wutchumna Water Co. v. Bailey*, supra, was a case wherein

the former client, who felt its former attorney was acting unprofessionally in taking adverse employment, sought and obtained an injunction preventing such activity. Apparently it was not until it filed this action for a money recovery that the theatre company advanced any claim before any court that Macomber's actions were harmful. We are not here called upon to rule upon or to comment on the actions of Macomber from the point of view of ethics. What appellant seeks here is a money recovery based upon a charge of unprofessional conduct and we think it clear from what we have said that the trial court's adverse findings find ample support in the record.

Palermo was in possession of the theater for approximately 32 months and the gross receipts for that period amounted to \$327,712.85

There was charged against this a series of items constituting generally such matters as federal admissions tax, Stockton amusement tax, salaries and wages, payroll taxes, film rental, legal cost, repairs, advertising, supplies and the like, yielding a total of..... 223,480.87

Leaving a balance at that point of..... \$104,231.98

The court allowed Palermo a management fee in the sum of 50% of this net amount, leaving a balance of..... 52,115.99

Palermo had paid personal income taxes to the State and Federal Governments upon his gross personal income, which, as per his filed returns, included all net receipts from the theater. The court ascertained that of the total payments so made by him there was attributable to receipts from the theater, and which the court charged against the theatre company, the sum of..... 29,333.44

This left a net theater profit for the whole period of.... 22,785.55

From this the court deducted rental at the agreed rate, and not paid by the theatre company, the sum of..... \$ 9,123.80

Leaving as the amount which the theatre company was adjudged to recover from Palermo the final figure of..... \$ 13,658.75

[12] Appellant attacks this accounting by pointing to specific instances of allowances which it challenges. It challenges in part the allowance for salaries and wages, claiming that Palermo was allowed credit for payment to employees made after he had turned back the theater and the business to the theatre company. These allowances aggregate \$294.27. We think it cannot be said that no allowance could be made after the day of the turn back since it did not necessarily follow that some payments beyond that date might not properly be made. We cannot say from this record that the court allowance of these items is not justified.

[13] The theatre company also challenges in part the allowance for repairs, maintenance and services, claiming that some of these items were improperly allowed since they were in the nature of capital investments or items of purely personal expense. Space will not permit us to treat of these challenges in detail and it must suffice to say that an examination of them does not demonstrate that they were not properly allowable. Much must, of course, be left to the discernment and judgment of the trial court in such matters. The same must be said as to certain challenges concerning allowances for auto repairs, insurance and depreciation on cars, the challenge being that to some extent these were matters personal to Palermo and not related to the theater business; and we must say the same as to the challenges to the allowances for supplies, theater insurance and sundry expenses.

[14] We now come to specific challenges of credits allowed Palermo where the challenge is that the items were for matters that had no relation to the business being accounted for. The first of

these was a credit of two items in the sum of \$3,000. This sum Palermo paid out in the compromise of an escheat action brought by the State of California. It appears that after Palermo began the declaratory action alleging that the lease was invalid because of the abrogation of the international treaty and after he had obtained a judgment so decreeing the State of California brought an action to escheat the real property involved, and, of course, the leasehold estate of the theatre company. Palermo appeared in the action through Mr. Macomber, his attorney, and the State's claim of escheat was settled for the sum of \$2,000. Mr. Macomber for his services received \$1,000. The complaint in the action was not served upon the theatre company and it made no appearance in the cause. It is not claimed by Palermo that the theatre company was consulted by him or his attorney or considered in any way and it is clear from the record that the sum paid the State in compromise of the escheat action and the sum paid the attorney for representing Palermo in that action were voluntarily paid by Palermo for his own use and benefit. We hold that neither of these sums can properly be charged to the theatre company. It may be that some indirect benefit resulted to the theatre company, but Palermo was in an adversary position to it throughout and can justly claim no credit against it because, in protecting his property interest, he, without even consulting the theatre company, much less being authorized by it, conferred some incidental benefit upon it.

[15,16] The theatre company attacks an allowance made by the court to Palermo concerning capital improvements, including an air conditioning system, the total cost being in excess of \$10,000. The amount of this total which was charged against the theatre company was arrived at by applying the income tax depreciation rates used by Palermo. To so allocate the cost of capital improvements appears to have been as an equitable an approach to the problem as could be arrived at and the allowance must be upheld. The theatre company likewise challenges the allowance by the trial court to Palermo of a sum representing

monthly rental under the lease for the period of Palermo's occupation of the theater. Says the appellant: "It is most inequitable to allow Palermo a credit for his unpaid rent during the period between the rendition and the final reversal of the erroneous judgments in his favor, in which he, rather than appellant-lessee, enjoyed the possession, income from and use of the leased theatre premises." We think the challenge is not sound. It was the duty of the trial court, in calling Palermo to account, to deal with both parties as justly as the circumstances would permit. In doing this the trial court was vested with a broad discretion and we think in allowing the rentals it acted within the proper bounds of such discretion. It must be borne in mind, as it undoubtedly was borne in mind by the trial court, that Palermo was not a wrongdoer in enforcing his judgments even though it finally turned out on appeal that those judgments had been erroneously rendered. Under such circumstances, when the trial court allowed a recovery by the theatre company from Palermo of the profits of the business it was just and fair that the ordinary and usual expense of operating such business, which includes rentals of leased premises, should be charged against the gross income.

[17] The court allowed to Palermo a management fee of 50% of the net profits derived during the period of his operation of the theater business. This allowance is challenged as being excessive. As we have seen, this fee for the period of some 32 months of management amounted to \$52,115.99. At first blush it is difficult to believe that so large a fee was justified. On full consideration, however, we have concluded that the trial court's decision on this matter ought to be accepted on appeal. The situation presented was an unusual one and the evidence shows no set standards nor even approximate standards whereby the trial court could be guided. Undoubtedly the trial court relied somewhat upon testimony of one of the officers of the theatre company who stated that under war conditions and while the stockholders were interned such a management fee had been contracted for by the theatre company.

This testimony, however, seems to be of little weight since it is so glaringly apparent that the bargain which the officers of this corporation could drive from the disadvantage of internment might well be far different from the bargain they could make under normal circumstances. In its attack upon this item the theatre company points to no expert testimony anywhere appearing by those in the theater business as to what would be a fair management charge. The trial court had itself taken the long and complicated account of that business and undoubtedly better realized the importance and the probable worth of management services than could anyone not so situated. A fair allowance was required and we think that the allowance made by the trial court is substantially supported and that the fixing of a proper allowance presented factual issues which, being so supported, must prevail on appeal.

The trial court allowed a credit to Palermo for his personal income taxes paid by him which the trial court found to be attributable to receipts from the theater business. The sum allowed was in excess of \$29,000, as hereinbefore stated. This allowance, however, was not final. The trial court found that there might accrue or become available to Palermo, and that he might receive, income tax refunds of all or a portion of the income taxes attributable to the theater business and paid by him and allowed to him as a credit in his account; that these benefits might come to him by means of his filing amended personal income tax returns and claims for refund or by means of negotiations, settlements and agreements with federal and state tax agencies. The court also found it was unable at the time to determine the amount of such tax benefits which might accrue or be received by Palermo in the premises and that the theatre company was entitled to receive from Palermo any and all tax refunds if and when Palermo should receive the same. The court concluded that Palermo ought to be, and he was therefore declared to be, a trustee of such tax claims above referred to and of the moneys which he might thereafter receive on account thereof and the court declared that it was reserving, and

did reserve, continuing jurisdiction of the cause for making such orders and decrees as might thereafter become meet and proper for the enforcement and the administration of said trust. The judgment decreed that Palermo was a trustee from the date of the judgment in respect to the tax claims referred to in the findings and conclusions and of the money which might be received by him therefrom, and that such money should be for the use and benefit of the theatre company. The court, by the decree, retained continuing jurisdiction as stated in the conclusions of law.

[18] Recalling that, while Palermo was not a wrongdoer in taking over the theater business, yet he was chargeable with knowledge that he did so by force of judgments not final and must therefore make restitution if reversal resulted from the pending appeals, we are unable to see how Palermo was justified in paying personal income taxes based upon his receipts from the theater business without taking available precautions to protect himself and the theatre company in the event he should be called upon to make restitution of those receipts. We think that Palermo's personal income tax situation had nothing to do with his accounting of the theater business in this action for restitution, nor do we think that the trial court's action in declaring Palermo to be a trustee of any claims he might have for tax refunds, with liability to pay over to the theatre company whatever he might receive by such claims, is a device in any wise fitted to achieve equity between the parties. The theatre company will, of course, have to pay its income taxes in respect of the benefit it derives from the theater business and we cannot see that Palermo's voluntary action in the payment of his personal income taxes could in any wise be for the benefit of the theatre company so that it ought to be charged with the amounts he thus expended. This charge against the theatre company cannot be upheld.

[19,20] Finally, the theatre company contends that for whatever moneys the account showed Palermo ought to turn over to it interest should be charged against him from the date the remittiturs were filed fol-

flowing reversal of the judgments under which he was acting. From that date, as has been seen from the authorities heretofore cited, Palermo was chargeable as a trustee for all property and benefits in his hands which came there through the enforcement of the judgments and which he ought, therefore, to restore. But certainly when the trial court determined, as we have said it did properly determine, that restitution should include not only the delivery of possession of the real and personal property passing into the possession and use of Palermo through the erroneous judgments, but also the profits accruing from Palermo's operation of the business, it became necessary not only that a detailed accounting of that business be taken, but also that a great multitude of determinations be made in order to ascertain the true profit which ought to be paid over to the theatre company. What has already been said illustrates the truth of this statement. The fundamental rule guiding the court in this proceeding was, so far as possible, to place the parties in as favorable a position as they could have been in had the judgments not been enforced pending appeal. Whether, therefore, it would be just and equitable that interest be charged from the date the remittiturs were returned upon such sum as after a long and complicated accounting might have been found then to have been due presented a question calling for judicial discretion in determining what equity required. This, therefore, we think presented an issue peculiarly for the trial court to determine in so far as the allowance of interest upon the amount ultimately found due be concerned, and we cannot say on this record that the trial court abused that discretion or in the refusal to allow interest prior to judgment failed to do equity. Generally speaking, where an accounting is required in order to arrive at a sum justly due, interest is not allowed. *Williams v. Flinn & Treacy*, 61 Cal.App. 352, 357, 214 P. 1024; *Davis v. Schneider*, 91 Cal.App. 631, 636, 267 P. 352; *Merchants' Collection Agency v. Gopcevic*, 23 Cal.App. 216, 221, 137 P. 609.

The judgment appealed from is modified and the cause is remanded to the trial court

with directions to surcharge the account of Palermo by adding to the sums for which judgment is to be rendered against him the sum of \$3,000, expended by him in the escheat proceedings, and the further sum of \$29,333.44 paid by him on income taxes; and as so modified the judgment is affirmed; the appellant theatre company to recover costs on appeal.

PEEK, J., concurs.

SCHOTTKY, J., not participating.

Hearing denied; EDMONDS, P. J., and TRAYNOR and SCHAUER, JJ., dissenting.



121 Cal.App.2d 750

PEOPLE v. OSTER.

Cr. 5054.

District Court of Appeal, Second District,
Division 2, California.

Dec. 8, 1953.

Hearing Denied Jan. 6, 1954.

Prosecution for assault with intent to rape, grand theft of automobile, and theft or unlawful taking and driving of the automobile. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgments of conviction for crimes other than grand theft, and defendant appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that the evidence supported the convictions.

Affirmed.

1. Rape ☞54(1)

Testimony of victim alone was sufficient to support conviction for assault with intent to rape.

2. Automobiles ☞355(10)

Evidence supported conviction for theft or unlawful taking and driving of automobile. Vehicle Code, § 503.

3. Indictment and Information ☞130

If person has committed several felonies of different varieties all may be

contained in one pleading so long as each is declared in a separate count.

4. Criminal Law Ⓒ200(1)

Fact that indictment in separate counts charged defendant with grand theft of automobile and with theft or unlawful taking and driving of the same automobile did not place defendant in double jeopardy. Pen.Code, § 954.

5. Criminal Law Ⓒ200(1)

If prosecutor chooses to charge one of two offenses by a different statement in separate count of same indictment, he may do so without placing defendant in double jeopardy. Pen.Code, § 954.

6. Criminal Law Ⓒ984

Where defendant is charged in one count of indictment with one offense and is accused in another count with another offense arising out of the same transaction, defendant may be punished under either of such counts but not under both of them. Pen.Code, §§ 654, 954.

7. Criminal Law Ⓒ157

Information filed the same month that crimes were alleged to have been committed was not barred by limitations.

George E. Oster, in pro. per., Albert C. S. Ramsey, Long Beach, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

MOORE, Presiding Justice.

About eleven o'clock in the evening of February 1, 1953, the prosecutrix, J. W., age 17, walked westward on the sidewalk of 23rd Street in Long Beach, carrying her shoes in her hand. She had just left a theater and was within a half block of her home. A cream colored automobile drove alongside her and parked at the curb. Its driver followed the young lady until she turned and looked at him. He grabbed her by putting his hand around her mouth and pulled her down onto the adjoining lawn. As he lay on top of her with one arm under her he told her not to yell. She jerked her

head away and "told him to stop it." He told her he was going to "have" her and offered her his watch and ring and placed his hand on her leg. She managed to rise to her feet but he threw her to the ground again and told her he would cut her throat if he had a knife. As they struggled he declared he "was going to have" her and touched her private parts beneath her garments. She then told him she would go with him to his car which he had repeatedly demanded. On the way she became hysterical, began to cry and ran to a neighboring house, knocked and related her experience to the master, the witness Haaland. In five minutes the police were there. They captured the miscreant, retrieved gloves, purse and one shoe and returned to the Haaland home where she recognized appellant as her assailant.

But another chapter in the career of this unfortunate man preceded his bestial experience on 23rd Street. A few minutes before he overtook J. W. he had entered the automobile of Mrs. Hill parked in front of a cafe on Santa Fe Street. He found that he could start it "by merely flipping the key or the lever and stepping on the starter." He took it away without Mrs. Hill's consent and immediately drove to 23rd Street where he struggled with J. W. and was apprehended by the police.

He was duly accused by the district attorney, count I, with assault with intent to commit rape by means of force and violence; count II, grand theft, by taking Mrs. Hill's car; count III, violating section 503 of the Vehicle Code in that he drove Mrs. Hill's automobile in her absence and without her consent, with intent to deprive her of its title and possession. After trial by a jury he was found guilty under counts I and III, and acquitted on count II. His motion for a new trial and his application for probation having been denied, this appeal was lodged from the judgment of conviction.

The grounds urged for reversal are: (1) the evidence was insufficient to sustain the judgment; (2) he suffered double jeopardy; (3) the "complaint is outlawed by the statutes of limitation."

The Evidence Is Sufficient

[1, 2] The testimony of Miss J. W. alone when believed by the jury is ample support for the verdict. *People v. Nye*, 38 Cal.2d 34, 37, 237 P.2d 1; *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. She saw him at the time of the attack; she saw him again in the police car about five minutes after she escaped from him. No doubt is left of his identity in view of subsequent events. That he attempted to commit rape is established not only by the testimony of the prosecutrix but by her midnight appearance, crying and beating the door of the Haaland home, and the complaint to the Haalands who called the police. The officers recovered from appellant the young lady's belongings which he had carried to the car. The officers discovered the cream-colored convertible, which had been reported stolen, while on the way to answer Haalands' call and found appellant crouched down in its front seat peering over his shoulder at the officer. He was forced to leave the car under threat to shoot, said he had been picked up by a girl and was waiting for her. On the morning of February 2, appellant signed a writing for Inspector Dyer in which he declared that he had visited a theater and a cafe and while at the bus stop "the girl" drove by and at his request took him in; that when he "made a play for her" she at first "shied away" but later agreed that she should expect it; that when she parked the car she left her purse and gloves. Later on the same day he told Inspector Sullans and the stenographer that he had gone to a bar on 16th Street; had seen "this convertible car" open and he entered it and started with "the switch," the ignition being unlocked; saw "this girl" on 24th Street for the first time; he intended "to try to pick her up" to have intercourse with her; that when he saw the girl walking on 24th Street he walked up to her; put his arms around her, put his hands over her mouth and said he would like to make a date with her, "would like to have a little fun with her"; he "didn't throw her down on the grass"; he held her shoulders and rubbed down her back "outside of her dress" trying

to induce her to have intercourse. He denied saying, "I will cut your throat."

On the following day he made substantially the same statement to Inspector Dyer and Deputy District Attorney Cochran but in their conversation he admitted that after he parked the convertible he walked up behind Miss J. W. and grabbed her.

No Double Jeopardy

Appellant has emblazoned the thirty-eight pages of his briefs with ill-tempered, rash and ill-considered utterances, demanding that he be granted a pardon. He says he was "arrested for three charges, unlawfully inflicted against him for one transaction"; was "unlawfully bound over for the same three independent indictments; still unlawfully under double jeopardy doomed helpless in his tracks"; "how could the district attorney mislead the court and try him and sentence him for two independent indictments based upon stealing the same automobile?" "Place him in peril of double jeopardy for two independent inflicted indictments based upon stealing the same automobile;" "that any attacks against him for three independent indictments, all happened at the same identical time"; "the State can't split one crime and prosecute in parts for two independent inflicted indictments based upon the same transaction of the same offence," etc.

[3-6] Appellant did not suffer double jeopardy. The accusations were lawfully drawn in one document. If a person has committed one hundred felonies of different varieties, all may be contained in one pleading so long as each is declared in a separate count. For instance, a person may be accused in one information of a felonious sex crime, and in separate counts he may be charged with grand theft, arson, and murder. If the prosecutor chooses to charge one of the offenses by a different statement, he may do so with safety. Penal Code, sec. 954. When a certain defendant is charged in count II under one statute and is accused under count III with different language but refers to the same transaction referred to in count II he may

be punished under either of such counts but not under both of them. Penal Code, sec. 654; *People v. Kehoe*, 33 Cal.2d 711, 714, 204 P.2d 321. In other words, when the act of the accused is charged twice in separate counts, he can be found guilty under only one of those counts.

No Limitation Involved

[7] There is no question of limitations involved in this action. The crimes charged to appellant were committed on February 1, 1953. The information was filed February 20, 1953. The district attorney could have filed it any time within three years after the offenses were committed.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.



121 Cal.App.2d 794

PEOPLE v. BASCO.

Cr. 2472.

District Court of Appeal, Third District,
California.

Dec. 9, 1953.

Defendant was convicted of having possession of narcotics. The Superior Court, San Joaquin County, R. M. Dunne, J., entered judgment and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that although defendant did not have actual possession of drug, fact that defendant knew her companion had large quantity of drug concealed on his person and that defendant accompanied him while moving from one hotel to another during early morning hours, was proof that defendant was participant in unlawful act of her companion and, with him, jointly interested in drug and hence constructively in possession of it.

Judgment affirmed.

1. Poisons ☞4

A person may be so closely interested in and connected with unlawful possession of narcotics by another as to furnish support for finding that there was joint possession.

2. Poisons ☞9

In prosecution for unlawful possession of narcotics, although defendant, who was user of narcotics, did not have actual possession of drug, fact that defendant knew her companion had large quantity of drug concealed on his person and that defendant accompanied him while moving from one hotel to another during early morning hours was sufficient proof that defendant was jointly interested in drug and hence constructively in possession of it.

3. Criminal Law ☞1144(13), 1159(6)

It is not the function of a reviewing court to determine whether circumstances relied on to justify conviction might be reasonably reconciled with the innocence of defendant, but court must assume in favor of verdict the existence of every fact that jury could reasonably determine from evidence and then determine whether or not reasonable jury could find defendant guilty beyond reasonable doubt.

John L. Briscoe, Public Defender, Stockton, for appellant.

Edmund C. Brown, Atty. Gen. by Gail A. Strader, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Appellant was informed against by the District Attorney of San Joaquin County for the crime of possessing narcotics. She was convicted and appeals from the judgment of conviction and from the order of the court denying her motion for a new trial.

On April 13, 1953, at about 2:30 P. M. police officers stopped appellant and one Rudy Landeros as they ascended the stairway from the lobby of a Stockton hotel en route to their room. The officers made a superficial search, then went on to the room where a further search revealed two boxes of narcotics which Landeros was

carrying concealed in the front of his trousers. No narcotics were found on appellant. The officers showed the packages to appellant, however, and asked her if there were any more and she replied that there were not, that the officers "had all of it". In a statement given later, appellant said that she knew her companion had the narcotics in his possession and in the front of his trousers. Also she said that she had known he had the narcotics when they left Los Angeles to come to Stockton and ever since he got them; that she also brought a quantity of narcotics with her on that trip. Appellant had been living with Rudy Landeros for some time and they were registered at the hotel where they were intercepted as "Mr. and Mrs. Loma". They had lived together at three other hotels, all in Stockton, and within ten days. The only narcotics found in the possession of either was that found on the person of Landeros. Appellant said she had used that which she brought. Appellant denied that the narcotics found on Landeros belonged to her and that she had any interest therein or had ever had possession thereof. Since appellant was accused of unlawful possession, and there being no direct evidence thereof, the sufficiency of the evidence to sustain her conviction must rest in circumstances. This circumstantial evidence may be summarized as follows: Appellant was a user of narcotics. She brought a quantity of narcotics to Stockton from Los Angeles a few days before her arrest. She and Landeros came from Los Angeles together, registered as husband and wife and moved several times in a short period from hotel to hotel. The quantity of narcotics found on Landeros amounted to 128 capsules of heroin valued at \$5 per capsule. Appellant, as stated above, indicated she knew how much heroin was being carried by Landeros while in her company. It is the claim of the prosecution that from the foregoing the jury could reasonably infer a joint possession of the narcotics between appellant and Landeros.

[1] A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for a finding that there was

a joint possession. *People v. Le Baron*, 92 Cal.App. 550, 561, 268 P. 651, 269 P. 476. See also, *People v. Bill*, 140 Cal.App. 389, 397, 35 P.2d 645, 649, where the court said: "Even though the cocaine were found in the joint possession of the defendant and Evelyn Moore, he would be guilty of violating the statute prohibiting the possession of narcotic drugs." See, also, *People v. Noland*, 61 Cal.App.2d 364, 143 P.2d 86, holding the evidence there was sufficient to show possession of narcotics found in a vase located in a hallway, the court saying that it was unnecessary in such cases to prove that the person accused had the narcotics on his person. Nothing in *Grantello v. United States*, 8 Cir., 3 F.2d 117, relied on by appellant, is contrary to the statements in the foregoing cases as the *Grantello* case must be distinguished on its facts.

[2] Applying the law as laid down in the statute involved and in the cases referred to, we think the evidence was sufficient to sustain the appellant's conviction. It could not, and indeed is not, contended that the possession of Landeros was lawful. The jury were entitled to infer that appellant knew this and had known it before leaving Los Angeles; that the quantity Landeros had was large and that heroin in that amount was quite valuable; that the handling of the heroin and its concealment as engaged in by Landeros to appellant's knowledge and in her company, along with the frequent moving from one hotel to another and the carrying of heroin in that amount on the person of Landeros in the early morning hours was proof that appellant was a participant in the unlawful acts of Landeros and, with him, jointly interested in the drug and hence constructively in possession of it.

[3] Attacking the evidence of constructive possession as being entirely circumstantial, appellant relies upon *Willsman v. United States*, 8 Cir., 286 F. 852, 854, 855, 856, which declares that the evidence respecting possession of narcotics as presented in that case was wholly circumstantial, was compatible with the theory of innocence, and that in such a situation it was the duty of an appellate court to reverse a judgment of conviction. Whatever may be

the rule in the Federal jurisdiction, the rule in California is otherwise. *People v. Hui-zenga*, 34 Cal.2d 669, 213 P.2d 710, holds: It is not the function of a reviewing court to determine whether the circumstances relied on to justify a verdict of conviction might be reasonably reconciled with the innocence of defendant. The court must assume in favor of the verdict the existence of every fact that the jury could reasonably determine from the evidence and then determine whether or not a reasonable jury could find defendant guilty beyond a reasonable doubt. See, also, *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

The judgment and the order appealed from are affirmed.

SCHOTTKY, J., and PAULSEN, J., pro tem., concur.



121 Cal.App.2d 761

GERALD

v.

SAN FRANCISCO UNIFIED SCHOOL
DIST. et al.

Civ. 15566.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1953.

Hearing Denied Feb. 3, 1954.

Action by student, passenger in automobile, against school district, board of education operating city college, and another for injuries sustained when fellow student-driver, who had been required by fraternity initiation proceedings to go without sleep for several days, fell asleep and automobile crashed into bridge. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for defendants, and passenger appealed. The District Court of Appeal, Fred B. Wood, J., held that where there was evidence that passenger had released driver in another action, question whether pas-

senger had received full compensation for injuries was for jury.

Judgment reversed.

1. Release ⇐29(3)

Where school authorities allegedly breached duties as to supervision of school activities and negligently permitted city college student who had been required, as part of fraternity initiation proceedings, to go without sleep for several days, to drive automobile and negligently permitted student-passenger who sustained injuries when automobile crashed into bridge to ride in automobile, school authorities and driver were not joint tort-feasors and hence release of driver by passenger in another action would not release school authorities in present action unless full compensation was made for passenger's injuries. Code Civ. Proc. § 597.

2. Release ⇐58(1)

In action by student, passenger in automobile, against school district, board of education operating college and another, for injuries sustained when fellow student-driver who had been required by fraternity initiation proceedings to go without sleep for several days, fell asleep and automobile crashed into bridge, where there was evidence that passenger had released driver in another action, question whether passenger had received full compensation for injuries was for jury. Code Civ. Proc. § 597.

Mancuso, Herron & Winn, John Wynne Herron, San Francisco, for appellant.

Dion R. Holm, City Atty., Edward F. Dullea, Deputy Atty., San Francisco, for respondents.

FRED B. WOOD, Justice.

The sole question upon this appeal is the legal effect of plaintiff's release of the defendant in another action. Did it operate to release the defendants herein despite the express reservation of certain of plaintiff's claims against them?

Plaintiff, a student at City College of San Francisco, brought this action for damages against the district and the board of education which operate the college, and

against Roy Walker as agent and employee of the district and the board.¹

He alleges that he was injured when a car in which he was riding, driven by a fellow student who had fallen asleep, crashed into a certain bridge on their return from a college fraternity initiation held at Rio Nido; that the initiation proceedings required plaintiff and the driver of the car, as pledgees, to go without sleep for a period of several days; that the district and the board had knowledge of, authorized, and conducted such proceedings, and negligently permitted the fellow student to drive in an extremely exhausted, sleepy and dangerous condition, and negligently permitted plaintiff to ride in a car operated by a person in such a condition.

These defendants answered, setting up several defenses. As their third defense, they allege that, in a separate action against the driver of the car, Donald Forsyth, plaintiff for a valuable consideration released and discharged Forsyth "from any and all claims arising out of the injuries alleged in the complaint to have been received by plaintiff."²

The instant case was tried solely upon the issue presented by the third defense, the asserted release of a joint tort-feasor; the trial, if any, of other issues, to await the determination of this plea in bar, as provided in section 597 of the Code of Civil Procedure.

The entire file in the other action (including the release and discharge of Forsyth) was put in evidence by the defendants. Plaintiff then read to the jury that portion of the complaint in the other action

which alleged the serious character of plaintiff's injuries (a severe cerebral concussion, laceration of his frontal lobes, multiple depressed compound fractures of his facial and frontal bones, great pain and mental anguish, extreme and permanent disfiguration of his face and head)³ and that portion of the release of Forsyth which in terms excepted therefrom the district, the board and the fraternity as to "any claim or cause of action the undersigned [plaintiff herein] may have against any of them arising out of their negligent supervision and control of the Beta Phi Beta Fraternity initiation proceedings * * *

Plaintiff's counsel then asked him, "Mr. Gerald, when you received the money from Mr. Forsyth that was paid to you, can you tell us whether or not you received that in full satisfaction for all your injuries or whether you received that in partial satisfaction for your injuries?" Defendants' objection to this question was sustained upon the ground, as stated at the time, that it called for plaintiff's conclusion and that the agreement of release was in evidence.

The court directed a verdict for the defendants. From the judgment entered thereon, plaintiff has appealed.

Can we say, from the pleadings and the facts in evidence, that the release of Forsyth operated as a release of these defendants? No.

[1] They were not joint tort-feasors as described in the complaints and it does not appear as a matter of law that there has been full compensation for all of plaintiff's injuries.

1. Beta Phi Beta Fraternity, a corporation, is also a defendant but is not involved upon this appeal.

2. The action against Forsyth was predicated upon his alleged willful misconduct as driver of the car, in violation of his obligation toward plaintiff as a guest rider. The court in approving the compromise of plaintiff's claim against Forsyth (plaintiff was a minor) ordered plaintiff's attorneys to dismiss that action with prejudice, but expressly declared that any claims or causes of action in favor of plaintiff and against the

district, the board, or the fraternity "arising out of the claimed negligent supervision and control of the Beta Phi Beta initiation proceedings are not released and are not compromised or settled at this time." The defendants herein were not parties to that action.

3. Defendants stipulated, without prejudice to their theory of the case, that, for the purpose of this hearing, the injuries thus described constitute the injuries to the plaintiff and it would not be necessary to call the doctor to testify concerning the nature and extent of the injuries.

Plaintiff's claims against Forsyth and the defendants herein were predicated upon the violation of distinct and separate duties owed by them respectively: Forsyth, the duty which as the driver of the car he owed plaintiff as his guest rider; these defendants, the duties which plaintiff claims they owed, as the authorities in charge of the school, to supervise school activities for the safety of the students including plaintiff. Nor do the complaints indicate concert of action, unity of purpose or design, and a common purpose upon the part of Forsyth and these defendants. In such a case their acts do not create a joint liability. They give rise to separate and independent causes of action. Therefore, the release of Forsyth did not release the others unless full compensation was made for plaintiff's injuries. See *Ash v. Mortensen*, 24 Cal.2d 654, 657-660, 150 P.2d 876, injuries caused by negligent operation of a motor vehicle, aggravated by negligent medical treatment; *Alexander v. Hammarberg*, 103 Cal.App.2d 872, 879-882, 230 P.2d 399, damages for a contractor's breach of a building contract and for negligence of the architect in supervising the work; *Prosser, Joint Torts and Several Liability*, 25 Cal.L.Rev., 413-425; *Prosser on Torts*, pp. 1107-1111.

[2] The question whether plaintiff received full compensation for his injuries is one of fact, as presented by the record before us. The Forsyth release recites payment of \$17,000 to plaintiff. His injuries were serious, some of them permanent. He was claiming \$24,000 damages in that action, filed within four weeks of the accident; \$200,000 in this action, filed eleven months after the accident. It was error to withdraw that issue from the jury.

The judgment must be reversed for further proceedings not inconsistent with the views herein expressed. Nothing herein said is determinative of any issues other than those presented by the Third Defense; e. g., the legal sufficiency of the complaint or of other defenses tendered by the defendants is not involved upon this appeal.

The judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

122 Cal.App.2d 55

GREENMAN et al. v. ROGERS et al.

Civ. 19510.

District Court of Appeal, Second District,
Division 3, California.

Dec. 15, 1953.

Hearing Denied Feb. 10, 1954.

Action for personal injuries sustained in intersectional automobile collision. After verdict for defendants, the Superior Court, Los Angeles County, Raymond McIntosh, J., entered order granting plaintiffs' motion for new trial, and defendants appealed. The District Court of Appeal, Vallée, J., 263 P.2d 95, affirmed the order. On rehearing, the District Court of Appeal, Vallée, J., held that where order granting new trial did not specify that the motion was granted on ground of insufficiency of evidence to sustain verdict, conclusive presumption arose that the motion was not granted on such ground, and absence of any error, other than insufficiency of evidence, which would justify granting of new trial, required that order be reversed.

Order reversed.

1. Appeal and Error ⇐854(6), 867(2)

On appeal from order granting new trial which is not grounded on insufficiency of evidence to sustain verdict, court has duty to consider entire record on which order was based to discover whether there was any error which would have justified trial court in making the order, and if the order is not sustainable on some ground other than insufficiency of evidence to sustain verdict, it must be reversed.

2. Appeal and Error ⇐933(4)

On appeal from order granting new trial, which order did not specify that the motion was granted on ground of insufficiency of evidence to sustain verdict and thus raised conclusive presumption that the motion was not granted on that ground, absence of any error, other than insufficiency of evidence, which would justify granting of new trial, required reversal of order. Code Civ.Proc. § 657.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for appellants.

Joseph Lewis, Palo Alto, for respondents.

VALLÉE, Justice.

Appeal by defendants from an order granting a new trial in an action for damages for personal injuries.

The cause was tried by a jury with the verdict for defendants. The order granted a new trial to "Martin Greenman as Guardian Ad Litem of Benita Greenman only." It did not specify that the motion was granted on the ground of the insufficiency of the evidence to sustain the verdict, or the ground on which it was granted.

[1] Since the order did not specify that the motion was granted on the ground of the insufficiency of the evidence to sustain the verdict, it is conclusively presumed it was not granted on that ground. Code Civ. Proc. § 657; *Roth v. Marston*, 110 Cal.App. 2d 249, 257, 242 P.2d 375. It is the duty of the court on an appeal from an order granting a new trial which is not grounded on the insufficiency of the evidence to sustain the verdict, to consider the entire record on which the order was based to discover whether there was any error which would have justified the trial court in making the order. *Renfer v. Skaggs*, 96 Cal. App.2d 380, 385, 215 P.2d 487. If the order is not sustainable on some ground other than the insufficiency of the evidence to sustain the verdict, it must be reversed.

[2] The accident was a collision between two automobiles in a street intersection. Respondent argues the sufficiency of the evidence only—that the intersection was blind, respondent's car entered first, appellant driver did not see respondent's car until it was about 10 feet from his car, and appellant driver was guilty of negligence per se as a matter of law. Respondent does not suggest that the order was made for any cause other than insufficiency of the evidence to sustain the verdict. We have examined the record to discover whether there was any error which would have justified the court in making the order and have found none.

Cal.Rep. 263-264 P.2d—31

As we have noted, the order granted a new trial to "Martin Greenman as Guardian Ad Litem of Benita Greenman only." Appellants urge that the order fails to grant a new trial to anyone. It is unnecessary to decide the point. Since the order did not specify that the motion was granted on the ground of the insufficiency of the evidence to sustain the verdict, and since there was no error which would justify the granting of a new trial, the order must be reversed irrespective of this question.

The order is reversed.

SHINN, P. J., and WOOD, J., concur.



122 Cal.App.2d 165

LEVENSTEIN v. HENIE et al.

Civ. 19754.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1953.

Rehearing Denied Jan. 11, 1954.

Action for attorney's fees. The Superior Court, Los Angeles County, Harry J. Borde, J., entered judgment and plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence supported trial court's findings that only 5¾ hours were required by plaintiff in traveling to and from, and rendering legal services in Chicago.

Judgment affirmed.

Attorney and Client ☞ 166(3)

In action for attorney's fees, evidence supported trial court's finding that only 5¾ hours were required by attorney in traveling to and from, and rendering legal services in Chicago.

Morton B. Harper, and Morton R. Goodman, Beverly Hills, for appellant.

Scudder & Forde, Pacific Palisades, Guy Richards Crump, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

Plaintiff's assignor is an attorney and the action herein is for attorneys fees. Plaintiff was awarded \$2,473.75. Plaintiff's appeal is based "upon three specific points, to-wit: First, the finding by the trial court that only five and three-fourths (5¾) hours were reasonably required by plaintiff's assignor in traveling to and from, and rendering legal services at Chicago, Illinois; Second, the failure of the trial court to allow any reimbursement for expenses incidental to such travel other than airplane fare to and from Chicago, Illinois; and, Third, the finding of the trial court that \$25.00 per hour is a reasonable fee for legal services rendered by plaintiff's assignor, this appeal being not only as to the finding by the court as to reasonable value, but also the failure of the trial court to distinguish between the value of the hours devoted by plaintiff's assignor to defendants' interests within the Los Angeles area and the value of hours devoted outside of the Los Angeles area, with particular reference to services rendered in Chicago, Illinois."

The court found as a fact that "The total number of hours reasonably required by the plaintiff's assignor to render said services is 85¾ hours, of which time 80 hours were performed in the State of California and 5¾ hours in the State of Illinois."

It is contended that, I. "The finding by the trial court that only 5¾ hours were reasonably required to render the legal services rendered in the state of Illinois is contrary to the evidence, is manifestly error, and constitutes an abuse of judicial discretion;" II. "The failure of the trial court to allow any reimbursement for expenses incidental to travel to and attendance at Chicago ignores the evidence and constitutes an abuse of judicial discretion" and that, III. "The trial court erred in finding that the total reasonable value of the legal services rendered is the sum of \$2,143.75, based on compensation computed at \$25.00 per hour."

In effect appellant argues that the decision of the trial court constitutes an abuse of discretion.

Respondent argues on the contrary that "Appellant seems to be under the impression that because Sonja Henie 'is a highly successful performer and theatrical producer * * * with an admitted annual capital investment of one-half million dollars' that Mr. Harper's services have a greatly increased value.

"The truth is that most of his services consisted in filling out printed forms of contracts for the signature of skaters and other artists.

"There were other services performed, but none we submit, that are not adequately compensated by the \$25.00 per hour awarded by the trial court. Especially is this so as much of the work was of a nature which could have been performed by a legal secretary or clerk."

In support of the foregoing respondents quote from *Freese v. Pennie*, 110 Cal. 467, 469, 42 P. 978, 979, as follows:

"Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation, and also inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing before the court the value of services performed in large estates fortunate enough to possess well-filled coffers. Under these conditions, when upon the witness stand as experts, they entertain most liberal views as to what should be the amount of a brother attorney's allowance, and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree. When a court has done this, this court, as an appellate court, only has the right to interfere with its judgment when a plain and palpable abuse of its discretion (for it has a large discretion in such matters) has occurred."

The evidence was conflicting but, as pointed out by respondent, "the trial court

had before it detailed evidence of the nature and extent of the services rendered". Inasmuch as there is substantial evidence to support the findings, the trial court's judgment in this regard is final. A review of the record reveals no prejudicial errors and in particular there is no evidence of an abuse of discretion.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



122 Cal.App.2d 104

ARMOUR v. BANK OF AMERICA et al.

TURNER v. BANK OF AMERICA et al.

Civ. 15561, 15562.

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1953.

Actions were brought for malicious prosecution. Orders were entered sustaining motions of defendants to strike amended complaints from the file and to dismiss the actions, and plaintiffs thereafter made motions to be relieved from their default in failing to file amended complaints within statutory time. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered orders adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding of Superior Court that defaults of plaintiffs were not excusable, and that plaintiffs were therefore not entitled to relief.

Orders affirmed.

Judgment ¶162(4)

On motions by plaintiffs, in actions for malicious prosecution, to be relieved from their default in failing to file amended complaints within statutory time, evidence sustained finding of trial court that defaults

were not excusable, and that plaintiffs were therefore not entitled to relief.

Vincent Hallinan, Doris Brinn Walker, San Francisco, for appellants.

Doyle & Clecak, San Francisco, G. D. Schilling, San Francisco, for respondents.

NOURSE, Presiding Justice.

By stipulation of the parties the above causes are consolidated for hearing and by stipulation are submitted for decision without oral argument. The two appeals are based upon the same grounds—that the trial court abused its discretion in denying appellants relief from their default in failing to file amended complaints within the statutory time, in sustaining defendants' demurrers to the second amended complaints and in dismissing the actions.

The complaints were based upon charges of malicious prosecution arising out of contempt proceedings in relation to other litigation then pending. These proceedings were dismissed on the grounds that the affidavit charging contempt was insufficient and that the alleged contemnor had not been given proper notice of the order on which the contempt was based.

The original complaints were filed on May 1, 1950. Demurrers were sustained on March 19, 1951, and amended complaints were filed on April 26, 1951. Demurrers to these amended complaints were sustained on June 19, 1951, with leave to amend. Notice was duly waived. More than six months thereafter—on January 25, 1952, the plaintiffs filed their second amended complaints. On February 28, 1952, the defendants moved to strike these pleadings from the file and to dismiss the action. Both motions were granted.

During the hearing of these motions, Richard M. Siegel, attorney associated with Vincent Hallinan as attorneys for plaintiffs herein, filed an affidavit stating that, following the order sustaining the demurrers, he and Hallinan were involved as defendants in criminal proceedings then pending in the United States Federal Court and that during that time he obtained by telephone

an oral agreement with counsel for defendants that the time for filing amendments to their complaints "would be kept open." He also averred that he had not informed his associate Hallinan of this agreement until about six months later. These averments were specifically denied by counsel for defendants, and the trial court found them to be untrue. These facts were all before the trial court on the hearing of appellants' motions to vacate their defaults and the finding of the trial court that they did not excuse their defaults is fully supported by substantial evidence. The trial court found that no oral extension had been made. There is no basis upon which this court could reverse that finding.

Other questions argued, such as the claimed error in the sustaining of the demurrer, are inconsequential because the order dismissing the action effectively terminated the proceedings.

Orders affirmed.

DOOLING, J., concur.



121 Cal.App.2d 745

MORAND

v.

**SEASIDE MEMORIAL HOSPITAL OF
LONG BEACH et al.**

Civ. 19770.

District Court of Appeal, Second District,
Division 2, California.

Dec. 8, 1953.

Action against hospital for personal injuries. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for hospital, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence supported finding that plaintiff's injury did not result from negligence of hospital employee.

Judgment affirmed.

1. Appeal and Error ⇨1010(1)

Trial court's findings are conclusive on appeal if respondents' evidence, viewed in the most favorable light and credited with all intendments and reasonable inferences in its favor, supports the findings.

2. Hospitals ⇨8

In action against hospital for personal injuries, allegedly sustained when hospital employee allowed plaintiff, who was undergoing treatment for injuries sustained in previous accident, to fall to floor, evidence supported finding that injuries complained of did not result from the accident in the hospital.

3. Hospitals ⇨8

Where trial court found that plaintiff's injuries were not a result of hospital's negligence, although it found that hospital attendant was negligent in dropping plaintiff, there was sufficient finding of absence of damages from hospital's negligence.

Russell H. Pray, Long Beach, for appellant.

Gibson, Dunn & Crutcher, Los Angeles, Sherman Welpton, Jr., Los Angeles, for respondents.

MOORE, Presiding Justice.

From a judgment for defendants in an action for damages for personal injuries, plaintiff appeals.

One evening, appellant stepped out of her trailer home, fell forward, landing at least on one outstretched hand, and suffered a severe fracture of her left wrist. She went to respondent hospital where her doctor placed the wrist in a cast. While being transferred from the cast table to a wheel chair by respondent orderly, appellant slipped or was dropped to the floor. Subsequently it was noted that she had recently sustained a dislocation and fracture of the right shoulder which was then treated by her physician. Appellant filed this action alleging that the shoulder injury occurred as a result of the negligence of the orderly. The court found as follows: the orderly was a servant and agent of the hospital; appellant was intoxicated, which

fact was known to respondents who failed to use reasonable care in handling appellant; as a result of their failure, appellant slipped from the arms of the orderly and fell to the floor; the injury to appellant's right shoulder was not a direct and proximate result of such negligence. From these findings it may be inferred that the court found also that the shoulder injury occurred prior to appellant's entrance into the hospital.

Appellant now contends that the finding that she suffered no injuries as a result of the negligence of respondents is without support in the evidence.

[1] The trial court's findings are conclusive on appeal if there is substantial evidence to support them. An appellate court will view the evidence in the light most favorable to the respondent; will not weigh the evidence, and will indulge all inferences and reasonable inferences which favor sustaining the finding of the trier of fact. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557; *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689.

[2] There was considerable, conflicting evidence introduced as to the actual and possible condition of appellant on her entrance into the hospital. She argues that all the evidence which tends to support the finding either cannot by any possibility be true or that it is inherently incredible and hence must be disregarded. Such is not the fact, as the record discloses.

The orderly testified that prior to the fall, while moving appellant to and from the X-ray room, she would not allow him to touch either of her arms and that she complained of pain in both. He testified also that at the time of the alleged injury, appellant slipped to her knees, but her shoulder never touched the floor. The only other witness to testify concerning her fall to the floor did not know exactly how appellant fell, because his view was partially obstructed.

The resident doctor testified that he first saw appellant out of the corner of his eye in the company of two men in the receiving room; when he next saw her she was lying on an examining table; she com-

plained of pain in her left wrist and right shoulder; he noted the fractured wrist and attempted to examine her shoulder but was prevented from doing so by her husband who stated: "I just want the left wrist taken care of; that is why she was brought here to the emergency room." Also, the physician testified that the type of injury the shoulder received would be produced by a forward fall on an outstretched arm, not by toppling over onto the shoulder with the arm held in close to the side.

The surgeon who treated the injuries testified that the dislocated shoulder was clearly visible when appellant was in the wheel chair following her fall in the cast room; that he had previously seen her only while lying down when such a dislocation is not visually obvious. Such testimony is sufficient to support the findings.

Appellant makes much of her testimony that prior to the fall in the hospital she complained only of her wrist's paining her; that she supported the left wrist with the right arm, and that she put on a coat unassisted prior to the trip to the hospital. But there is testimony from one of the doctors to the effect that where there is more than one injury, a person is often conscious of only one and does not realize the second exists until the pain of the first subsides. Be that as it may, appellant's argument goes only to the weight to be given conflicting evidence, not its inherent incredibility.

[3] As a second ground for reversal appellant contends: "The failure to find on the question of plaintiff's damages is inconsistent with the other findings of negligence and error. Where the court finds that there is liability on the part of defendant to the plaintiff it is reversible error to refuse to award compensatory damages." This proposition indicates a lack of understanding of the record. The court *did make a finding* on the question of damages, namely, that as a proximate result of defendants' negligence, appellant was not made sick, sore or lame, nor was she injured in her right shoulder nor did she suffer shock, nor was she damaged; nor was she required to have hospitalization

or medical or X-ray care. From such findings the court concluded there was *no liability* on the part of respondents. In support of her contention, appellant cites 15 American Jurisprudence 795, section 356. That section contains the pronouncement, evidently overlooked, to wit, "There must be proof that the damage sought to be recovered has occurred, that it was caused by the wrong of defendant." The court determined that no injury to appellant was caused by respondents. Hence, appellant is not entitled to recover.

Bowers v. Olch, 120 Cal.App.2d 108, 260 P.2d 997; *Spencer Kennelly Ltd. v. Bank of America*, 19 Cal.2d 586, 589, 129 P.2d 552, cited by appellant, are not pertinent.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



122 Cal.App.2d 72

JOHNSON et ux. v. CELLA et al.

Civ. 8307.

District Court of Appeal, Third District,
California.

Dec. 15, 1953.

Action to quiet title to easement over defendants' property for $\frac{3}{4}$ inch pipeline, together with incidental right to enter and maintain flow of water through pipeline and for damages incurred as result of defendants' action of shutting off water and for loss of sale of plaintiffs' property. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment quieting title to easement in plaintiffs and awarding damages of \$500 and denied defendants' motion for new trial. Defendants appealed. The District Court of Appeal, Paulsen, J. pro tem., held that conflicting evidence supported finding that defendants had constructive notice of easement in plaintiffs.

Judgment and order affirmed.

1. Waters and Water Courses ☞158½(1)

In action to quiet title to an easement over defendants' property for a $\frac{3}{4}$ inch pipeline, together with incidental right to enter and maintain flow of water through said pipeline and for other relief, finding that "at the time of their purchase the defendants had actual notice of facts and circumstances sufficient to put them on inquiry as to the said pipeline and rights of plaintiffs", if supported by evidence, was sufficient without a further statement of facts that gave rise to notice. Civ.Code, §§ 19, 1104.

2. Easements ☞22

Purchaser of land who claims protection against one holding easement over land as a bona fide purchaser is entitled to such protection unless it is established that he is chargeable with actual or constructive notice of existence of the easement. Civ. Code, §§ 19, 1104.

3. Waters and Water Courses ☞158½(1)

In action to quiet title to an easement over property for a $\frac{3}{4}$ inch pipeline, together with incidental right to enter and maintain flow of water through said pipeline and for other relief, conflicting evidence supported finding that at time of purchase of land, purchasers had constructive notice of easement. Civ.Code, §§ 19, 1104.

Bruce B. Bruchler & Lovett K. Fraser,
Lakeport, for appellants.

Calfee, Gregg, Moses & Calfee, Gregory
Solich, Richmond, for respondents.

PAULSEN, Justice pro tem.

This is an action to quiet title to an easement over defendants' property for a $\frac{3}{4}$ inch pipeline, together with the incidental right to enter and maintain the flow of water through said pipeline.

Plaintiffs also claimed damages incurred as a result of defendants' action in shutting off the water and thereby depriving plaintiffs of household water and for loss of a sale of their property.

The court entered judgment quieting title to the easement in plaintiffs and awarding damages in the sum of \$500, and costs.

Defendants' motion for a new trial was denied. They now appeal from the judgment and the order.

The property here involved consists of three tracts lying adjacent to one another. On the most southerly side lies the Cella tract, owned by the defendants, and over which the plaintiffs claim the easement. To the north, and contiguous to the Cella tract, lies the Benson tract; and to the north of the Benson tract, and contiguous to it, lies the Johnson tract owned by plaintiffs. Plaintiffs previously had owned the Cella tract but on April 2, 1946, sold it to one Patton. In 1947 Patton acquired the Johnson and Benson tracts also, then owning and controlling all three as a single tract. Plaintiffs purchased the Benson and Johnson tracts from Patton on September 2, 1947. Defendants purchased the Cella tract from Patton on April 13, 1948. In March, 1949, Johnson sold the Benson tract to Benson.

At the time plaintiffs purchased the Johnson and Benson tracts from Patton they inspected the properties and found that the household water supply for the most northerly tract was supplied from a spring on the most southerly (now Cella) tract and that the pipeline was already installed. However, when the purchase of the northerly tract was made, nothing was said in the deed about the pipeline or water.

Throughout the trial and in the briefs filed on this appeal, appellants contended that plaintiffs never had an easement of any kind. Plaintiffs at all times insisted that one was created by implication under the provisions of section 1104 of the Civil Code. At the time of oral argument, appellants conceded the existence of the easement at the time Johnson purchased his tract from Patton. They argue, however, that they were bona fide purchasers of the Cella tract without knowledge or notice sufficient to put them on inquiry as to the existence of the easement.

[1] It is admitted that there was no record evidence of the easement, but the court found that "at the time of their purchase the defendants had actual notice of facts and circumstances sufficient to put them on inquiry as to the said pipeline and

rights of plaintiffs." Such a finding, if supported by the evidence, is sufficient without a further statement of the facts that gave rise to notice. *Rubio Canon, etc., v. Everett*, 154 Cal. 29, 35, 96 P. 811; *Kenniff v. Caulfield*, 140 Cal. 34, 73 P. 803.

[2] In an action of this kind the subsequent grantee who claims protection as a bona fide purchaser is entitled to such protection unless it is established that he is chargeable with actual or constructive notice of the existence of the easement. *Kenniff v. Caulfield*, supra; *Powers v. Perry*, 12 Cal.App. 77, 106 P. 595. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civil Code, sec. 19. He is bound to take notice of facts which a reasonable inspection of the land would disclose to him and to make further inquiry when something is visible that would suggest such a course to a prudent person, possessing ordinary faculties. *Pollard v. Rebman*, 162 Cal. 633, 124 P. 235; *Rubio Canon, etc., v. Everett*, supra; *Powers v. Perry*, supra.

[3] It was admitted that when appellants inspected the tract just prior to the purchase of it, it had a chicken yard lying adjacent to the south boundary of the Benson tract; that in the north portion of the chicken yard and somewhere between 9 and 15 feet from the Benson boundary line there was a standpipe with a valve on the north side thereof; that a pipeline led from this valve northerly across the Benson tract to the Johnson tract; that the pipeline was buried, but that about three or four inches of it were visible; that there was a depression several inches deep in the ground above the pipeline leading in the direction of the Benson tract. There were two standpipes rising from the pipeline on the Benson tract, both visible from the Cella tract, the nearest to it being about 300 feet distant. The Benson tract is about 1,000 feet wide and in the spring is covered with grass.

There was evidence to the effect that at least one of the appellants knew of the existence of the standpipe in the chicken yard

and that a shut-off valve connected it with the pipeline leading in the direction of the Johnson tract; that appellants knew that the source of water for that pipeline was a spring on the Cella tract; that they saw the pipeline leading off through the Benson tract to the Johnson tract but would not take the trouble "to see where the water went." There was also evidence showing they knew there was no public utility water available in the area and that some of their neighbors drew water from springs on the land of other owners.

Some of these facts were denied by appellants but this did nothing more than raise a conflict in the evidence to be resolved by the trier of facts.

There was abundant evidence to support the finding of constructive notice.

Appellants do not contend that there was error in awarding \$500 in damages if the easement existed in favor of respondents.

The judgment and the order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



121 Cal.App.2d 754

PEOPLE v. THOMAS.

Cr. 5090.

District Court of Appeal, Second District,
Division 2, California.

Dec. 8, 1953.

Hearing Denied Jan. 6, 1954.

Defendant pleaded not guilty to count I of information accusing him of kidnapping a woman and of having been previously convicted of two felonies and pleaded guilty to count II of information which charged him with having assaulted the victim of the alleged kidnapping and which included the two prior felony convictions. Defendant was sentenced to prison. Thereafter he filed petition for writ of error coram nobis. The Superior Court, Los Angeles County,

Clement D. Nye, J., denied petition for writ of error coram nobis and defendant appealed. The District Court of Appeal, Moore, P. J., held that allegations in defendant's petition that "he was terrorized, abused, intimidated, forced under his will or consent to enter a plea of guilty for fear of his life, and he was not represented by legal counsel" without setting forth means of intimidation or force used were insufficient to obtain writ of error coram nobis.

Judgment affirmed.

1. Criminal Law §997(11)

Petition for writ of error coram nobis which alleged that petitioner "was terrorized, abused, intimidated, forced under his will or consent to enter a plea of guilty for fear of his life, and he was not represented by legal counsel" but which did not allege means of intimidation or force used was insufficient.

2. Criminal Law §997(6)

Writ of error coram nobis cannot be used to correct an error of law committed at a trial.

3. Criminal Law §163

Doctrine of double jeopardy has no application to defendant who is tried but once on several counts arising out of same facts occurring at the same time. Pen.Code, §§ 654, 954.

4. Criminal Law §171

Where defendant pleaded not guilty to first count of information charging defendant with kidnapping a woman and having previously been convicted of two felonies and defendant pleaded guilty to count II charging defendant with having assaulted the victim of the alleged kidnapping and including the two prior felony convictions, defendant was never in jeopardy as to count to which he pleaded "not guilty", by virtue of statute forbidding double punishment. Pen.Code, §§ 654, 954.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Dep. Atty. Gen., for respondent.

Long V. Thomas, in pro. per., Grant B. Cooper, Los Angeles, of counsel, for appellant.

MOORE, Presiding Justice.

Appellant was at first accused by information of kidnapping a woman and of having previously been convicted of one felony in Shreveport, Louisiana, and of another in Los Angeles, California, and of having served a term in prison for each of them. At his arraignment, with his counsel present, he pleaded not guilty and denied the prior convictions. Five weeks after such arraignment, the district attorney filed an amended information which included a second count, charging appellant with having assaulted the victim of the alleged kidnapping by means of force likely to produce great bodily injury. Also, the amended pleading included the two prior felony convictions and prison terms and was filed on stipulation that count II be included. When arraigned on the double-barrel information, appellant, with his counsel present, repeated his denial of count I but pleaded guilty to count II and admitted both of the alleged prior convictions. Probation having been denied him, he was sentenced to the State Prison for the term prescribed by law and count I of the amended information was dismissed. Neither a motion for a new trial nor other effort to avoid the judgment was made. But five months and twenty-six days after sentence, appellant filed with the superior court his petition for writ of error coram nobis. He was there represented by the public defender, only to have his petition denied.

[1,2] The brief filed by appellant is such a confusion of misconceptions and misstatements of his rights that it is difficult to determine just what abuses he means to assert he was subjected to at the time of his plea of guilty. He says the prosecution denied him "all means of self-defense * * * they forced his prior conviction against him unlawfully * * * doomed him helpless in his tracks because he was a colored man * * * denied him all rights to have witnesses * * * to prove any part of his innocence." Such allegations of conclusions can serve no office in pursuit of a writ of error coram nobis. Neither can such writ be used to correct an error of law committed at a trial.

People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375. The petition itself is destitute of such an allegation of fact as would entitle appellant to the writ. It declares "he was terrorized, abused, intimidated, forced under his will or consent to enter a plea of guilty for fear of his life, and he was not represented by legal counsel." Not a word is said as to the means of intimidation or force used. His recital of the events at the time of his arrest is wholly irrelevant. No allegation of abuse or misuse by the police is pertinent to such a petition unless it be declared to have been the cause of petitioner's plea of guilty and then the facts must be set out in the petition. In People v. Chapman, 96 Cal.App.2d 668, at page 671, 216 P.2d 112, at page 114, the court said, "we are not bound, nor was the trial court, to accept at face value the allegations of the petition for the writ, especially since strong presumptions of regularity favor the judgment against petitioner." See In re Seeley, 29 Cal.2d 294, 299, 176 P.2d 24; In re Bell, 19 Cal.2d 488, 500, 122 P.2d 22; People v. Russell, 156 Cal. 450, 451, 105 P. 416. So far as can be told from the record, the district attorney as well as the court treated appellant at the time he pleaded guilty with kindness and consideration and there is no averment in the petition that any attache of the court mistreated the prisoner. A mere declaration that he was compelled to enter a plea of guilty is ineffective either to obtain a writ or to cause a reversal of the judgment denying a writ of error coram nobis.

[3,4] The claim that he is the victim of double jeopardy is a chimerical illusion of appellant. The form of pleading used in the amended information is common practice and is authorized by the Penal Code, § 954. Appellant stipulated to the amendment of the pleading by the insertion of count II. He now contends that by reason of the fact that both alleged crimes arose out of the same act, he was placed in "double jeopardy." If, in a set of facts occurring at the same time and place, two or more crimes are found to have been committed, each crime may be alleged in a separate count. However, the accused

can be convicted under only one of them. Penal Code, § 654. In the case at bar there was one information with two counts. Count II was based upon the same incident involved in the alleged kidnapping of count I. The accused was called on to plead to each count separately. He pleaded "not guilty" to count I but "guilty" to count II. By virtue of section 654, supra, he was never in jeopardy as to the count to which he was to plead "not guilty." The moment a judgment of conviction was entered, count I became a nullity destined to be dismissed. Where a prisoner is tried but once on several counts arising out of the same facts occurring at the same time, "double jeopardy" is impossible. See *People v. Chessman*, 38 Cal.2d 166, 193, 238 P.2d 1001; *People v. Amick*, 20 Cal.2d 247, 251, 125 P.2d 25; *People v. Degnen*, 70 Cal. App. 567, 576, 234 P. 129.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



122 Cal.App.2d 36

PORTIS v. PORTIS.

Civ. 4724.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1953.

Action for separate maintenance on ground of extreme cruelty. The husband filed cross-complaint, first for divorce on ground of cruelty and then, over year later, on ground of desertion. The Superior Court, San Bernardino County, Martin J. Coughlin, J., found that neither party was entitled to any relief. The husband appealed. The District Court of Appeal, Griffin, J., held, inter alia, that circumstances were not indicative of wife's intent to desert where parties were evicted for nonpayment of rent, husband made no at-

tempt to re-establish a home, and it was not until well over a year later that wife first categorically refused to return to husband.

Judgment affirmed.

1. Appeal and Error ⇐1011(1)

Where there was a conflict in the evidence, the District Court of Appeal could not determine that evidence established husband's extreme cruelty as ground for separate maintenance.

2. Divorce ⇐37(15)

Where parties were evicted for nonpayment of rent and husband made no attempt to re-establish a home, wife had just cause for living apart and such living apart was not desertion. Civ.Code, §§ 95, 96, 99.

3. Divorce ⇐37(6)

Where parties were evicted for nonpayment of rent and husband made no attempt to re-establish home, if wife did not ultimately conclude not to return to husband under any circumstances until trial of her action for separate maintenance and husband's cross-action for divorce, time of claimed desertion would run from that date and previously filed complaint for divorce on ground of desertion would be premature. Civ.Code, §§ 95, 96, 99.

4. Divorce ⇐133(3)

In cross-action for divorce on ground of desertion, findings of trial court that wife separated from husband in good faith and without intent to desert, and that husband failed to establish desertion on part of wife on date she first left his home were supported by the evidence. Civ.Code, § 98.

L. E. Dadmun, Pomona, for appellant.
Nichols, Cooper, Hickson & Lamb,
Pomona, for respondent.

GRIFFIN, Justice.

On February 6, 1951, plaintiff and cross-defendant, hereinafter referred to as plaintiff, brought an action against defendant and cross-complainant (referred to as defendant) for separate maintenance, alleging extreme cruelty. Defendant, on March 6, 1951, filed a cross-complaint for divorce

alleging cruelty. On September 15, 1952, he filed a supplemental cross-complaint, alleging that on January 27, 1951, plaintiff willfully and without any reason or provocation upon his part, deserted and abandoned their home with the intention of deserting him and with the intention never to return and live with him as his wife, all of which was against his will and consent. It is then alleged that the reason for not setting up the ground of desertion in his cross-complaint was that when it was filed the one year of desertion had not elapsed but such period has now elapsed. Plaintiff denied generally and specifically these allegations.

The trial court found generally that plaintiff was not entitled to separate maintenance on her complaint and that defendant was not entitled to a divorce on either his cross-complaint or his supplemental cross-complaint.

The sole question presented on this appeal is: Did the trial court err in denying defendant a divorce on the ground of desertion? It is defendant's position that since both plaintiff and defendant alleged and proved, and since the court found, that the parties separated on January 27, 1951, and since the evidence conclusively shows that plaintiff deserted defendant by leaving the home which was established by them, defendant was entitled to a divorce on his cross-complaint as a matter of right, and that the trial court abused its discretion in denying him that right.

A review of plaintiff's evidence discloses that plaintiff and defendant were married on September 24, 1947; that they had two children; that they separated on January 27, 1951, and did not live together as husband and wife thereafter; that defendant operated a small, but financially unsuccessful machine shop near his parents' home; that when they were married plaintiff had \$800 in the bank and that they lived with plaintiff's parents for about 16 months because the parents felt sorry for plaintiff because she needed their financial help; that defendant refused and failed to buy clothes for her and her babies; that after they were married plaintiff found defendant

was a "dope fiend", constantly using sleeping pills; and that he admitted he had been released from an institution in Palo Alto, where he had been confined as a mental case. Defendant denied these general accusations.

Plaintiff testified that she soon used up her \$800 in paying her husband's debts; that in the second year of their married life defendant fell behind in paying the gas bills, rent, and for other necessities; that defendant told her they had been paid when they had not, and that the landlord threatened them with eviction on several occasions; that from the day they were married, defendant would drink excessively of wine and she would be unable to awaken him until about 11 o'clock in the morning to go to work; that he would tell her he was working late at the shop at nights and not return until 2 or 3 o'clock in the morning with liquor on his breath; that he refused to take plaintiff or the children out and spent very little time with them. She then testified that they separated on occasions but went back together again; that defendant threatened her with a gun and maliciously told her he was not the father of their last child but that plaintiff's father was.

Defendant admits making this last accusation but claims it was only said because he wanted her to stay home with the children and not go over to her parents' home so often; that they were evicted from the last home in which they lived for nonpayment of rent, on January 27, 1951 (the day they claim they separated). Plaintiff and the two children went home to plaintiff's parents and defendant slept in his work shop. The evidence discloses that the landlord subsequently obtained judgment in the small claims court for the unpaid rent.

Plaintiff's testimony was corroborated to a considerable extent by her mother. The day plaintiff left the home she left a note in it for defendant reading: "Dick: If you move your books are in book-case in front room. Your clothes in bedroom and personal things in hall. You can give your mother all the food."

It is defendant's contention that this note conclusively shows plaintiff's intention to desert defendant on that date.

Plaintiff, on cross-examination, testified she left her husband because she "was forced to leave" him and that she told him so. At the trial she testified that she, at that time, did not want to have anything more to do with him and would not go back to live with him under any conditions.

Defendant denied generally the testimony of plaintiff and testified that plaintiff left the home without his consent; that he would then be willing to take her back if she came voluntarily, "for the sake of the children". It is from this evidence that defendant claims he was entitled to a divorce on the ground of desertion as a matter of right, since the court found she was not entitled to separate maintenance on the ground of extreme cruelty, and accordingly all presumptions of good faith on the part of the wife in reference to the separation were dispelled, and that the filing of the action for separate maintenance, as alleged, when considered in connection with the evidence, emphasized her intent to desert him.

[1] From the cold record on appeal it appears to us that extreme cruelty on the part of defendant was fairly well established by plaintiff's evidence. However, there being a conflict in the evidence, it is not our duty to determine that question. *Chichester v. Seymour*, 28 Cal.App.2d 696, 83 P.2d 301.

The court did find, however, in denying defendant's claim of desertion, that plaintiff "separated from the defendant in good faith, and not with intent to desert the defendant". In a memo opinion, the trial judge stated he was not of the opinion that the evidence was of sufficient weight to establish the allegations of cruelty on the part of either party; that as to the desertion alleged, he found that plaintiff commenced her action for separate maintenance and separated from defendant in good faith, believing that the evidence of cruelty was sufficient to justify a finding to that effect; that the statements made by her at the trial that she would not live

with defendant were made under this belief; that when defendant filed his cross-complaint for divorce on the ground of cruelty on March 6, 1951, three months after the parties separated, it constituted a consent to the separation, and that the continuation of such separation under such circumstances would not create a cause of action for desertion, citing *Ewing v. Ewing*, 16 Cal.2d 208, 105 P.2d 586.

Counsel for defendant attacks this reasoning as not being supported by the cited case. In *Kusel v. Kusel*, 147 Cal. 52, 81 P. 297, relied upon in the *Ewing* case, it was said that where a wife in good faith begins an action for divorce against her husband and immediately separates herself from him for the reason that it would not be proper to live with him while she was prosecuting the action for divorce, such separation will not constitute desertion within the meaning of the law although in fact the suit was unfounded but, on the other hand, it will not be contended that a wife who intends to desert her husband can, with that intent, leave his residence and live separate from him, and at the same time destroy the effect of the desertion by immediately beginning an unfounded action for divorce against him. The action must be begun in good faith in order to have the effect contended for, and the burden of proof to show that an unfounded action for divorce begun by the wife was begun by her in good faith is upon the wife. It is argued that the *good faith* there referred to applies to the *good faith* in offering to return and fulfill the marriage contract under section 102 of the Civil Code; that *Silva v. Silva*, 32 Cal.App. 115, 162 P. 142, also relied on in the *Ewing* case, involved a separation by agreement, evidenced by a written instrument; that the court there held no desertion was shown while the agreement was in effect; and that the holding in *Ewing v. Ewing*, supra, must be considered in the light of the facts set forth in the *Silva* and *Kusel* cases, which are cited as authority for the statement.

It is further contended that plaintiff failed to establish her allegations of cruelty, and consequently her withdrawal from

or refusal to live with defendant in their home cannot be predicated upon defendant's claimed cruelty, citing *Perry v. Perry*, 93 Cal.App.2d 720, 209 P.2d 847; and *Colombo v. Colombo*, 71 Cal.App.2d 577, 581, 162 P.2d 995. But see *Hutton v. Hutton*, 109 Cal.App.2d 567, 241 P.2d 53, where it is said, quoting from the syllabus:

"Mere denial of divorce to wife does not necessarily mean that the court disbelieved her testimony; such relief may properly be denied where the judge feels that such testimony is not sufficiently corroborated."

It appears from the evidence that plaintiff did separate from defendant on at least one other occasion and returned to him upon his promise to maintain a home for her. At the time of the separation in the instant case on January 27, 1951, it is not indicated whether plaintiff intended to separate permanently from defendant or whether it was to seek an abode in which she and her children could live, due to the failure of defendant to provide one for them. The latter intent, at that time, appears to be more probable. Her action for separate maintenance was filed on January 30, 1951, and apparently defendant made no overtures toward furnishing a home for them or providing properly for plaintiff and their children, if she was inclined to return to him. He satisfied himself by seeking a divorce from her on the ground of extreme cruelty. The trial was commenced on December 11, 1952, and it was at that time she testified she would *then* not go back to him under any condition, and it was *then* that defendant first said he would be willing to take her back for "the sake of the children."

The amended cross-complaint for divorce on the ground of desertion was filed on September 15, 1952, alleging that more than one year had passed since plaintiff "willfully and without any reasonable provoca-

tion on his part and against his wishes, deserted" him and that plaintiff refused to live with him.

[2] Section 95 of the Civil Code defines "willful desertion" as the voluntary separation of one of the married parties from the other with intent to desert. Section 96 provides that "* * * the refusal of either party to dwell in the same house with the other party, *when there is no just cause for such refusal*, is desertion." It affirmatively appears in the instant action that there was just cause for plaintiff's refusal to dwell in the house in which they were living at the time. Section 99 of the Civil Code provides that "Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion."

[3] The trial court may well have concluded that it was at the time of trial, about December 11, 1952, that plaintiff ultimately concluded not to return to defendant under any circumstances. This being so, the time of any claimed desertion would run from that date. Therefore, any ground of desertion based on a complaint filed in September, 1952, would be premature.

[4] The ultimate finding of the trial court that plaintiff separated from defendant in good faith and without the intent to desert, and that defendant failed to establish desertion on the part of plaintiff on January 27, 1951, as alleged, is fully supported by the evidence. *Ewing v. Ewing*, supra, fully supports this conclusion. See, also, *Brooks v. Brooks*, 53 Cal. App.2d 95, 127 P.2d 296; *Peretti v. Peretti*, 165 Cal. 717; *Baker v. Baker*, 168 Cal. 346, 143 P. 607; *Hutton v. Hutton*, 109 Cal.App.2d 567, 241 P.2d 53; and section 98 Civ.Code.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

121 Cal.App.2d 707

MORRIS v. MORRIS.

Civ. 19725.

District Court of Appeal, Second District,
Division 3, California.

Dec. 4, 1953.

Proceeding on petition for modification of provision of divorce decree which awarded custody of minor children to husband. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered order denying petition, and wife appealed. The District Court of Appeal, Shinn, P. J., held that where evidence indicated that children were content and well cared for with husband, although both parents were capable of providing a good home, and although distance made wife's access to children difficult, Superior Court did not err in refusing to modify decree.

Order affirmed.

1. Divorce ⇌303(2)

In proceeding on petition for modification of provision of divorce decree which awarded custody of minor children to husband, where evidence indicated that children were content and well cared for, although both parents were capable of providing a good home and although distance made wife's access to children difficult, trial court did not err in refusing to modify decree.

2. Divorce ⇌303(3)

In proceeding on petition for modification of provision of divorce decree which awarded custody of minor children to husband, where wife made no demand that judge state what children had said to him in private interview, wife could not complain that order was based on unknown evidence.

3. Parent and Child ⇌2(4)

In custody case, where court refused to modify decree awarding custody of children to husband, after a full and fair hearing, the order could not be disturbed in absence of showing of abuse of discretion.

Harry Albert, Long Beach, for appellant.

Louis J. Hart, Frank J. Hill, Long Beach, for respondent.

SHINN, Presiding Justice.

This is an appeal by Geneva L. Shipsey (Morris) from an order denying her application for change of custody of daughters, Susan age 10½, and Sara age 6½, whose custody had been awarded to defendant Thomas G. Morris in 1949 by interlocutory decree of divorce. In the divorce action each had charged the other with cruelty and Thomas had charged Geneva with adultery. Each sought a divorce and custody of the children. At the conclusion of a contested trial in which findings were waived, Thomas was awarded an interlocutory decree and custody of the children; Geneva was given the right to visit the children between the hours of 9:00 a. m. and 5:00 p. m. at their home, and also the right to have them with her between the hours aforesaid on two days each week and each alternate Saturday. She was ordered not to permit the children to be in the presence of Edward J. Shipsey. By final decree entered September 21st, 1950, the custody provisions of the interlocutory decree were continued in effect. Geneva thereafter married Mr. Shipsey. It was his third marriage. Before awarding custody to the father, the court considered an extensive report of an investigation with respect to the conditions under which the children would live in the custody of each of the parties.

On May 22, 1951, Geneva petitioned for modification of the custody provisions. On September 26, 1951, an investigator's report was filed recommending modification under which Geneva would have custody on alternate week ends from 10:00 a. m. Saturday to 8:00 p. m. Sunday, and would also have the children with her during the entire summer vacations and during the Thanksgiving, Christmas and Easter vacations. On September 26, 1951, the parties entered into a stipulation pursuant to which the court made an order of modification which provided that the children would

be with their mother on alternate week ends from 10:00 a. m. Saturday until 8:00 p. m. Sunday, that each parent would have them for one-half of each summer vacation and upon alternate holidays of Thanksgiving, Christmas and Easter. The provision that the children would not be allowed in the presence of Mr. Shipsey was vacated.

On June 9, 1952, Geneva petitioned for further modification which would allow her to have the daughters with her except when they visited with their father, namely, on alternate week ends and a half of summer vacations, and other vacation periods. A report of an investigator was filed with the same recommendation respecting custody as was contained in the September 26, 1951 report. It was received in evidence under a stipulation that if called as a witness the investigator would testify to the facts contained in the report. As the matter stands now the custody provisions are those the parties agreed upon as the basis of the earlier modification.

The court took evidence of the parties and their witnesses in the latest hearing. There is naturally bitter feeling between the parties and between Mr. Shipsey and Mr. Morris. There was conflicting evidence as to whether it would be in the best interests of the children to live in the Shipsey home and as to certain disadvantages of living with their father. There was evidence that each parent has great affection for the children, has always been solicitous of their welfare and that each would properly perform parental duties in a satisfactory manner. It would serve no good purpose to relate the evidence given at the hearing. The court without objection interviewed the little girls privately and apparently gave serious consideration to their wishes. It would appear also that the children made statements to the court which materially influenced the decision. The children live with their father at Yucaipa and his parents live on the premises in a trailer. The Shipseys live at Silverado, in Orange County, approximately 100 miles from Yucaipa. It is undoubtedly burdensome for them to take the long week end trips to get the girls and to re-

turn them. While Mr. Morris is at work the girls are in the care of their grandmother, who is 68 years of age and whose capabilities are not seriously questioned.

[1] It appears to us that the court did not err in continuing in effect the agreement of September 26, 1951, and the order based thereon. While the terms of the agreement fell short of gratifying the conflicting wishes of the parents, they were satisfactory as a compromise of differences which no doubt will exist until the daughters are free from court supervision. It may be inferred that the children are better satisfied with present conditions than they would be if their custody was awarded exclusively to their mother. The fact that they did not wish to be taken from the custody of their father indicated that they were happy in their present home.

[2] There is nothing in the record as to any arrangement for the children to be interviewed by the court, although it is apparent that there was some agreement for it. The court made no statement of what the children had said in the interview. Plaintiff criticizes the practice as one which permitted the court to take evidence that was not known to the parties, or their attorneys. No request was made for a statement by the court. Nevertheless we think it would be the part of wisdom for the court to make a record of such interviews with children in custody cases in order to protect itself against any suspicion of unfairness on the part of the parent against whom the decision is rendered.

[3] The children will, of course, be deprived of advantages which they would have enjoyed had their parents not separated, and this will be true as long as they must be shuttled back and forth between their mother and their father. But all a court can do in such circumstances is to give fair recognition to the rights and wishes of the parents, and at the same time make what appears to be the most reasonable provision for the welfare of the children. When, after a full and fair hearing, the court refused to modify the former order, the denial of modification may not be disturbed on appeal in the absence of a showing of an abuse of discretion. Prouty

v. Prouty, 16 Cal.2d 190, 105 P.2d 295. The court did not abuse its discretion in refusing to award a greater measure of custody to the mother than she has enjoyed under the former modifying order.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



121 Cal.App.2d 777

FRANKE v. CLAUS et al.

Civ. 8283.

District Court of Appeal, Third District,
California.

Dec. 9, 1953.

Contractor's action against owners and tenant on open book account for labors and materials used in installing ceiling in building. The Superior Court, Solano County, Raines, J., rendered judgment adverse to contractor who appealed. The District Court of Appeal, Schottky, J., held that conflicting evidence supported finding that labor and materials had not been supplied at special instance and request of owners.

Judgment affirmed.

1. Parties ⇨65(3)

Where at opening of trial plaintiff's counsel stated that plaintiff dismissed complaint as to one defendant but court reinstated such defendant on statement of counsel for other defendant that such defendant was a necessary party, but such defendant was not served, filed no pleading, was not represented by counsel and did not participate in trial except to testify as witness for plaintiff, statement of court that he was reinstating such defendant in the case was of no effect. Code Civ.Proc. § 389.

2. Account, Action on ⇨7

In contractor's action against owners on open book account for labor and materials used in installing ceiling in building, evidence supported finding that labor and materials had not been supplied at special instance and request of owners.

3. Appeal and Error ⇨172(1)

Where there was no allegation that owners of building were unjustly enriched or were benefited by ceiling installed in building by contractor and issue of unjust enrichment was not presented in the trial court and there was no evidence in the record how and to what extent, if at all, owners were benefited by the installation, contractor appealing from adverse judgment was not entitled to reversal on any theory of quasi contractual recovery against owners for value of labor and materials furnished.

4. Estoppel ⇨52

There are four elements essential to the application of the doctrine of "equitable estoppel": the party to be estopped must be apprised of the facts; he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; the other party must be ignorant of the true state of facts; and he must rely upon the conduct to his injury. Code Civ.Proc. § 1962, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Equitable Estoppel".

5. Estoppel ⇨118

In view of conflicting evidence on issue as to whether owners held themselves out to contractor as the ones liable to pay for ceiling installed in building and finding in favor of owners, owners were not estopped from denying that they held themselves out to contractor as backing the work or being responsible for it in contractor's action against owners.

6. Trial ⇨395(5)

Where plaintiff sued upon a common count and findings were in the language of the complaint, finding material allegations to be untrue, findings were legally

sufficient as against contention that they did not state ultimate facts or refer to pleadings stating ultimate facts.

Brantley W. Dobbins, Vallejo, Allan H. Fish, San Francisco, for appellant.

O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for respondents.

SCHOTTKY, Justice.

Plaintiff, on March 22, 1950, commenced an action against defendants, alleging that said defendants became indebted to plaintiff on an open book account "for labor performed and materials furnished in and about the alteration to, addition to and completion of a certain store building owned by defendants and located at then known Number 926 Tennessee Street in the above City, County and State [City of Vallejo, County of Solano, State of California], in the sum of Two Thousand Ninety-five and 06/100 Dollars (\$2,095.06); that said labor performed and materials furnished were at the special instance and request of said defendants." Defendants Claus filed an answer denying the material allegations of the complaint. There was no service of summons on defendant Schamun and he did not appear in the action, and prior to the commencement of the trial on October 25, 1951, plaintiff filed a dismissal of the complaint as to defendant Schamun. (While the name of defendant Schamun appears in the title on the Clerk's Transcript and Reporter's Transcript and also in the pleadings, findings and judgment as "Schuman," we have ascertained from the Reporter's Transcript and the original exhibits that his correct name is "Schamun" and we shall, therefore, use the name of "Schamun" throughout this opinion.)

[1] At the opening of the trial counsel for plaintiff stated that plaintiff had dismissed the complaint as to defendant Schamun and was only relying on the complaint as to defendants Claus. Counsel for defendants Claus then moved the court that Schamun be made a party to the action upon the ground that he was a necessary party, and over the objection

of counsel for plaintiff the court made the following ruling: "I am keeping Schuman in the case upon the record and the statement of counsel here that he deem him a necessary party under the code and while the dismissal will be filed, I am reinstating him as a defendant." The trial then proceeded with plaintiff and defendants Claus being represented by their respective counsel, but defendant Schamun, who had not been served and had filed no pleading, and was not represented by counsel, did not participate in the trial. No order was made that any service be made upon Schamun or that he be given an opportunity to file any pleadings, and it is apparent from the record that the case was tried by plaintiff and defendants Claus upon the issue of whether or not defendants Claus were indebted to plaintiff. While section 389 of the Code of Civil Procedure authorizes other parties to be brought in when a complete determination of the controversy cannot be had without the presence of such parties, it also provides that they must be served, and certainly contemplates that they be given an opportunity to appear and answer. Under the circumstances here present we must consider that the statement of the court that he was reinstating defendant Schamun in the case was of no effect and that the trial proceeded as a controversy between plaintiff Franke and defendants Claus.

The case was tried before the court without a jury and the court made findings, following the language of the complaint, stating that it was not true that defendants became indebted to plaintiff for labor performed and material furnished, and that it was not true that the labor was performed and the material furnished at the special instance and request of the defendants. In its judgment the court decreed "that plaintiff take nothing by this said action and that defendants L. J. Claus, Eugene F. Claus and Hans H. Schuman have judgment of plaintiff for their costs of suit."

Plaintiff has appealed from said judgment and urges a number of grounds for reversal.¹ Before discussing these contentions

we shall give a brief summary of the evidence.

[2] Defendants Claus were owners of real estate in the city of Vallejo. Plaintiff Franke was a general contractor engaged in the construction business. For many years the plaintiff and defendants had been friends, and during this time the plaintiff had done some building for defendants. The parties during this time had dealt on a verbal basis, plaintiff carrying the work he did for defendants on an open book account, and usually receiving compensation for his work on a cost plus 10% basis.

During the year 1945 the defendants Claus were desirous of erecting buildings on property owned by them and located on Tennessee Street in Vallejo. They made a verbal, informal contract for the construction of these two buildings with plaintiff; said buildings being known as building number one and building number two. During the latter part of 1945 the defendant Schamun approached the defendants Claus and inquired about leasing building number two, which was still under construction, to be used by him as a meat market. The matter was discussed by the parties over a short period of time, whereupon it was finally decided that Schamun would take a lease on building number one rather than building number two and install a super type market therein. He also anticipated subletting a part of the building to others. During these negotiations the plaintiff continued his construction of the two buildings. As the plans and contract provided, building number one was to be open inside, without partitions or ceiling. In January, 1946, defendant Schamun obtained permission from defendants Claus to have plaintiff install some partitions in the building. Also, defendant Schamun went to defendant Louis Claus and asked about installing a ceiling in the building, as the internal appearance would be objectionable without a ceiling to cover the trusses. The subsequent installation of a ceiling in building number one is the subject matter of the litigation. When inquiring of defendant Louis Claus about the ceiling, defendant Claus testified that he told Schamun that it was all right

with him if he (Schamun) wanted to put in a ceiling, so long as he did so at his own expense and didn't damage the building. Defendant Claus testified further that Schamun later asked him if he knew what the cost would be, to which defendant Claus replied, "No", but stated that either he or Schamun could consult plaintiff about that. According to his testimony defendant Claus then told plaintiff that Schamun wanted a ceiling installed, and wanted an estimate of the cost of it. Defendant Claus testified that a week or ten days after telling this to plaintiff he met plaintiff again and stated to him, "That fellow is 'hot' to get a ceiling in there. He is after me. Now, have you got an estimate to give him?" To which plaintiff replied, "No". Defendant Claus then testified that plaintiff sat down and figured up the cost on a piece of paper and reported to him that it would be \$1,700, but did not give him the estimate or any diagram or paper. Defendant Claus, according to his testimony, then relayed the estimate to defendant Schamun, and stated that nothing further was said or done about the matter for several days. Then Schamun came to defendant Claus and asked him if he could assist with the financing of the ceiling, to which defendant Claus then replied no. Defendant Claus at this time also refused to bear the cost of the ceiling himself and increase the rental to be paid by Schamun. It was discussed, however, between Schamun and Claus as to whether or not Schamun might be allowed to retain \$1,290 which was advance rental to be paid under the terms of the lease, and apply same to the cost of the ceiling. It was finally settled between the two defendants Claus and Schamun, according to the Clauses' testimony, that they agreed to let Schamun retain this advance rental and apply it to the cost of the ceiling, Schamun still to bear the entire cost of the ceiling. Defendant Claus then testified that he had nothing further to do with the matter; that he did not order plaintiff to install the ceiling; that he did not direct anyone in the installation of the ceiling; that he did not order any of the materials to be incorporated into the ceiling; and that he

did not pay for any part of the labor or materials which went into the installation of the ceiling.

Plaintiff's testimony was substantially the same as that of the defendant Claus, except that relating to the ceiling job, about which there is glaring conflict. Plaintiff testified that he had an oral contract with the defendant Claus to erect the two buildings on a cost plus ten per cent basis, on an open book account. Plaintiff then testified that defendant Claus told him one day that Schamun wanted a ceiling in the building, building number one. Plaintiff also testified that defendant Claus told him that Schamun was going to pay for the ceiling. In clarification of this he testified that defendant Claus stated Schamun was supposed to pay for the ceiling, but that it was not intimated that Schamun was going to pay him (plaintiff) for it. Several days elapsed after this conversation, and then defendant Claus approached plaintiff again about the ceiling and told him, "Bill, Hank is 'hot'; he wants an approximate estimate on that ceiling." Plaintiff testified that he then drew up a sketch of the proposed ceiling on a piece of paper, and then made out an approximate estimate on a piece of paper on which the estimate was figured to the defendant Claus. Defendant Claus denied that he was ever given this piece of paper or any written estimate; admitting only that plaintiff told him how much the estimate was. The figuring of the estimate of the ceiling was done on either the 4th or 5th of February by plaintiff. Up to this time plaintiff had discussed the ceiling only with the defendant Claus, never talking with the defendant Schamun about it at any time to this point. On the night of the 6th day of February plaintiff was stricken with a serious illness and was taken to the hospital on the seventh day of February, where he remained for seven weeks. He testified that up to the time he was stricken and taken to the hospital he was not advised as to whether or not the ceiling was to be installed. Upon being taken ill plaintiff left one Henry Minyard in charge of the work on defendants' two buildings, and made one Harry Oliver his general foreman, his job being mainly to be responsible

for obtaining materials and supplies for the various jobs which were being done by plaintiff. Upon his return from the hospital, plaintiff was visited by the defendant Claus who told plaintiff to prepare his bills for the work plaintiff had done for him. Plaintiff then prepared a bill for each of the two buildings he had erected for the defendants, and also prepared a bill for the ceiling which had been installed in building number one during his stay in the hospital. The bill for the ceiling he made out in Schamun's name, or rather "Hank's Meat Market," the name of the defendant Schamun's place of business located in building number one. Plaintiff testified that he gave the bills for the two buildings to defendant Claus, and gave the bill for the ceiling to the defendant Schamun, who stated at that time, "Bill, I will see you in a few days"; to which plaintiff replied, "All right." Plaintiff testified that he saw defendant Schamun several days later and defendant Schamun told him with reference to the ceiling bill, "There is something wrong; this is not all mine." Schamun then gave the bill back to plaintiff who in turn presented it to the defendant Claus. Defendant Claus refused to pay the bill for the ceiling, and never paid any part of it thereafter. Plaintiff testified that while he was on the way to the hospital he told Henry Minyard, who was accompanying him in the ambulance to the hospital, that "Louie [defendant Claus] is the only man that knows what has got to be done there."

Witness Minyard testified that about the time plaintiff was stricken ill he told him there might be a ceiling job involved in building number one. Minyard then testified that in plaintiff's absence he was instructed by defendant Claus as to all of the work being done on the two buildings, including the ceiling which was installed in building number one. Minyard testified that he never took instructions or directions from the defendant Schamun with reference to the ceiling. It is not clear from Minyard's testimony, however, just who gave him the instruction to start the ceiling job.

Defendant Schamun testified in general about his dealings with the defendant Claus,

and then testified about the subject of the ceiling. Schamun stated that he said to the defendant Claus one day, "Well, what about the ceiling, Louie?" to which Louie replied, "You want a ceiling in there?" Schamun then testified he said, "I understood when you were going to build me a building for a grocery store naturally I understood there would be ceiling, complete in other words, so I could start opening and run a grocery store and meat market." Louie then replied, "I will go see Bill Franke about it and see what he says." He also said, "I will get an estimate on what the ceiling will cost." Schamun testified that the ceiling was installed; that he never discussed it with plaintiff or any of his employees, only with the defendant Claus; that he never agreed to pay for the ceiling with Claus or anyone else; that he never asked Claus to pay for it and increase his rent; that he never asked Claus for financial help on the ceiling, and more particularly that he never asked Claus if he could retain the \$1,290 advance rental under the lease so as to finance the ceiling; that he was asked for the advance rental by Claus but has never paid it to this day. Sometime later in the year when the ceiling was installed Schamun went out of business because of financial difficulties, and ultimately went into bankruptcy. Testifying about the presentation of the ceiling bill to him by plaintiff, Schamun stated that he gave the bill back and said, "Bill, this is not right; this is not all mine." Explaining this, Schamun stated that he expected to be billed only for partitions which he had put in by plaintiff.

The ceiling bill was apparently carried on plaintiff's books in the name of Hank's Meat Market until 1950 at which time it was changed to Claus Sheet Metal Works.

Appellant's first contention is that respondents Claus are liable to him "on quasi-contract or implied in fact contract for services performed at their request." He argues that the finding that the labor and materials were not furnished at the special instance and request of respondents Claus is not supported by any substantial evidence. As hereinbefore pointed out, the complaint alleged that defendants were indebted in a

certain sum for labor and materials furnished at the special instance and request of defendants, and the findings followed the language of the complaint. The case was tried by appellant upon the theory that the labor and materials were supplied at the special instance and request of respondents Claus, and the court found that they were not. We are unable to agree with appellant that this finding is not supported by substantial evidence. It may be conceded that the evidence is highly conflicting, but the trial court is the judge of the weight and effect of the evidence. As this court said in *Ellis v. Geiger*, 105 Cal.App.2d 415, at page 416, 233 P.2d 166, at page 167:

"* * * If there is any rule that is well settled it is the oft-repeated rule that an appellate court cannot disturb a finding of the trial court if there is any substantial evidence to sustain it, and that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence and inferences in conflict therewith, it still appears that the law precludes the rendering of judgment in favor of such prevailing party. The evidence must be construed most strongly against the losing party and every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded."

We believe that the trial court could reasonably conclude from the evidence that the tenant, Schamun, wanted the ceiling, not the defendants Claus; that the defendant Claus conveyed this to the plaintiff; that the defendant Claus told the plaintiff this a second time, whereupon plaintiff drew up a sketch of the ceiling and figured an estimate, and orally relayed the estimate to defendant Claus; that the defendant Claus

himself did not ever order or request that the ceiling be installed; that the defendants Claus agreed to let the tenant, Schamun, retain the \$1,290 advance rental to help finance the cost of the ceiling; that the ceiling was installed with the knowledge of the defendant Claus, but without any directions, instructions, orders or purchase of materials on his part; that the tenant Schamun was to be solely responsible for the cost of the ceiling; that defendant Claus was acting merely as an intermediary between the plaintiff and the defendant Schamun in so far as the preliminary negotiations for the ceiling were concerned. It appears that under the original plans for the building a ceiling was not provided for, and that it was only because of the needs of the tenants that it was necessary that a ceiling be installed. There is no dispute as to the fact that the defendants Claus never received the advance rental due them under the lease from Schamun. Furthermore, plaintiff himself testified that the defendant Claus told him that Schamun was supposed to pay for the ceiling, but did not intimate that Schamun was to pay him (plaintiff) directly. However, when the bill was presented for the ceiling the plaintiff made it out in the name of the tenant, Hank's Meat Market, and presented the bill directly to the tenant, giving it to defendant Claus only after the tenant refused to pay. The bill was thereafter carried on the plaintiff's books in the name of the tenant until shortly before the institution of this action. Before any final arrangements had been made for the installation of the ceiling the plaintiff was taken ill and placed in a hospital. In his absence his workmen installed the ceiling. It was not brought out in the testimony who instructed the workmen to install the ceiling.

[3] Appellant's next contention is that: "To prevent unjust enrichment, a contractor, not a volunteer, who mistakenly believes that an owner is responsible for an improvement, where the circumstances place the owner on notice of the mistake, is entitled to quasi-contractual recovery against the owner for the value of his labor and materials." Respondents Claus in reply assert that the issue of unjust enrichment

was not before the trial court, and point out correctly that there is no allegation in the pleadings that respondents Claus were unjustly enriched or were benefited by the ceiling installed by appellant. It is apparent from the record that the issue of unjust enrichment was not presented in the trial court, and there is no evidence in the record how or to what extent, if at all, respondents Claus were benefited by the installation. So even if appellant is now entitled to raise the issue upon this appeal there is no evidence upon which a finding of unjust enrichment could be based.

Appellant also raises the issue of estoppel and contends that: "Where an owner of leased property permits a contractor to improve it, knowing the contractor does not have a definite contract rendering the owner or tenant liable and knowing the circumstances warrant the contractor's looking to the owner for payment and the contractor's failure to have a definite contract is excused by his illness, the owner is estopped to deny liability, because of the contractor's change of position." Respondents Claus in reply assert that estoppel was not in issue before the trial court and cannot now be raised for the first time on appeal. However, in the case of *Foster v. Fisher*, 44 Cal.App.2d 33, 37, 111 P.2d 935, 938, it was stated:

"Although it is true that estoppel must ordinarily be pleaded, respondent's failure to do so is not fatal, for the evidence upon which the estoppel is based was admitted without objection and the defect in the pleading was therefore waived."

See, also, 10 Cal.Jur., Estoppel, sec. 30. In the instant case the evidence to which appellant refers to support his assertion of estoppel was admitted without objection. Furthermore, at the close of the case the attorney for appellant argued the subject of estoppel to the court, and cited and quoted Code of Civil Procedure, section 1962, subd. 3.

[4] The rule of estoppel in California is set forth in Code of Civil Procedure, section 1962, subd. 3, and reads as follows:

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to be-

lieve a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it".

Generally there are four elements essential to the application of the doctrine of equitable estoppel; the party to be estopped must be apprised of the facts; he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; the other party must be ignorant of the true state of facts; and he must rely upon the conduct to his injury. 10 Cal. Jur., Estoppel, section 14.

[5] It appears to be appellant's contention that respondent Louis Claus so conducted himself concerning the installation of the ceiling that he is estopped to deny that he held himself out to the plaintiff as backing the work or being responsible for it. Appellant argues that he would have never relied upon the liability of the tenant and failed to file a mechanic's lien on the work had he not felt that the owner was backing the job. There is nothing to show that the parties to be estopped, respondents Claus, were apprised of the fact that the appellant was looking to them for payment. Respondent Louis Claus testified that he merely told appellant that the tenant wanted a ceiling installed; that he conveyed the estimate made by appellant to the tenant; that he told the tenant that he could retain the advance rental due under the lease so as to help in the financing of the ceiling; that he informed the plaintiff that he was allowing the tenant to retain the advance rental for this purpose; that he took no part in ordering the installation of the ceiling, or in directing or instructing the installation of it. Even appellant by his own testimony admitted that defendant Claus told him that the tenant was to pay for the ceiling, but qualified this by stating, "He didn't tell me that Schamun was going to pay me, because he never intimated that." Furthermore, when a bill was finally prepared for the ceiling it was made out by appellant in the name of the tenant and presented directly to him. Apparently only after the tenant refused to pay did appellant

then take the bill to the defendant Claus and present it to him. That appears to be the first time that defendant Claus was apprised of the fact that the appellant was looking to him for payment of the bill. Nor is there anything from defendant Claus' conduct which would justify a finding that he held himself out to appellant as the one liable to pay for the work to be done. Accepting the respondents' testimony, as the trial court did, and as we must, there is nothing to show that the appellant was aware of facts other than those to the effect that the tenant was to pay for the ceiling. According to the respondent's testimony, the facts were that the tenant was to bear the cost of the ceiling, and the appellant apparently relied upon this. This is evidenced by the fact that the bill was prepared by appellant in the name of the tenant. While appellant may have relied upon a belief that respondents Claus were obligated to pay for the ceiling, and may have been injured thereby, in view of the conflict in the evidence and the finding of the court in favor of respondents, appellant's contention that respondents Claus were estopped to deny that they were liable to pay for the ceiling cannot be sustained.

Appellant next contends that the findings and judgment in so far as they do not permit him to recover against either the owners, respondents Claus, or the tenant, Schamun, are against the evidence and the law. If appellant had made service of summons upon Schamun, or if he had appeared in the action and the trial had proceeded regularly against all defendants there would be considerable merit in this contention of appellant. But, as hereinbefore pointed out, Schamun was not served and did not appear, and at the opening of the trial counsel for appellant stated that he had dismissed the complaint as to Schamun and was relying on the complaint only as to respondents Claus. While upon the motion of counsel for respondents Claus the court stated that he would keep Schamun in the case and reinstate him as a defendant, such purported order was of no effect as no pleadings were filed on behalf of Schamun and he was not represented by counsel, nor did he participate in the trial except to testify as a wit-

ness for appellant. The record shows that the case was tried upon the issue of whether or not respondents Claus were indebted to appellant for the ceiling. Under such circumstances there could have been no judgment against Schamun, and in view of the fact that we have concluded that there is substantial evidence to support the judgment in favor of respondents Claus, there is no merit in this contention of appellant.

[6] There is no merit in appellant's final contention that "The findings are legally insufficient, since they do not state ultimate facts or refer to pleadings stating ultimate facts." Appellant sued upon a common count and the findings were in the language of the complaint, finding the material allegations to be untrue. A similar contention was made by the appellant in the case of *Gschwend v. Stoll*, 104 Cal.App.2d 806, 232 P.2d 494, hearing denied, in which case the complaint alleged two common counts for lumber sold and delivered. In holding against such contention this court said in 104 Cal.App.2d at page 807, 232 P.2d at page 495:

"It is, of course, the law that a trial court commits error when it does not find upon all material issues, but it is also the law that findings should be on ultimate facts, and it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all of the probative necessary to sustain it. Since ultimate facts are required to be pleaded, it is only necessary in order to determine the sufficiency of a finding of fact to ascertain what statement of that fact is required in a pleading. (24 Cal.Jur., sec. 203, p. 968.) See, also, *Nicolds v. Storch*, 67 Cal.App.2d 8, 153 P.2d 561; *Hitchcock v. Lovelace*, 47 Cal.App.2d 818, 830, 119 P.2d 151; *Pellegrino v. Los Angeles Transit Lines*, 79 Cal.App.2d 40, 42, 179 P.2d 39.

"The findings in the instant case were as broad as the pleadings, and when the trial court found that respondents sold and delivered to appellants logs in the agreed and reasonable sum of \$7,258.05, and that \$5,949.24 had been paid on account, this neces-

sarily included a finding that the price had not been reduced from \$24 to \$21. In *Pacific States S. & L. Co. v. Perez*, 51 Cal.App.2d 84, at page 94, 124 P.2d 184, at page 189, the court said: 'In response to the claim that there is no finding on the issues of fraud and confiscation, it is sufficient to call attention to the finding of the lower court that the claims of defendants to the property are without right and that they have no interest in the property. Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made. *Reiniger v. Hassell*, 216 Cal. 209, 211, 13 P.2d 737; *Publishers Distributing Service v. Southern Cal. School Book Depository*, 14 Cal.App.2d 448, 58 P.2d 401.'"

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



121 Cal.App.2d 737

GIRARD et al.

v.

MONROVIA CITY SCHOOL DIST. et al.

Civ. 19664.

District Court of Appeal, Second District,
Division 1, California.

Dec. 8, 1953.

Action for wrongful death of plaintiffs' nine year old son when struck by automobile as child was crossing street en route home from school. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgments dismissing action as to defendant school district in which deceased child resided at time of death and district from which he had recently removed, and plaintiffs appealed.

The District Court of Appeal, White, P. J., held that any breach of duty by officers or employees of school districts in advising or permitting child upon removal from one district to the other to enroll in school which would necessitate crossing heavily traveled street on which he was killed or in failing to provide transportation from school to home was too remote to impose liability on either school district for death of child.

Motion to dismiss appeal denied and judgments affirmed.

1. Appeal and Error ⇨419(1)

Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates, unless it appears that respondent was misled by such misdescription.

2. Judgment ⇨138(1)

It is the policy of the law that every case should be heard on its merits.

3. Appeal and Error ⇨419(1)

Where notice of appeal from judgment in favor of "above named defendants" referred by date and judgment book entry to only one of two separate judgments entered on different dates in different judgment books dismissing action as to each of two defendants, but it appeared that plaintiffs sought review of order of superior court sustaining respective demurrers of both defendants by appealing from judgment of dismissal, failure to properly describe other judgment did not mislead or prejudice defendant in whose favor such judgment was entered and hence appeal was not dismissable as to such defendant.

4. Pleading ⇨225(1)

Where complaint disclosed that a cause of action could not be stated upon any theory warranted by the facts set forth and record did not disclose that leave to amend was requested in lower court, sustaining demurrer to complaint without leave to amend was not abuse of discretion.

5. Schools and School Districts ⇨89.8

Negligence of nine year old child or of driver of automobile which struck child as he was crossing street en route home

from school or unavoidable accident was sole "proximate cause" of death of child and could not reasonably be foreseen by school district officials, and any breach of duty by officers or employees of school districts in advising or permitting child upon removal from one district to the other to enroll in school which would necessitate crossing heavily traveled street on which he was killed or in not providing transportation from school to home was too remote to impose liability on either school district for death of child. Education Code, §§ 1503, 1503.1, 16251.

See publication Words and Phrases, for other judicial constructions and definitions of "Proximate Cause".

6. Negligence ⇨119(1)

In order to maintain action for damages based on wrongful act or negligence of another, plaintiff must allege and prove that the wrongful act of defendant was a direct and proximate cause of injury.

7. Negligence ⇨56(1.6), 60

The word "proximate" as applied to causal connection between negligence and injury means direct or immediate, as opposed to remote, and negligence requiring the interposition of new and independent agency to cause injury is too remote.

See publication Words and Phrases, for other judicial constructions and definitions of "Proximate".

8. Negligence ⇨56(1.12)

In determining question of proximate cause, care must be taken to avoid confusing that which causes the injury and that without which the injury would not have occurred.

9. Schools and School Districts ⇨89.13

Statute providing that a school district may provide for transportation of pupils is permissive in character and failure of district to provide such transportation does not constitute negligence. Education Code, § 16251.

10. Schools and School Districts ⇨89.13

School district, though it had undertaken to provide transportation for pupils from home to school, was under no duty to provide transportation in both directions,

and failure to provide transportation from school to home was not negligence. Education Code, § 16251.

11. Schools and School Districts ⇐154

Neither school district in which pupil had resided nor district to which he moved owed any duty to pupil to see that he was enrolled in a particular school within the district of his new residence, in view of statutes authorizing enrollment of pupils from another district or even from another county. Education Code, §§ 1503, 1503.1.

Porter C. Blackburn and Earle William Burke, Burbank, for appellants.

Hunter & Liljestrom, and Richard M. Gilliland, Los Angeles, for respondent Monrovia City School Dist.

Robert A. Cushman, Los Angeles, for respondent Azusa City School Dist.

WHITE, Presiding Justice.

Gerald Girard, aged nine, a pupil at Monroe Elementary School in the Monrovia City School District, was struck and instantly killed by automobile operated by defendant Delores L. Hall. At the time he was struck Gerald was returning home from school and was in a marked pedestrian crosswalk on Huntington Drive. His parents brought an action for wrongful death against the driver of the automobile and also against Monrovia City School District and Azusa City School District. Each of the defendant school districts filed a demurrer to the complaint, and each demurrer was sustained without leave to amend. Two judgments were thereupon entered, one, on October 16, 1952, in favor of Azusa City School District, and one on October 22, 1952, in favor of Monrovia City School District. On December 8, 1952, plaintiffs filed a notice of appeal "from that certain judgment in favor of the above named defendants, and against plaintiffs, made and entered in the above entitled Court on the 16th day of October, 1952, in Judgment Book 2446, Page 302." The judgment in favor of Monrovia City School District was entered in Judgment

Book 2450, Page 72. The latter school district has moved to dismiss the appeal as to it, upon the ground that no appeal was taken from the judgment in its favor. The notice of appeal refers to the judgment "in favor of the *above-named defendants*". The notice was addressed to and served upon both school districts. The notice to the clerk to prepare the transcript on appeal stated that plaintiffs had appealed from "that certain judgment entered in favor of defendants Monrovia City School District, and Azusa City School District." Counsel for appellants states in his affidavit:

"At the time of the Notice of Appeal affiant had telephoned the Clerk of the Court for the date, book and page of the Judgment entered in favor of *defendants*, and was informed by the Clerk of the date and book and page indicated in the Notice of Appeal. At that time affiant believed that the Court had entered in a single Judgment the dismissals in favor of both defendants in keeping with the rule that the Court should make but one Final Judgment in a cause."

[1] Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription. *Harrelson v. Miller & Lux*, 182 Cal. 408, 414, 188 P. 800; *Balkins v. Norrby*, 61 Cal.App.2d 413, 416, 142 P.2d 958; *Kellett v. Marvel*, 6 Cal.2d 464, 471, 58 P.2d 649; *Adams v. Talbott*, 20 Cal.2d 415, 417, 126 P.2d 347; *In re Estate of Smead*, 215 Cal. 439, 441, 10 P.2d 462. The respondent Monrovia City School District was not misled by the uncertainty in the notice of appeal. In June, 1953, the district procured a stipulation extending the time within which to file its brief. The brief was filed on September 11, 1953, the same day on which the motion to dismiss was filed.

[2,3] It is the policy of the law that every case should be heard on its merits. Here it is perfectly apparent from the notice of appeal that the appellant sought review of the order of the superior court sustaining the respective demurrers of the

two school districts and properly sought to do so by appealing from the judgment of dismissal. His only error was in assuming that a single judgment of dismissal had been entered, when in fact a separate judgment had been entered as to each school district. Respondent Monrovia City School District was not misled, nor has it suffered any prejudice. It is clear that in the circumstances presented the motion to dismiss should be denied. See *Holden v. California Emp., etc., Comm.*, 101 Cal.App.2d 427, 430, 431, 255 P.2d 634; and *Airline Transport Carriers v. Batchelor*, 102 Cal.App.2d 241, 247, 248, 227 P.2d 480.

Turning to the merits of the cause, the theory upon which plaintiffs sought to recover is that a proximate cause of the death of their child was the asserted negligence of the two districts in advising and permitting the child to attend Monroe Elementary School in the City of Monrovia, whereas he should have been sent to Santa Fe Elementary School; that in traveling to and from Monroe Elementary School, the child was obliged to cross Huntington Drive, a heavily traveled street. Recovery is also sought upon the ground that Monrovia School District was negligent in not providing the child with transportation from school to his home or for his safe conduct across Huntington Drive.

In substance, the allegations of the complaint are that Gerald Girard, aged nine, was a registered pupil at Slauson Elementary School in the Azusa City School District; that two employees of that district were advised by Gerald's brother that the family had moved to 1304 Alamos Street in Monrovia, and said employees were requested by the brother to have Gerald and his school records transferred to the proper elementary school in Monrovia; that said employees negligently advised the brother that Monroe Elementary School in Monrovia was the proper school for Gerald to attend; but that in truth said employees knew or should have known by use of ordinary care that a child who resided at 1304 Alamos Street was not entitled to enroll at Monroe Elementary School, but should enroll and attend Santa Fe Elemen-

tary School. Further, it is alleged that in reliance upon the information received, the parents presented Gerald for admission to Monroe Elementary School and the employees, principal and teachers of said school negligently permitted Gerald to register and attend, knowing that a pupil residing at Gerald's address should attend Santa Fe Elementary School. That in permitting such enrollment and attendance, the Monrovia City School District and its said employees acted negligently and in violation of section 1503 of the Education Code.

The complaint continues by charging that the defendants and their employees knew or should have known that Huntington Drive was a major and heavily traveled thoroughfare and dangerous for a child of nine to cross; that "in keeping with the law and custom," defendant Monrovia City School District "purported" to provide motor transportation for pupils crossing Huntington Drive, and did provide transportation from Gerald's home to the school, but negligently failed to provide transportation from school to home and negligently failed to provide protection or a safe means for Gerald to cross Huntington Drive on his way home.

The complaint concludes with the allegation that the acts of negligence of the defendant Delores L. Hall, operator of the vehicle that struck the child and the acts of negligence of the school districts and their employees "operated singly and independently as well as jointly and concurrently and proximately to cause the death of said Gerald Girard."

Appellants urge that the superior court abused its discretion in sustaining the demurrers without leave to amend; that "what constitutes negligence of the school district in making possible a condition of hazard is a question of fact for the jury"; and that whether the death of the child was proximately caused by the act of one of two negligent agencies is also a question of fact for the jury; that the test of liability of the districts is whether the consequences of their acts were "reasonably foreseeable"; that they, the school districts, are not excused because the im-

mediate cause of the injury was not actually foreseen by them if by the exercise of ordinary care they would have foreseen the danger to the child.

[4] The contention that the court abused its discretion in sustaining the demurrers without leave to amend must fail for two reasons: first, the record does not disclose that leave to amend was asked for in the court below; and second, it clearly appears from the allegations of the complaint that amendment would be fruitless, because a cause of action upon any theory warranted by the facts set forth could not be stated against either of the school districts. Appellants have not attempted to point out on appeal how or in what manner the complaint could be amended so as to meet the objections of respondents.

[5-8] The facts of the case clearly show that the sole proximate cause of the child's death was that he was struck by an automobile while crossing the street. Assuming that any of the asserted acts or omissions of the districts constituted a breach of a legal duty owed to the child, such breach of duty was a remote, and not a proximate, cause of the death. As was said in *Johnson v. Union Furniture Co.*, 31 Cal.App.2d 234, 237, 87 P.2d 917, 919:

"It is well settled that in order to maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege and prove that the wrongful act of the defendant was a direct and proximate cause of the injury. *Marsiglia v. Dozier*, 161 Cal. 403, 119 P. 505. In other words, 'To impose liability it is not enough to show that an injury would not have occurred in the absence of the negligent act, but it must be shown that the act was the efficient cause of the injury—the act from which the injury followed in continuous sequence unbroken by any efficient intervening cause. Thus even though one has been guilty of negligence, he may still not be liable * * * if such negligence is remote in the chain of causation and did not contribute proximately to the injury'. 19 Cal.Jur., p. 561. And in this connection it is held generally that the word 'proximate' is intended to mean direct or immediate, as opposed to remote (*Straten*

v. Spencer, 52 Cal.App. 98, 197 P. 540); and that negligence requiring the interposition of new and independent agencies to cause injury is remote (*Oakland Bank of Savings v. Murfey*, 68 Cal. 455, 9 P. 843). Moreover, in determining the question of proximate cause, care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the *causa causans*, and not merely the *causa sine qua non*. *Klarquist v. Chamberlain & Proctor*, 124 Cal.App. 398, 12 P.2d 664."

In *Angelis v. Foster*, 24 Cal.App.2d 541, 75 P.2d 650, 651, the complaint charged that school trustees by resolution had deemed it advisable to provide the pupils of a school with transportation, but that on the day plaintiff was injured the trustees had failed to provide such transportation, and plaintiff was injured while crossing the road. It was contended that the failure to provide transportation was a proximate cause of injury. The court there said, in part: "While the alleged failure to provide transportation may have been a condition in the order of causation by which the injury was brought about * *, it was manifestly the gross and intervening negligence of Foster, *which could not have been reasonably anticipated by respondents*, which was the sole proximate cause of the damage." (Emphasis added.)

Of course respondents could reasonably foresee that if a pupil is transferred to a different school he will take a different route and cross different streets, and be subjected to varying degrees of traffic hazards, but they cannot reasonably foresee that on any given street on any particular occasion, either a motorist or the pupil will fail to exercise ordinary care, or that at any particular location an unavoidable accident may occur.

[9,10] A second ground upon which the action of the trial court should be upheld is that no legal breach of duty was committed by either of the respondent

districts. Section 16251 of the Education Code provides that a district may provide for transportation of pupils. The section is clearly permissive in character. Appellants cite no authority for the proposition that it is negligence for a school district to fail to provide transportation. Appellants argue that the district, having undertaken to provide transportation, is bound to use due care in carrying out the duties it has undertaken to perform. However, it appears that the facts are that the Monrovia District undertook merely to provide transportation from home to school, and it was under no duty to provide transportation in both directions.

[11] No authority is cited for the proposition that either district owed a duty to the pupil to see that he was enrolled in a particular school within his district. As pointed out by respondents sections 1503 and 1503.1 of the Education Code authorize enrollment of pupils from another district or even from another county.

Without further discussion of appellant's claim that the school districts were negligent in failing to provide transportation on the day of the accident and in failing to enroll the deceased pupil in a particular school in the district within which he lived, we are satisfied that from the facts averred, such failure was a remote and not a proximate cause of the accident which resulted in the pupil's death. While the alleged failure to provide transportation or enroll the decedent in another school may have been a condition in the order of causation by which the fatality was brought about, it was manifestly the intervening negligence of the driver of the vehicle, which could not have been anticipated by the officials of the school districts, which was the sole proximate cause of the accident. The following authorities support this conclusion: *Hale v. Pacific Tel. & Tel. Co.*, 42 Cal. App. 55, 183 P. 280; *McMillan v. Thompson*, 140 Cal.App. 437, 35 P.2d 419; *De Vito v. Peterson*, 134 Cal.App. 100, 25 P. 2d 19; 19 Cal.Jur., "Negligence", sec. 17, p. 567.

The motion of respondent Monrovia City School District to dismiss the appeal from the judgment in its favor is denied.

For the foregoing reasons, the judgments are, and each of them is, affirmed.

DORAN and DRAPEAU, JJ., concur.



122 Cal.App.2d 63

D'AMICO v. BROCK et al.

Civ. 8289.

District Court of Appeal, Third District,
California.

Dec. 15, 1953.

Rehearing Denied Jan. 8, 1954.

Hearing Denied Feb. 10, 1954.

Producer of olives brought action against the Director of the Department of Agriculture of the State of California and others to enjoin them from enforcing director's order prohibiting the canning of Saint Agostino olives, smaller in size than "mammoth" as that size is defined in the Agricultural Code. The Superior Court of Butte County, Deirup, J., entered judgment adverse to defendants, and they appealed. The District Court of Appeal, Paulsen, J. pro tem, held that order was a major amendment to marketing order within meaning of the Marketing Act, and, having been made without following statutory procedure provided for adoption of a major amendment was invalid for all purposes.

Judgment affirmed.

1. Evidence ⇐20(1)

The District Court of Appeal may take judicial notice of the fact that the production of olives is a seasonal operation in a limited sense only.

2. Constitutional Law ⇐81

The police power of the state may, at times, be harsh, and necessarily so, but is not unlimited.

3. Constitutional Law ⚖️67

Whether there has been a reasonable exercise of the police power by the state is a question for the courts.

4. Agriculture ⚖️1

The Marketing Act should be construed in such a way as not to impute to the Legislature the intention to provide for an arbitrary, unreasonable, and unconstitutional exercise of the police power. Agricultural Code, § 1300.10 et seq.

5. Constitutional Law ⚖️48

Courts should construe legislative enactments and orders made by administrative agencies thereunder so as to uphold their constitutionality if possible.

6. Constitutional Law ⚖️48

Where two statutory constructions, one consistent and one inconsistent with the provisions of the constitution, are possible, the enactment or order should be construed so as to harmonize with the constitution and comport with the legitimate powers of the Legislature.

7. Administrative Law and Procedure ⚖️420
Food ⚖️1

Order, purportedly issued by the Director of Agriculture under authority of the Marketing Act of 1937, and prohibiting the canning of Saint Agostino olives smaller in size than "mammoth" as that size is defined in the Agricultural Code, was a "major amendment" to marketing order within meaning of the Marketing Act and, having been made without following statutory procedure provided for adoption of a "major amendment," was invalid for all purposes. Agricultural Code, §§ 870, 1300.10 et seq., 1300.13, 1300.15(b) (7), 1300.16.

See publication Words and Phrases, for other judicial constructions and definitions of "Major Amendment".

8. Estoppel ⚖️63

A litigant can not be prevented from asserting his legal rights when assailed by either criminal or civil action merely because he protested against proposed legislative or administrative changes designed to curtail those rights.

9. Estoppel ⚖️63

Fact that producer of olives knew of and protested against proposed order of Director of Agriculture prohibiting canning of Saint Agostino olives, smaller than "mammoth" as that size is defined in the Agricultural Code, did not estop producer of olives from questioning validity of order after it was entered, on ground that it was entered without notice required by Marketing Act, in view of fact that the Agricultural Code imposes both civil and criminal liability on one violating a legally adopted order made pursuant thereto. Agricultural Code, §§ 870, 1300.10 et seq., 1300.13, 1300.15(b) (7), 1300.16.

Edmund G. Brown, Atty. Gen., by Paul M. Joseph, Dep. Atty. Gen., for appellants.

Clewe & Blade, Oroville, for respondent.

PAULSEN, Justice pro tem.

This is an appeal from a judgment enjoining and restraining defendants and appellants from enforcing the provisions of an order of the Director of Agriculture, purportedly issued by authority of the California Marketing Act of 1937, which attempted to prohibit the canning of Saint Agostino olives smaller in size than "Mammoth", as that size is defined in Section 870 of the Agricultural Code.

For approximately 16 years prior to the commencement of this action on December 3, 1951, respondent had been a producer of that variety of olives in Butte County. During the 1951 season he harvested in excess of 200,000 pounds of olives, of which approximately 94,000 pounds were of the size denominated in the Agricultural Code as "Small," "Select," or "Standard," or larger, but smaller than "Mammoth". The reasonable market value of these olives for canning purposes was in excess of \$8,500. For no other purpose were they worth more than \$10 a ton, or a total of \$500.

From January 20, 1951 until October 15, 1951 there was in effect a marketing order issued by the Director, governing the mar-

keting of olives in that area. This order defined the terms used therein, established an advisory board, and further provided in paragraph 2, section A of Article IV, among other things, that:

"* * * All olives which are 'mammoth or larger' for the Ascolano and Barouni varieties, 'giant or larger' for the Sevillano variety, 'medium or larger' for the Obliza variety, and 'Standard or larger' for all other varieties, except as provided in Paragraph 4, following, as such sizes are defined in the applicable section in the Agricultural Code, are hereby declared to be of proper quality, as to size, for canning as whole or pitted olives; but, for the protection of the interests of consumers and to attain the advertising and sales promotion objectives of this Order, all olives below such sizes are hereby declared to be objectionable and unfit for canning as whole or pitted olives, and are designated as 'substandard sizes.' The Board shall have authority to make necessary and proper arrangements for inspection and otherwise carrying out the provisions of this Section."

Obviously, the effect of the foregoing provision of the marketing order was to declare and establish that "Standard or larger" olives of any variety other than those therein mentioned by name were "of proper quality, as to size, for canning as whole or pitted olives."

The order provided in paragraph 4 of said Section A, Article IV that:

"For any variety of olives other than Missions, Manzanillos, Ascolanos, Sevillanos, Barounis or Obliza varieties, the Board may recommend and the Director may approve an appropriate minimum canning size, larger than standard size, for any such variety, as such sizes are defined in the Agricultural Code; provided that the Director finds that olives of such variety or varieties smaller than such recommended minimums are below a reasonable standard of marketable quality due to objectionable size."

Pursuant to the authority granted by said paragraph 4, on October 5, 1951 the Director issued an order entitled, "Order of the Director of Agriculture Approving and Making Effective General Operating Rules and Regulations for the Marketing Order for California Canned Olives and California Green Olives as Amended 1951-1952 Marketing Season."

This order, hereinafter referred to as the "size order", after reciting the findings of the Director, provides:

"(1) The minimum canning size for olives of the Saint Agostino variety shall be the mammoth size as such size is defined in the Agricultural Code of the State of California and that all olives of the Saint Agostino variety below such size are hereby declared to be objectionable and unfit for canning as whole or pitted olives and are designated as substandard in size.

"(2) Subject to the provisions of Subsection 2 of Section A, Article IV of said Marketing Order, as Amended, no processor shall prepare for market for canning as whole or pitted olives nor shall can whole or pitted olives of the Saint Agostino variety which are smaller than mammoth size as such size is defined in the Agricultural Code of the State of California.

"(3) This Order shall become effective at 12:01 a. m., Monday, October 15, 1951, and shall continue in effect until suspended, terminated or modified."

The trial court held that the size order was invalid and enjoined defendants from enforcing it.

Respondent has at all times since the commencement of this action challenged the authority of the Director to include in a marketing order a provision which would authorize him to issue, as an administrative rule or regulation, a size order such as that involved herein, without following the procedure prescribed for the adoption of a marketing order or major amendments thereto.

It is the position of appellants that the size order was not an amendment within

the statutory meaning of that term but that it was an administrative order issued under the provisions of Section 1300.16, subsection (f), of the Agricultural Code, and that pursuant to said subsection it was adopted in accordance with the procedure set up in the general rules and regulations implementing the marketing order. Said subsection (f) reads as follows:

"(f) Upon recommendation by the advisory board concerned the director shall have power, consistent with this act, to establish such general rules and regulations covering the operations of marketing orders as may be necessary to carry out the purposes and attain the objectives of this act or any marketing order issued thereunder. The provisions of subdivision (e) of this section relative to posting, publication, and mailing of notice and time of taking effect shall be applicable to any general rule or regulation established under this subdivision applicable to marketing orders generally. Notice of seasonal marketing regulations and other administrative actions authorized in any particular marketing order shall be given to producers or handlers in the manner and within the time required as specified in such marketing order or in general rules and regulations issued and made effective hereunder. The exercise of the powers granted to an advisory board in its administration of a marketing order made effective in accordance with the provisions of this act shall be subject to the approval of the director."

The provisions for posting, publication and mailing of notice referred to in subsection (e) do not relate to notice and hearing *before* the adoption of a marketing order or of an amendment, but are designed to acquaint interested parties of action already taken.

The act is completely lacking in clear-cut definitions of such terms as "administrative regulations" and "major amendments", although it does state, as hereafter appears, some of the changes of a marketing order that would be considered major amendments. It is therefore necessary to

examine the pertinent provisions of the act and to determine what these terms mean in the light of the purposes of the act and the effect of the practical application of the order, amendment, or regulation on those concerned and on those to be protected.

Section 1300.10 is a legislative declaration of the purposes of the act, and of the intention to protect the public in the marketing of agricultural commodities and promote the industry by the exercise of the police power of the state.

Section 1300.13 provides in substance that the Director shall administer and enforce the provisions of the act; that in order to effectuate its purposes he is authorized to issue and enforce marketing orders regulating the marketing of agricultural commodities. Then follow detailed provisions for *prior* notice to all persons who might be directly affected by the proposed order or amendments thereto. Provision is made for accurate and inclusive lists of persons to be notified, for hearings, for the taking of testimony under oath and for the keeping of complete records of the proceedings.

Section 1300.15 provides for an advisory board composed of producers where the order affects producers, and composed of handlers where the order affects handlers. The duties of the board are confined to advice and administrative matters and may include recommendations for administrative rules and regulations as well as for amendments to the marketing order. It is then provided that:

"(b) Subject to the legislative restrictions and limitations set forth herein any marketing order issued by the director pursuant to this chapter may contain any or all of the following provisions for regulating or providing methods for regulating producer marketing or the handling or any of the operations of processing or distributing by handlers of any agricultural commodity within this State, but no others:
* * *"

Then follow provisions for the control of surpluses, for limiting and allotting quantities and other matters which can not be

construed to authorize the issuance of a size order of the nature of the one here involved without prior notice and hearing. If such authority exists, it must be found in subsection (b), paragraph (7), of said section, which reads in part as follows:

"Provisions for the establishment of uniform grading and inspection of any agricultural commodity delivered by producers to handlers or others engaged in the handling thereof and for the establishment of grading standards of quality, condition, size or pack for any agricultural commodity, and the inspection and grading of such commodity in accordance with such grading standards so established, such grading standards for any such commodity shall not be established below any minimum standards now prescribed by law for such commodity."

Section 1300.16 sets up elaborate procedure for the adoption of marketing orders and major amendments thereto. Before either may be made effective the procedure for notice and hearing heretofore mentioned must be followed, and the Director must also make findings that one or more alternative provisions for obtaining the assent of certain percentages of the persons directly affected have been complied with. It is provided that "For the purposes of this chapter a major amendment to a marketing order shall include *but not be limited to* any amendment which adds to or deletes from any such marketing order any of the following *types of regulation or authorizations: * * **" (Italics supplied.) Listed here are 13 types, 12 of them dealing for the most part with limitations on the handling of surpluses. Number 13 provides:

"Authority to extend the application of the provisions of any marketing order to portions or uses of an agricultural commodity not previously subject to such provisions or to restrict or extend the application of such provisions upon the producers or handlers of such portions or uses of any such commodity."

There can be no question that if the size order had added or deleted an *authorization* to do the things mentioned therein or described in said item 13, it would, by the

terms of the act, have constituted a major amendment. But the size order did not purport to add an authorization, as it already contained one of that nature; it was obviously intended to be a regulation. And in this connection it is significant that, in speaking of major amendments and the 13 items included as such, the act refers to them as *types of regulations* or authorizations. This, and the fact that major amendments were not limited to the 13 types, is a recognition of the difficulty inherent in attempting to frame definitions that will include either class of change and exclude the other.

This section also contains the following:

"Modification of any provisions of any marketing order in effect for the purpose of clarifying the meaning or application of such provisions or modifying administrative procedures for carrying out such provisions are hereby declared not to be a major amendment of such marketing order."

It is obvious that the size order was not a "minor amendment". The original marketing order clearly permitted the canning of olives not specifically named therein that were smaller than "Mammoth". There was no doubt or uncertainty concerning the meaning or application of these provisions. The size order did not constitute a *minor* amendment.

We have a situation then where the provisions of the act do not conclusively determine the question: Was the size order merely an administrative regulation that could be made effective following notice that it had already been adopted, or was it a major amendment which was invalid because of a failure to give the statutory notice?

It is clear from a reading of the entire act that the legislature intended to vest broad powers in the Director to regulate production and marketing of agricultural commodities for the protection of the consuming public, for the promotion of the agricultural industry of the state as a whole; and also for the protection of those engaged in the industry. It is equally clear that to a large extent this was to be done on a cooperative basis, with active participation of

those directly affected and in a manner that would give producers, processors and handlers an opportunity to be heard when matters of vital importance were under consideration and before action could be taken.

The original marketing order permitted respondent to grow and market his olives in the manner followed by him in preceding years. The record discloses that he had heard of the contemplated change and had protested it, but that its actual adoption occurred during the harvest season.

[1] This Court may take judicial notice of the fact that the production of olives is a seasonal operation in a limited sense only. Trees must be planted and nurtured during the nonproductive years. Each season the operation must extend over a period of many months. It is not always possible to readjust to drastic changes made on short notice, even when there is reason to believe they are under consideration.

When respondent, with an established orchard in operation, started preparing for the 1951 season he was justified in believing that the standards theretofore fixed would not be changed before the crop was marketed. The period of harvest was upon him when the size order was adopted on October 5, 1951, effective as of October 15, 1951.

It seems clear that the legislature intended to confer authority upon advisory boards, when a marketing order includes the provision permitted by 1300.15(b)(7), to recommend, and upon the Director to approve, grading standards of size greater than those already fixed by law. But it does not follow, necessarily, that the resulting order is nothing more than an administrative regulation that may be made effective without prior notice and hearing as prescribed for major amendments.

The manifest difficulty of effectuating the purposes of this act made it necessary to vest broad powers in the Director, but the facts of this case again demonstrate the cogent reason for guaranteeing the right of individuals and groups directly affected to notice and to a hearing before major decisions are made. Without such a guarantee the power of the courts to act promptly when the police power is abused would, in many instances, be defeated.

Cal.Rep. 263-264 P.2d-33

[2,3] The police power of the state may, at times, be harsh, and necessarily so, but that power is not unlimited, and whether there has been a reasonable exercise of it is a question for the courts. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381; *Paraco, Inc. v. Department of Agriculture*, 118 Cal.App.2d 348, 257 P.2d 981.

[4] In this case a means was employed which practically destroyed the value of respondent's crop after it was ready for or partly harvested. Prior to the adoption of the order no notice was given and no opportunity for a legal hearing was afforded. If the legislature intended by the provisions of the act to vest such broad and sweeping authority in the Director by means of a regulation made under the terms of a marketing order, such authorization was arbitrary and unreasonable and an unconstitutional exercise of the police power. We are of the opinion that the act should be construed in such a way as not to impute such intentions to the legislature.

[5,6] It is well settled that the courts should construe legislative enactments and orders of this kind so as to uphold their constitutionality if possible. Where two constructions, one consistent and one inconsistent with the provisions of the Constitution, are possible, the enactment or order should be construed so as to harmonize with the Constitution and comport with the legitimate powers of the legislature. 11 Cal.Jur. 2d, sec. 61.

[7] Applying the foregoing rule of construction in this case it must be held that the size order here involved was a major amendment to the marketing order and it having been made without following the statutory procedure provided for the adoption of such orders, was invalid for all purposes.

Appellants contend that the original complaint and the amended complaint made to conform to proof do not state a cause of action; that the evidence does not support the findings and the findings do not support the judgment. These contentions are based upon appellant's assertion that the size order was a mere administrative regulation and must fall with it.

The record discloses that respondent heard of the contemplated changes in advance of their adoption and protested them. Appellants now argue that he has waived his rights to notice and hearing and is estopped to question the validity of the size order.

No authority is cited to support these contentions and no facts are called to our attention that would constitute an estoppel.

The Agricultural Code imposes both civil and criminal liability on any person who violates a legally adopted order made pursuant thereto.

[8, 9] A litigant can not be prevented from asserting his legal rights when assailed by either criminal or civil action merely because he protested against proposed legislative or administrative changes designed to curtail those rights.

In view of the conclusions reached herein, it is unnecessary to consider other points raised in the briefs.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



121 Cal.App.2d 838

PEOPLE v. LAMB.
Cr. 2903.

District Court of Appeal, First District,
Division 1, California.
Dec. 14, 1953.

Defendant was convicted of committing lewd and lascivious acts upon children eight and six years of age respectively. From judgment of conviction and order denying his motion for new trial entered in the Superior Court, Alameda County, Donald K. Quayle, J., defendant appealed. The District Court of Appeal, Peters, J., held that three girls, alleged victims of offense, five, six and nine years of age respec-

tively at time of trial, had demonstrated their qualifications to testify as witnesses, and that their testimony was sufficient to sustain conviction.

Judgment and order affirmed.

1. Infants ⇨20

Testimony of three girls, nine, six and five years of age respectively, as to lewd and lascivious acts allegedly committed upon them by defendant in the presence of all was sufficient to sustain conviction of lewd and lascivious conduct with children in violation of statute. Pen.Code, § 288.

2. Infants ⇨20

Appellate courts will critically examine the record in cases involving charges of sex crimes against children, and will consider the fact that prosecution's case depends upon testimony of a child or children of tender years in determining the prejudicial nature of other errors.

3. Criminal Law ⇨1159(2)

In a criminal case, appellate court cannot reweigh the evidence.

4. Criminal Law ⇨1159(4)

Testimony of three children as to lewd and lascivious acts allegedly committed upon them by defendant in the presence of all, though involving unusual and perverted conduct, was not so fantastic as to be inherently improbable, and hence determination of jury as to the credibility of such witnesses was conclusive on appeal. Pen.Code, § 288.

5. Witnesses ⇨40(1), 45(2)

A child under 10 years of age, in order to qualify as a witness, must be capable of receiving just impressions at time the facts testified to occurred and must be capable of relating such facts truly at time of trial, and child must have some understanding before oath is administered of the nature and obligation thereof. Code Civ. Proc. § 1880.

6. Witnesses ⇨40(2)

Trial judge has considerable discretion in determining whether a child under 10 years of age possesses the statutory qualifications of a witness. Code Civ.Proc. § 1880.

7. Witnesses ⇨77

In determining whether a child under 10 years of age was qualified to testify as a witness, appellate court is not limited by voir dire examination, but may examine testimony subsequently given by such witness, and such testimony, if clear, relevant and coherent, may be used to support ruling as to qualifications of witness. Code Civ.Proc. § 1880.

8. Witnesses ⇨40(1)

A child under 10 years of age may have ability to recollect and narrate sufficient to qualify as a witness, even though he cannot remember and narrate some simple facts. Code Civ.Proc. § 1880.

9. Witnesses ⇨45(2)

An understanding that some earthly evil will follow if he does not tell the truth is sufficient to qualify a child under 10 years of age as a witness in so far as statutory test of truthfulness is concerned, and no religious belief or conviction nor any detailed knowledge of the nature of oath is required. Code Civ.Proc. § 1880.

10. Witnesses ⇨45(2)

Ability to recollect and narrate, as demonstrated by voir dire examination and clear, coherent and plausible testimony subsequently given, and knowledge that she should tell the truth and would be punished if she did not were sufficient to qualify a girl nine years and two months of age to testify as a witness in prosecution for lewd and lascivious acts allegedly committed upon her, over objection that voir dire examination did not show that child knew the purpose of an oath, though she was unable to describe what happens to adults when they lie. Code Civ.Proc. § 1880; Pen.Code, § 288.

11. Criminal Law ⇨1036(2)

Failure to challenge or object to a child's qualifications to testify constitutes an implied waiver which precludes raising the question on appeal. Code Civ.Proc. § 1880.

12. Witnesses ⇨79(2)

Voir dire examination and clear, coherent and plausible testimony subsequently given established that a girl six years

and nine months of age was qualified to testify as a witness in prosecution for lewd and lascivious acts allegedly committed upon her five months previously. Code Civ. Proc. § 1880; Pen.Code, § 288.

13. Witnesses ⇨79(2)

Voir dire examination and clear, coherent and plausible testimony subsequently given established qualifications of a girl five years and three months of age to testify as a witness in prosecution for lewd and lascivious acts allegedly committed in her presence upon her sister and another girl five months previously. Code Civ. Proc. § 1880; Pen.Code, § 288.

14. Criminal Law ⇨1171(1)

Where three girls, five, six and nine years of age respectively, testified in detail as to lewd and lascivious acts allegedly committed by defendant upon them and a fourth girl, calling fourth girl, then five years and nine months of age, as a witness, though she refused to answer any questions on voir dire and was therefore withdrawn, was not prejudicial to defendant, even if prosecuting attorney was chargeable with knowledge of her inability to testify. Code Civ.Proc. § 1880; Pen. Code, § 288.

15. Criminal Law ⇨730(7)

Argument of prosecuting attorney to jury in prosecution for lewd and lascivious acts against children was fair and objective and remarkably free of appeals to passion and prejudice, and slight overstatement of fact was not prejudicial, in view of prompt admonition to jury that counsel's statements were not evidence. Pen.Code, § 288.

16. Infants ⇨13

Contributing to delinquency of minors by telling children under 14 years of age an obscene story without touching them would not constitute violation of statute relating to commission of lewd and lascivious acts upon children. Pen.Code, § 288; Welfare and Institutions Code, § 702.

17. Criminal Law ⇨717, 730(5)

Statement by prosecuting attorney in argument to jury that if defendant had committed upon prosecuting witnesses, who were under 14 years of age, violations of

section of Welfare and Institutions Code relating to offense of contributing to delinquency of a minor, defendant would necessarily be guilty of a violation of Penal Code provision making commission of lewd and lascivious acts against children under 14 years of age an offense, was erroneous statement of law, but was not prejudicial to defendant, in view of cautionary instructions to disregard statements of law made by counsel and determine what the law was from instructions of court. Pen.Code, § 288; Welfare and Institutions Code, § 702.

Edmund G. Brown, Atty. Gen., Clarence A. Lin, Asst. Atty. Gen., Clayton R. Janssen, Jr., Deputy Gen., for respondent.

Ivan C. Sperbeck, Oakland, for appellant.

PETERS, Presiding Justice.

Defendant was charged with two counts of lewd and lascivious conduct alleged to have been committed upon children eight and six years old, respectively, in violation of section 288 of the Penal Code. The jury brought in verdicts of guilty on both counts. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

The information charged and the evidence produced by the prosecution showed that the offenses involved occurred on the afternoon of May 23, 1952, in the home of appellant in Oakland. The evidence produced by the prosecution also showed that in addition to the two offenses charged in the information alleged to have been committed against Alberta, then aged eight years and nine months, and Loretta, then aged six years and four months, the appellant, at the same time and place, committed similar lewd and lascivious acts upon Kathleen, sister of Loretta, then aged four years and ten months, and upon Patricia, sister of Alberta, and then aged five years and four months. All four girls were produced as prosecution witnesses. Patricia on *voir dire* was unable to qualify as a witness and was withdrawn. The other three girls qualified and were permitted to testify. The major contentions of appellant on this appeal are that the evidence

is insufficient to sustain the judgments, and that the trial court committed prejudicial error in permitting these three young children to testify. It is also urged that the prosecuting attorney committed prejudicial misconduct in calling Patricia as a witness, and in making certain statements in his arguments to the jury.

There can be no doubt, if the three children who testified properly qualified, that their evidence supports the judgment. The three child witnesses all told substantially the same story, differing in some details, but substantially similar, as to the commission and the manner of the commission of the sexual acts constituting the operative elements of the crimes charged. There is no need to set forth these sordid facts in this opinion. Suffice it to say that these three girls, who live in the same general area as does appellant, testified that after school on May 23, 1952, they, together with Patricia, were playing on the railroad tracks adjoining appellant's property; that they went into his yard and ultimately into his house to play; that he invited the children to go upstairs to the bedroom; that there in the presence of all the children, and upon each child successively, he committed the first series of acts constituting violations of section 288 of the Penal Code; that a short time later, in the same bedroom, again in the presence of all the children, and again upon each child successively, he committed a second series of acts, different from the first, but also constituting violations of section 288 of the Penal Code. Alberta and Loretta also testified that, after these events, they took a bath in appellant's house and in his presence, and that appellant then told them an obscene story. The mother of Kathleen and Loretta testified that her daughters complained to her of appellant's conduct upon their arrival home on the very day the acts are alleged to have been committed. The mother of Alberta and Patricia did not testify to any complaint made by her daughters, but did testify, somewhat ambiguously, that on August 27, 1952, three months after the offenses are alleged to have occurred, and one month after the information was filed, which in one count

charged an offense against her daughter Alberta, her two girls came to her and stated that they had been over to appellant's home.

Complaint was immediately made to the police, and officer Curran of the Oakland Police Department interviewed appellant in the city jail. Curran testified that on May 24, 1952, appellant denied that the four children, or any of them, had, on May 23, 1952, been in his home. But on May 26, 1952, in a second interview, appellant admitted that the four children had been in his home on May 23, 1952, and that some of them had taken a bath there.

Appellant, as a witness on his own behalf, testified that he had been a railroad employee for 27 years, and had lived at the address where these acts are alleged to have taken place for some 18 years. He admitted that the four children had been in his home on May 23, 1952, but he denied committing any of the criminal acts testified to by the children and, in fact, testified that at no time while the children were in the house did he even go upstairs with them or know that they had gone upstairs. He denied that he had told officer Curran that the children had gone upstairs and had taken a bath. It was his testimony that on May 22, 1952, Alberta and some other children not here involved, had played in his yard and had come into the house to get some water, and, while there, that he had permitted them to play on his typewriter; that on May 23, 1952, Alberta, in the company of Loretta, Kathleen and Patricia, without permission, walked into his house, and asked permission to play in his yard, which he granted; that they played in the yard and basement for a while and again entered the house; that Loretta and Alberta got into an argument and started to slap each other; that Loretta told him that Alberta had taken some gum and candy from a cabinet and some money from appellant's wallet; that appellant ordered them to stop fighting and to get out and not to come back. Alberta admitted taking some money from the wallet but testified that this occurred after the events in the bedroom had been committed, and that appellant saw her take it and made no pro-

test. The girls also testified that, in addition to the money taken by Alberta from the wallet, appellant, after committing the acts in the bedroom, gave each of them ten cents.

Appellant testified that the children then left, and that he then discovered that \$5.50 was missing from his wallet. Alberta's testimony was that it was \$1.25. At any rate the children left and bought some coca cola, candy, potato chips and ice cream with the money they had taken or received. Appellant then testified that the children returned to his home with their purchases and again entered his kitchen; that he charged Alberta with taking the money, but she replied that she had secured it from her own bank; that Alberta then asked permission, which he granted, to put the ice cream into his refrigerator; that the children went out on the back lawn to eat the candy, etc.; that Alberta returned to the house and got the ice cream; that the children then left.

[1-4] The evidence is obviously sufficient, if admissible, to sustain the judgment. Appellant stresses the difficulties of an accused in meeting such charges, and, after comparing the testimony of the three child witnesses, emphasizes some of the inconsistencies in their stories. He urges the possibility that the children had been coached in their testimony, and concludes that their stories are so fantastic as to be incredible and not entitled to belief. It is undoubtedly true that appellate courts will critically examine the record in cases involving charges of sex crimes against children, and will consider the fact that the prosecution's case depends upon the testimony of a child or children of tender years in determining the prejudicial nature of other errors. *People v. Byrd*, 88 Cal.App. 2d 188, 198 P.2d 561; *People v. Adams*, 14 Cal.2d 154, 93 P.2d 146. But such cases usually depend upon the uncorroborated testimony of one child as to the commission of the acts. Here three children testified as to the acts that were committed. Although there are some variations and inconsistencies in their testimony, all three of the children testified as to the acts that were committed and how they were committed,

and all three stories are consistent and in some detail. Most of the arguments now made by appellant as to the sufficiency of the evidence should have been and were urged in the argument to the jury. The appellate court cannot reweigh the evidence. The stories here, although involving unusual and perverted conduct, are not so fantastic as to be inherently improbable. Under such circumstances, the determination of the jury as to the credibility of the witnesses is conclusive on an appellate court. *People v. McBride*, 69 Cal.App.2d 331, 159 P.2d 59; *People v. Mangus*, 5 Cal. App.2d 353, 42 P.2d 681; *People v. Hicks*, 76 Cal.App.2d 142, 172 P.2d 565.

The next major contention of appellant is that the trial court abused its discretion in allowing the three child witnesses to testify, it being claimed that these witnesses failed to qualify under section 1880 of the Code of Civil Procedure. That section provides:

"The following persons cannot be witnesses: * * *

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. * * *

[5] This section lays down two qualifications that a child under ten must possess before such child can testify—(1) such child must be capable of receiving "just impressions" at the time the facts testified to occurred, and (2) such child must be capable of "relating them truly" at the time of trial. *People v. Watrous*, 7 Cal.App.2d 7, 45 P.2d 380. That case also held that there was a third related but independent requirement and that is that, 7 Cal.App.2d at page 10, 45 P.2d at page 381, "there must be some understanding, before the oath is administered, of the nature and obligation thereof." (See, generally, 18 Cal.L.Rev. 85.)

[6] The trial judge, because of his ability to see how the child acts on the stand, possesses considerable discretion in determining whether a child under ten possesses these qualifications. *People v. Daily*, 135 Cal. 104, 67 P. 16; *People v. Meraviglia*, 73 Cal.App. 402, 238 P. 794; *People v. Tib-*

betts, 102 Cal.App. 787, 283 P. 830; *People v. Walker*, 112 Cal.App. 146, 296 P. 692.

[7, 8] In determining whether a child sufficiently can recollect and narrate, the appellate court is not limited by the *voir dire* examination, but may examine the subsequently given testimony. Subsequently given testimony, if clear, relevant and coherent, may be used to support the ruling on qualifications. *People v. Walker*, 112 Cal.App. 146, 296 P. 692; *People v. Arcia*, 85 Cal.App.2d 127, 192 P.2d 31; *People v. Denton*, 78 Cal.App.2d 540, 178 P.2d 524; *People v. Gibbons*, 83 Cal.App.2d 504, 189 P.2d 37. The trial court properly may decide that a child has the ability to recollect and narrate even though he cannot remember and narrate some simple facts. Thus in *People v. Slobodion*, 31 Cal.2d 555, 191 P.2d 1, a six-year-old child was held qualified in spite of his expressed opinion that there were twelve days in a week, was unable to fix the month of the occurrence, was unable to describe the size of defendant, and there was some evidence of coaching. In *People v. Carpenter*, 3 Cal.App.2d 746, 40 P.2d 524, a six-year-old misstated her age, could not give the date of her birthday nor her address, but, nevertheless, based upon her subsequently given coherent testimony, was held qualified.

[9] As to whether a child witness has demonstrated sufficiently a disposition for truthfulness, no religious belief or conviction is necessary nor need the child have any detailed knowledge of the nature of the oath. As long as the child understands that some earthly evil will follow if he does not tell the truth, that is all that is required. (See, generally, 13 Cal.L.Rev. 285, 289.) In *People v. Delaney*, 52 Cal.App. 765, 199 P. 896, a child of four was held properly qualified insofar as disposition for truth was concerned (but held disqualified because of his inability to recall) on testimony that he went to Sunday School, that his mother taught him to tell the truth, and that boys who lie go to jail. After first holding that a child need not understand the nature of an oath and that no belief in divine punishment was needed other than a sense of moral responsibility, the court stated, 52 Cal.App. at page 770, 199 P. at page 899:

"For these reasons we think that, to qualify a child under 10 years of age, upon the score of his moral responsibility, it is sufficient that he understands that it is his duty to tell the truth, and that he will somehow be punished if he does not. * * * With us, as we have said, intelligence, and not belief, is the true test."

In *People v. Carpenter*, 3 Cal.App.2d 746, 40 P.2d 524, it was contended that a child of six should have been disqualified because she testified that she did not know what happened to little girls who did not tell the truth except that she was spanked when she lied. The appellate court appropriately stated, 3 Cal.App.2d at page 748, 40 P.2d at page 525: "As a certainty, neither a child of six years nor any other person 'knows what happens' to anyone who does not tell the truth. The fact that the child knew that for such conduct ordinarily she suffered corporal punishment was a sufficient knowledge of consequences that would result to her from such misconduct in that regard." See, also, *People v. Thourwald*, 46 Cal.App. 261, 189 P. 124.

[10] How do these rules apply to these three children? Alberta was eight years and nine months old when the acts were committed, and nine years and two months old when called upon to testify. On her *voir dire* she gave her age, her birthday, the name of her school, the grade in school she attended—the low fourth—her address, and the names and ages of her sisters. She testified that she attended Sunday School "once in a while," and learned there what "happens" to those who do not tell the truth. She stated that it was "bad" not to tell the truth, and that she would not lie in the courtroom. In response to questions put to her by appellant's counsel she stated that she knew that if she lied she would get a whipping, but she was unable to describe what happens to adults when they lie. Appellant's objection to her qualifications "on the ground the *voir dire* examination does not show that she knows the purpose of an oath" was overruled. She then testified, her testimony covering some 47 pages of transcript. Her testimony is coherent, clear and plausible. In her cross-examination appellant's counsel was able to develop but few inconsistencies. That testimony

clearly indicates that her powers to recollect and to narrate were ample to comply with the code section. While her testimony as to her understanding of an oath, and the necessity of telling the truth is not too clear nor positive, it is sufficient to disclose that she knew she should tell the truth and would be punished if she did not, so as to comply with the rules as stated in *People v. Delaney*, 52 Cal.App. 765, 199 P. 896, and *People v. Carpenter*, 3 Cal.App.2d 746, 40 P. 2d 524, cited above. The objection was properly overruled.

Loretta was the next child witness produced. She was six years and four months old on May 23, 1952, and six years and nine months old at the time of trial. On *voir dire*, with some hesitancy, she testified as to her name and address, gave her age as six, stated that she was in the low second grade, and gave her teacher's name. She stated, in answer to leading questions asked of her by the court, that she attended Sunday School every Sunday where she has been taught the difference between right and wrong, and to tell the truth; that she knows what the truth is, and that if it is not told you "Go down to the devil"; that the devil was not going to get her, and that she intended to tell the truth; that one who does not tell the truth is a "brat." She stated that she understood the difference between the truth and a fairy story; that a fairy story was not the truth; that it was wrong to make up a fairy story except in play, and that she would not tell a fairy story while testifying but would tell just what she remembered. She was sworn in as a witness without objection by appellant. Her direct and cross-examination covers 31 pages of the transcript. It, too, is clear, coherent and plausible. Although there are some inconsistencies, and perhaps some contradictions, in her testimony, they are all minor in nature. As to the acts committed by appellant upon her and upon the other children, her testimony is detailed, clear, and entirely corroborates that of Alberta. Although she had to be led on her *voir dire*, her answers then, and when testifying as a witness, demonstrated that she had the ability to recollect and narrate. She answered key questions directly and intelligently. The *voir dire* demonstrated,

even more clearly than in the case of Alberta, that Loretta knew of the necessity of telling the truth.

[11] It should also be mentioned that failure to challenge or object to a child's qualifications constitutes an implied waiver which precludes the raising of the point on appeal. *People v. Aleshire*, 90 Cal.App.2d 506, 203 P.2d 569; *People v. Collins*, 5 Cal.App. 654, 91 P. 158; *Trigueiro v. Skow*, 24 Cal.App.2d 253, 74 P.2d 836.

[12] There was no error in permitting Loretta to testify.

[13] The last child witness was Kathleen, sister of Loretta, who was four years and ten months old on May 23, 1952, and five years and three months old at the time of trial. She had some difficulty at the beginning of her *voir dire* examination. She could not tell her correct age, insisting at all times that she was but five months old. However, without coaching, she gave her name, the names of her sisters and their ages, stated that she attended kindergarten, and gave the name of her teacher. She testified that she attends Sunday School regularly; that she knows what it means to tell the truth; that she is scolded and hit when bad; that she would be a bad girl if she did not tell the truth, and would go "down there" if she told a lie, and that she would "go up there" if she told the truth. She also stated that a fairy story was a lie and that what really happened was the truth. Not only was no objection made to her qualifications, but, at the close of the *voir dire*, counsel for appellant stated: "I am satisfied." Thereupon, she was sworn as a witness, her direct and cross covering 16 pages of the transcript. Her testimony is also clear, coherent and plausible. It amply demonstrates that she possessed the requisite powers of recollection and narration. Her understanding as to the necessity of telling the truth appears from the summary above. Moreover, there was an express waiver as to this child's testimony. She was a qualified witness.

[14] Appellant next contends that error of a prejudicial nature was committed in calling Patricia to the stand. Patricia, sister of Alberta, was five years and four

months old on May 23, 1952, and five years and nine months old at the date of the trial. On *voir dire* she refused to say anything at all. She refused to respond to questions put to her by the court and the prosecuting attorney as to her age, school attendance, her sister's name, and her place of residence. This witness was then withdrawn by the prosecution. She did not return to the stand. Appellant asserts that the mere production of this witness, in view of her complete inability to testify, constituted misconduct, and that she was only called to prejudice the appellant, particularly since the balance of the evidence showed that Patricia was one of the victims. There is nothing to substantiate the charge that Patricia was not produced in good faith. Testimony was secured from three children, ages 5, 6 and 9, and there is nothing in the record to indicate that the prosecutor knew he could secure no evidence from Patricia. Even if the prosecutor must be charged with knowledge of the inability of Patricia to testify, *People v. Adams*, 14 Cal.2d 154, 165, 93 P.2d 146, her mere production as a witness in a case where three other children testified in detail as to the acts involved would not and could not have been prejudicial.

[15-17] The appellant argues very broadly that the prosecuting attorney was guilty of misconduct in his arguments to the jury, but fails to specify what the claimed misconduct was. We have, nevertheless, read the arguments. They were fair and objective, and remarkably free of appeals to passion and prejudice that frequently are made in such cases. In only two instances, during the arguments, were there any objections made by appellant to the prosecutor's argument, and in both cases the jury was promptly admonished that counsel's statements were not evidence. The first objection was directed at a slight factual overstatement that could not have been deliberate and was not prejudicial. The second objection related to an objection to the prosecutor's statement of law to the effect that if the jury found that appellant had committed violations upon the girls of section 702 of the Welfare and Institutions Code then the defendant would, of necessity, be guilty of a violation of

section 288 of the Penal Code. The objection was that this was a misstatement of law because it precluded the jury from finding the commission of a lesser included offense. During the course of the discussion the court promptly and carefully told the jury that they should disregard statements of law made by counsel and determine what the law was from his instructions. The statement of law by the prosecutor was incorrect because, if the jury had believed that the only offense committed by appellant was that he had told the children an obscene story and had not touched them, the violation of section 702 of the Welfare and Institutions Code would not have been a violation of section 288 of the Penal Code. *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512. But the repeated cautionary instructions removed any question of prejudice.

This case was thoroughly and ably tried on both sides. The appellant was fairly treated by both the judge and the prosecutor. No prejudicial rulings or misconduct appear.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



121 Cal.App.2d 723

BECKER

v.

CITY AND COUNTY OF SAN
FRANCISCO.

Civ. 15237.

District Court of Appeal, First District,
Division 2, California.

Dec. 7, 1953.

Action by 82 year old pedestrian, by his guardian ad litem, against municipal corporation, for personal injuries sustained when plaintiff, while standing on the curb at a regular bus stop, leaned forward and was struck in the head by side of

defendant's moving bus. The Superior Court, City and County of San Francisco, Arthur Coats, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that instruction that if, under the evidence, jury found that no part of bus went over or upon sidewalk adjacent to bus loading zone, defendant was operating bus with degree of care required by law, when read together with other instructions, neither misstated the law nor invaded province of jury.

Judgment affirmed.

1. Trial ⇨295(1)

Instructions must be read as a whole.

2. Trial ⇨295(6)

In action by pedestrian against municipal corporation for personal injuries sustained when plaintiff, while standing on the curb at a regular bus stop, leaned forward and was struck in the head by side of defendant's moving bus, instruction that if, under the evidence, jury found that no part of bus went over or upon sidewalk adjacent to bus loading zone, defendant was operating bus with degree of care required by law, when read together with other instructions, neither misstated the law nor invaded province of jury.

3. Trial ⇨193(3)

In action by pedestrian against municipal corporation for personal injuries sustained when plaintiff, while standing on the curb at a regular bus stop, leaned forward and was struck in the head by side of moving bus, record was insufficient to bear out defendant's claim that judge instructed on the facts.

Fahey, Castagnetto & Gallen, Daly City, for appellant.

Dion R. Holm, City Atty., Clayton W. Horn, Deputy City Atty., San Francisco, for respondent.

GOODELL, Justice.

Plaintiff sued for serious injuries sustained when he was hit by a Municipal Railway bus at the northeasterly corner of Mission and 23rd Streets in San Francisco.

The jury returned a verdict for the defense and plaintiff appealed after a new trial had been denied.

Twenty-third Street runs approximately easterly and westerly and Mission Street at that point runs approximately northerly and southerly. On April 21, 1950 about 11 a. m. plaintiff while standing on the easterly curb of Mission Street at a regular bus-stop leaned forward and his head came into contact with the side of the moving bus, which was headed northerly.

Plaintiff, who was about 82, was unable to testify because of his serious brain injuries. The first blow on his head spun him around several times and he struck the sidewalk on the back of his head, sustaining a fracture of the skull.

There were four witnesses to the accident, namely Kelsey, who was waiting on the curb for the bus; Platt, a passenger sitting on the right-hand side of the bus looking out the window; Loblely, a passenger standing on the right-hand side of the bus also looking out, and Carlson, the operator, in the driver's seat.

Kelsey, a witness for the plaintiff, saw practically all that happened as he leaned against a pole looking toward the south. He saw the bus come to a stop at the southeasterly corner of Mission and 23rd and then cross 23rd and draw in to the bus stop on the northeast corner. He saw the impact, and as plaintiff was spun around attempted to save him from falling.

Kelsey testified that as plaintiff stood on the sidewalk about 10 feet south of the pole his "toes were just about even with the outside edge of the curb"; that from an erect position "he leaned, nodded his head slightly forward as if to spit onto the gutter"; he "bent forward from the waist up"; he moved his head "maybe six inches or so". He testified that when the bus came into the loading zone at a slight angle its front end was 14 or 15 inches out from the curb; that as the bus was passing plaintiff, plaintiff "leaned way out from the hips" and that the portion of the bus which came in contact with him was "the door well, in the front section of the bus"; he "leaned out just as the bus hit him"; that

the front of the bus was just even with him as he leaned forward, and "he banged his head then into the side of the bus" as it was passing; the plaintiff's head, he testified, was the only part of his body that came in contact with the bus. He testified that when he first saw him, plaintiff was facing west, then looked "back and forth up and down the street" and as the bus was coming in and he leaned forward he was looking straight ahead, not in the direction from which the bus was coming, or toward the bus. The witness gave an approximation "of depreciation in elevation * * * between the height of the plaintiff and the point where he leaned over and his head was hit" as "between 8 and 10, maybe 12 inches". He testified that the blow "caught him more or less on the forehead"; that his head "bounced off the bus" and that he had warned "Look out!" or something like that because plaintiff was placing himself in a position where he was liable to be hit by the bus. He testified that he heard no horn blown.

Platt, a defense witness, was a bus operator for the Municipal Railway but off duty and riding in the bus as a passenger. He testified that he saw through the window "a man standing near the loading zone, and he bent over just as the bus was approaching * * * when he bent over * * * I heard a passenger scream." He estimated that plaintiff was standing 12 or 18 inches from the curb, and right in the loading zone. He said he could see nothing to cause him to bend over, and said he did not know "whether he bent over after the front of the bus passed him or if he bent over in front of the bus"; he could not see. When he bent over he was facing straight across Mission Street and that at no time that he saw him was he looking in the direction from which the bus was coming. "Q. Can you tell us whether or not any part of the bus went over onto the sidewalk in that loading zone area? A. Well, I don't think so. * * * The bus was parallel."

Loblely, a defense witness, testified that from where he stood in the bus right behind the front door, as the bus was coming into the loading zone he "saw a man stand-

ing on the edge of the curb and his feet were right * * * on the curb line * * * and this man bent over and as he did so, as he passed the front door he hit the bus, turned around, the bus whirled him around, he landed on the sidewalk on the back of his head". When plaintiff bent over, Lobley testified, the front of the bus was approximately 6 or 8 inches from the curb and approximately 24 inches in back of the pole; the front of the bus had passed the plaintiff before he bent over; plaintiff's head struck the bus back of the front door. "As the bus swung in he leaned over. In fact, he leaned over before the bus got to him, and in doing so he struck his head in that section of the bus right there that I have marked. * * * Q. Was there any reason that you could see for him to bend over, to cause him to bend? A. No, sir, it just amazed me at the moment. It happened so fast. Q. Did any part of the bus at any time, so far as you could observe, go over upon the sidewalk area? A. No, sir, definitely not." On cross-examination he testified that when he said 6 inches he meant "the distance between the curb and the wheels or the body of the bus". He said he realized that the wheels are in further underneath the body. He testified that the impact was so strong it could be felt throughout the bus. He testified that plaintiff "hit that section [of the bus] just back of the front, just where the hinges are. * * * You know, where the door swings open. * * * Q. Something that protrudes out from the side of the bus? A. Yes, sir, on the corner."

Carlson, the bus operator, a witness for the defense, testified that as he drove into the bus-stop he saw plaintiff on the sidewalk, but knew nothing of the impact until a passenger screamed.

With respect to the speed of the bus as it approached the bus stop, Kelsey testified that *as it crossed 23rd* it was "around 10 miles an hour"; Platt testified that as it came into the loading zone it was about 5 miles per hour. Lobley put it at "no more than maybe 5, 6, 7 miles an hour; something like that" but added that that would be hard for him to determine.

With respect to the proximity of the bus to the curb Kelsey testified that at the time of impact it "was still coming on an angle, and I imagine his rear wheels were about 4 feet out of the curb and the front was just about even with the curb". On cross-examination he testified that at the time of impact the front end of the bus "was just out a few inches, or just about even with the curb. * * * It was in fairly close". Platt testified: "Q. Can you tell us whether or not any part of the bus went over on to the sidewalk in that loading zone area? A. Well, I don't think so. * * * The bus was parallel to the curb, so I am sure no part of the bus went over the curb." On cross-examination he testified "Q. And was the bus coming in at an angle at that time? [when plaintiff bent over]. A. Well, I don't hardly think it was at an angle * * * the bus was about straight at that time, or parallel to the curb at that time." He testified that he could not say how close the bus was to plaintiff when he bent over, but that "it was close". He testified or repeated that he did not know "whether he bent over as the bus was approaching him or after the front of the bus passed, and he bent over against the bus * * *" he "couldn't see whether he was just in front of the bus or whether he bent over just at the time the front of the bus passed the spot he was standing."

Platt testified that after the impact and the bus had come to rest it was, as near as he could recall, about "six inches from the curb, parallel with the curb". He said he thought the bus was straightened before the impact. On redirect Platt testified that he was sure the forward bend took plaintiff "beyond the curb line out into the street."

Lobley testified that as the bus crossed 23rd Street it came in at an angle toward the curb, but that the front part of the bus did not come anywhere nearer to the curb than 6 inches.

Kelsey testified that the bus moved "about 4 feet or so after the impact at a slight angle although it was closer to the curb. The driver set his brakes and got out and asked what happened and that when it

had halted after the impact he thought the bus was just within the marked lines of the bus stop—"within its bound".

Platt testified the bus went only 3 or 4 feet after the impact.

Appellant's attack is based solely on claimed errors in the instructions. We agree with appellant that the factual situation called for precise instructions, but we are satisfied that such instructions were given.

[1] This case emphasizes the necessity for adherence to the rule that instructions must be read as a whole. Appellant singles out an instruction reading: "Under the evidence * * * if you find that no part of the bus went over or upon the sidewalk adjacent to the bus loading zone, then the defendant was operating said bus with the degree of care required by law * *."

When read by itself the instruction might appear questionable, but when read in context all doubt disappears. It was the last of a group of six instructions reading as follows:

(A) "If the plaintiff was a passenger, the defendant owed him the duty of the utmost care. If he was not a passenger, then the defendant owed him the duty of ordinary care.

(B) "In either instance, under the facts of this case, that care, whether it be ordinary care or utmost care, is the same. That care was to bring the bus to a stop for the purpose of receiving passengers at the designated stopping place in a careful and prudent manner, approaching as near to the curb as practical but so that no portion of the bus protruded over or beyond the sidewalk.

(C) "If you find that a portion of the bus was over or beyond the sidewalk, then this was an act of negligence, and if it was a proximate cause of the injury, then your verdict should be for the plaintiff unless you find that the plaintiff was guilty of contributory negligence.

(D) "In any event, whether you find that the defendant had a duty of utmost care because of the relationship of common carrier and passenger existing between it-

self and the plaintiff, or had merely a duty of ordinary care because of the nonexistence of such relationship, you are instructed that it would be the duty of the bus driver to keep any portion of the bus from coming over the curb at the bus stop so as to endanger any persons standing on the sidewalk at the bus stop. A breach of this duty would constitute negligence.

(E) "If you find from a preponderance of the evidence that as the bus was pulling into the loading zone the plaintiff was standing in a position of safety on the sidewalk adjacent to the loading zone, and that he moved from such position to one of danger by projecting part of his body beyond the curb line, and as a direct and proximate cause of such change a collision between the plaintiff and the bus occurred, I instruct you that the plaintiff was guilty of contributory negligence and your verdict must be in favor of defendant.

(F) "Under the evidence in this case if you find that no part of the bus went over or upon the sidewalk adjacent to the bus loading zone, then the defendant was operating said bus with the degree of care required by law, whether it be the highest degree or that of ordinary care."

[2] Instruction "F" simply gives the converse of instruction "C", and each balances the other. When all six instructions are read together it is clear that they neither misstate the law nor invade the province of the jury.

[3] The instructions in this case were lengthy, and in our opinion they were wholly fair. The jury returned after deliberating about an hour and a half and asked for instructions on the duties of a driver coming into a loading zone. The court re-read several instructions which had been already given. It is argued that this led to confusion but, as we read the record, there was no more confusion than is usual in such instances. Appellant's claim that the judge instructed on the facts is not borne out by the record.

The court instructed: "As the plaintiff, according to the evidence, cannot relate or recall what happened, the law presumes that Louis Becker, the plaintiff in this action,

in his conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law." The only eyewitness who testified for the plaintiff was Kelsey, and his testimony (summarized rather fully above) gave a very full picture of the acts and conduct of the plaintiff immediately prior to and at the time of the impact. Despite this instruction the jury found for the defendant on evidence which is not challenged for insufficiency.

This was purely and simply a fact case and in our opinion the plaintiff had a perfectly fair trial.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



CHASTAIN v. BELMONT. *

Civ. 4726.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1953.

Rehearing Denied Jan. 7, 1954.

Hearing Granted Feb. 10, 1954.

Action to recover damages for defendant's alleged wrongful entry on plaintiff's land and picking, removal and conversion of oranges growing thereon. Defendant filed a cross-complaint to recover an amount alleged to have been loaned by him to plaintiff, damages for plaintiff's alleged breach of a contract by refusal to deliver an orange crop to defendant, and liquidated damages for plaintiff's marketing of oranges elsewhere. From so much of a judgment of the Superior Court of Orange County, Kenneth E. Morrison, J., as awarded defendant less than the sum sought in the cross-complaint, he appealed, and from so much of the judgment as awarded defendant liquidated damages, plaintiff appealed. The District Court of Appeal, Mussell, J., held that plaintiff's testimony, with ap-

parent ambiguities and inconsistencies in the written contract, substantially supported the trial court's findings and conclusion that the contract obligated defendant to pay plaintiff the net sum of \$1 per box for all oranges picked by defendant in 1949, so as to entitle plaintiff to credit at such rate for oranges picked by defendant in that year against amount advanced by defendant to plaintiff on the purchase price of the crop.

Judgment affirmed.

1. Sales ⇐87(3)

In action for damages for defendant's alleged wrongful entry on plaintiff's land and picking, removal and conversion of oranges growing thereon, plaintiff's testimony, together with apparent ambiguities and inconsistencies in written contract for sale of plaintiff's orange crop to defendant, supported trial court's findings and conclusion that contract obligated defendant to pay plaintiff net sum of \$1 per field box for all of plaintiff's oranges picked by defendant in 1949, so as to entitle plaintiff to credit at such rate for all such oranges against amount advanced by defendant to plaintiff on purchase price of crop.

2. Damages ⇐76

Generally, parties may contract for liquidated damages for breach of contract, if necessary in order that they may know with reasonable certainty extent of liability for breach of contract.

3. Damages ⇐79(1)

A provision of contract for liquidated damages for breach thereof is invalid, unless it falls within provisions of statute authorizing parties to contract to agree therein on presumed amount of damage sustained by breach thereof when it would be impracticable or extremely difficult, from nature of case, to fix actual damage. Civ. Code, § 1671.

4. Damages ⇐83

Whether provision of contract for liquidated damages for breach thereof falls within provisions of statute authorizing parties to contract to agree therein on presumed amount of damage sustained by breach thereof when it would be impracticable or extremely difficult, from nature of case, to fix actual damage, is generally a

question for trier of facts, unless facts are admitted. Civ.Code, § 1671.

5. Damages ⇨150, 163(3)

The burden is on party relying on provision of contract for liquidated damages for breach thereof to plead and prove facts showing impracticability of fixing actual damage. Civ.Code, § 1671.

6. Damages ⇨150

In action for damages for defendant's alleged wrongful entry on plaintiff's land and picking, removal and conversion of oranges growing thereon in 1950, allegations of defendant's cross-complaint, supported by his testimony, as to impracticability of fixing damage to defendant from plaintiff's alleged breach of contract by failure to deliver his 1950 orange crop to defendant, warranted trial court's finding and award of liquidated damages to defendant in specified contract amount of 35 cents per box of oranges picked and delivered to others than defendant by plaintiff in such year. Civ.Code, § 1671.

G. V. Weikert, Los Angeles, and S. B. Kaufman, Anaheim, for appellant.

Rimel & Johnston, Santa Ana, for respondent.

MUSSELL, Justice.

This appeal involves an agreement between an orange grower and fruit shipper. Plaintiff alleges in his complaint that on June 25, 1950, he was the owner and in possession of a crop of oranges growing upon his 15 acre tract of land near the city of Anaheim; that on said day the defendant wrongfully, maliciously and fraudulently entered upon said real property and unlawfully picked and carried away 1,226 boxes of oranges and converted them to his own use to plaintiff's damage in the sum of \$2,450; that the defendant also injured plaintiff's citrus trees to his further damage in the sum of \$300.

Defendant answered, alleging, among other things, that on or about August 4, 1949, plaintiff and defendant entered into a contract in writing (a copy of which is attached to the pleadings and is the contract

here involved); that concurrently with the execution of the contract defendant loaned to plaintiff the sum of \$6,000; that on or about June 25, 1950, defendant entered upon plaintiff's land and picked 1,226 boxes of oranges in accordance with the provisions of the contract; that plaintiff prevented defendant from picking and harvesting the remainder of the crop and that plaintiff is indebted to defendant on a book account for money loaned in the sum of \$5,297.26. Defendant also filed a cross-complaint in which he sought recovery of said sum and further alleged that plaintiff had violated the contract and had refused to deliver the 1950 orange crop in accordance therewith. He also sought liquidated damages at the rate of 35¢ per box for fruit marketed elsewhere by plaintiff.

In plaintiff's answer to the cross-complaint he alleged that the said \$6,000 received by him from defendant was not a loan but was in payment for a matured crop of oranges, paid on the basis of \$1 per box for the estimated crop with an agreement for adjustment depending upon the number of boxes in the crop; that the contract was for the year 1949 only; that defendant Belmont, through his agent, represented to plaintiff that if he would execute a consignment contract, defendant would guarantee plaintiff a minimum of \$1 per field box for a 3,519 cubic inch box; that under such agreement there would be deducted from any possible additional sums to be paid by plaintiff certain costs and expenses and if plaintiff's fruit, when sold, brought sufficient money not only to meet the guarantee of \$1 per box but to pay said costs and expenses, that the additional returns would then be paid to plaintiff. It was further alleged therein that the written contract was not in accordance with the oral agreement and that defendant's agent made false representations as to the contents and meaning of the written contract, thereby inducing plaintiff to execute it.

The trial court found that on June 25, 1950, defendant Belmont entered upon plaintiff's property and picked 1,226 field boxes of oranges at the guaranteed price of \$1 per field box; that the said \$6,000 paid to plaintiff was an advance on the

purchase price of plaintiff's crop and was not a loan; that the contract between the parties was in force and effect during 1949 and 1950; that plaintiff Chastain did not during the last ten days of November, 1949, notify defendant Belmont that the contract was terminated; that during the year 1950 plaintiff Chastain picked 2,049 boxes from his citrus grove; that plaintiff agreed to pay defendant as liquidated damages the sum of 35¢ per box for the 1950 fruit picked by plaintiff; that Chastain is entitled to credit for 4,966 field boxes of oranges picked in 1949 at \$1 per field box under the guaranteed provisions of the contract, leaving a balance of \$1,034 owing at the end of the 1949 picking season; that Belmont is entitled to interest on this sum amounting to \$47.65 and is entitled to a credit of 35¢ per field box on the 2,049 field boxes picked by plaintiff and withheld from Belmont as liquidated damages in the sum of \$717.15; that Chastain is entitled to a credit of \$1 per box for the 1,226 boxes picked by Belmont and the total due Belmont was and is the sum of \$626.70, plus costs. The trial court further found in accordance with the allegations in Chastain's affirmative defenses that the parties entered into an oral agreement whereby Belmont guaranteed to Chastain \$1 per field box for a 3,519 cubic inch box for all citrus fruit received and accepted as per contract during the 1949 season only; that Belmont's agent represented that the written contract provided as the parties had agreed orally and that Belmont and his agent knew that the written instrument did not express the intention of the parties.

Belmont appeals from the judgment only insofar as it awarded him on his cross-complaint the sum of \$620.79 instead of \$5,085.14, plus interest, and Chastain appeals from that part of the judgment awarding Belmont liquidated damages on his cross-complaint and costs.

The instrument signed by the parties hereto was partly printed and partly in handwriting. The printed matter provides, in part, that the grower agrees to consign to Belmont all oranges growing or to be grown on plaintiff's premises during the term of the contract * * *; "that this contract covers merchantable fruit only

and the shipper or his agent shall be the sole judge as to the merchantability of said fruit". * * * Shipper agrees to pay to the grower the total amount received from the sale of said fruit, after deducting therefrom all sums of money (1) paid out in advance hereunder; or (2) loaned or advanced to or for the use and benefit of the grower; or (3) paid out for picking and processing said fruit, also deducting (4) hauling charges at prevailing rates; and (5) shipper's charges for packing and selling said fruit, as follows: 125¢ per packed box for picking oranges or grapefruit and 15¢ per packed box for selling * * * etc. (The figures 125 and 15 were written in pencil in the blank spaces provided.) * * * Grower agrees to pay shipper as liquidated damages 35¢ for each box disposed of by grower to any person other than the shipper. The contract also provides as follows: "Shipper guarantees to grower 1.00 per field box for 3519 cu. inch box for all citrus fruit received and accepted as per contract for and during current season only". The underlined portion of said provision was written in pencil and is the basis for the trial court's admission in evidence of the statements of the parties as to what was said at the time and prior thereto as to what was intended by them and to explain the ambiguities in the agreement.

Appellant Belmont contends that under the consignment contract, the guarantee was limited to that portion of the 1949 crop of fruit classified as merchantable. However, he made the same contention in *Jackson v. Belmont*, 108 Cal.App.2d 288, 238 P.2d 1084, and we there held contrary to his contention and that the trial court properly received in evidence the statements of the parties as to what was said at the time as indicating the real purpose of additions and modifications of the same printed form contract. Again in *Groover v. Belmont*, 114 Cal.App.2d 623, 250 P.2d 686, this court held that parol evidence was admissible where, as here, the written contract was ambiguous in many respects and there was an obvious inconsistency between the provisions contained in the fine print and the provisions written in longhand. In that case a provision written in longhand in the same form contract guaranteed 35¢ per field box to

the grower for fruit taken, while the printed provision was that the packer should pay the grower only what was left after deducting numerous charges, and after eliminating any fruit which the packer might prefer to consider as unmerchantable. In that case, as here, mistake, misrepresentation and fraud were alleged and the validity of the agreement was the fact in dispute. Under the pleadings and proof in the instant case the trial court was entitled to find both fraud and mistake as well as ambiguity in the contract.

[1] Plaintiff Chastain testified that on or about August 4, 1949, he had a conversation with Mr. Herb Miller (Belmont's agent) in which Miller stated that they would give him 90¢ a box for his fruit and that plaintiff refused this offer; that he later talked to Miller and the substance of that conversation was "that they would give me \$1.00 a box guarantee on my fruit with the provision that if it brought more, I would get it, but I was guaranteed that \$1.00 a box net to me. There would be no recourse on the \$1.00 a box"; that the substance of another conversation with Miller was "Well, the first thing I asked Miller is if this dollar a box guarantee meant that a dollar was mine without recourse from Belmont; that I got that dollar net and if there was anything above the cost of packing and all of that my dollar I was to get that. I was to get the dollar a box net to me. We estimated the crop at 7,000 boxes, which it didn't pick, but in view of the fact that there was 7,000 boxes I asked for a \$6,000 advance on the pick before they started picking and which he agreed to. I also asked, before we made the contract, that he put a provision in there that the contract covered 1949 crop only. He made the contract and I disagreed to some of the other. * * * He wrote the contract and I signed it and I called his attention to the fact that he hadn't put on the contract 'to cover 1949 crop only,' and he said, 'Okay, I'll put it on', and took my copy and put it on." Chastain further testified that he would not have executed any instrument or agreed to sell any of his fruit to Belmont if he had known that the meaning of the written contract was in any respect different from the oral understanding reached with

Miller. This testimony, together with the apparent ambiguities and inconsistencies in the written agreement, furnish substantial support for the findings and the conclusion of the trial court that Belmont was obligated under his contract to pay to Chastain the net sum of \$1 per field box for all of Chastain's oranges picked by Belmont in 1949.

Plaintiff Chastain failed to give Belmont written notice of the termination of the contract as therein provided and the trial court's finding that the contract was in full force and effect during 1950 is supported by the record. The endorsement on the back of the contract that "this contract covers 1949 crop only", signed by Herb Miller, adds nothing to the written agreement since the guarantee of \$1 per field box was expressly "for and during current season only".

Appellant Chastain contends that the trial court erred in awarding Belmont 35¢ per box for fruit picked by Chastain and not delivered to Belmont. This award was based upon the provision in the contract that "Grower agrees to pay the shipper as liquidated damages the sum of thirty-five cents (\$.35) for each and every commercial package box known to the trade as 'standard field box' or the equivalent thereof of citrus fruit, which the grower may dispose of, sell, market, or consign to any person other than the shipper named herein or that grower may remove or permit to be removed from said citrus orchard or fail to deliver to said shipper, it being specifically agreed that it is impractical and extremely difficult to fix the actual damage which would thereby be suffered by the shipper."

Section 1671 of the Civil Code provides that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

[2-5] In *Better Food Markets v. American Dist. Teleg. Co.*, 40 Cal.2d 179, 184, 253 P.2d 10, the general rules relating to agreements providing for liquidated damages are discussed, and it is there held that, under the law generally, the parties are al-

lowed to contract for liquidated damages if it is necessary to do so in order that they may know with reasonable certainty the extent of liability for a breach of the agreement; that unless a clause providing for liquidated damages falls within the provisions of section 1671 of the Civil Code, it is invalid; and except on admitted facts this is generally a question to be resolved by the trier of facts; that the burden is on the party seeking to rely upon a liquidated damage provision in the contract to plead and prove facts showing impracticability.

[6] The trial court found that it was and is impracticable and extremely difficult to fix the damage or loss to Belmont resulting from the refusal of Chastain to permit Belmont to market the 1950 crop of oranges. The impracticability of fixing such damages and the resulting damage to Belmont from Chastain's failure to deliver the 1950 crop was adequately pleaded in Belmont's cross-complaint and the allegations therein were sufficiently supported by the testimony of Belmont. Under the circumstances shown, the finding and award of the trial court in respect to such damages was not error. *Anaheim Citrus Fruit Ass'n v. Yeoman*, 51 Cal.App. 759, 762, 197 P.2d 959.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



121 Cal.App.2d 729

CAMPBELL v. VEITH et al.
Civ. 4732.

District Court of Appeal, Fourth District,
California.

Dec. 7, 1953.

Rehearing Denied Jan. 4, 1954.

Action for damages sustained when lessees influenced sub-lessees to evict plaintiff, who was sub-lessees' tenant. Plaintiff's complaint asked damages for libel. When plaintiff did not appear at hearing on demurrer, the Superior Court, Riverside County, Russell S. Waite, J., sustained demurrer without leave to amend and en-

tered judgment for lessees, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where complaint alleged that lessees influenced sub-lessees to evict plaintiff because plaintiff's real estate business conflicted with lessees', complaint could be amended to properly state cause of action for tortious interference with contractual relations, and order sustaining general demurrer without leave to amend was improper.

Affirmed in part and reversed in part.

1. Appeal and Error ⇐171(1)

Rule that cause of action which is alleged in complaint and tried in court will be adhered to on appeal does not apply to appeals from rulings on general demurrers to complaint.

2. Pleading ⇐49

The cause of action is determined from facts alleged, not from title of cause of action or theory of recovery expressed in complaint, since doctrine of theory of pleading is repudiated.

3. Pleading ⇐205(1)

A complaint is not vulnerable to general demurrer if it can be sustained on any ground.

4. Pleading ⇐216(1)

Where complaint alleged that lessees influenced sublessees to evict plaintiff, sub-lessees' tenant, because plaintiff's real estate business conflicted with lessees', that lessees might have had right to see that occupants of their leasehold were proper persons, that sublessee might have had apparent right to evict plaintiff regardless of lessees' influence, and that lessees might have had right to protect their business from plaintiff's competition, were matters of defense, and could not be considered in ruling on general demurrer. Code Civ. Proc. § 1981.

5. Pleading ⇐225(1)

Where complaint shows, in any manner, that plaintiff has a cause of action and is entitled to relief, general demurrer should not be sustained without leave to amend, particularly if complaint is subject to amendment.

6. Pleading $\S$ 225(1)

Where complaint was entitled a cause of action for libel, and alleged that lessees influenced sublessees to evict plaintiff, sublessees' tenant, because plaintiff's real estate business conflicted with lessees', it appeared that complaint could be amended to properly state a cause of action for tortious interference with contractual relations, and ruling which sustained general demurrer without leave to amend was improper.

7. Costs $\S$ 230

Where complaint sought damages for libel, and Superior Court entered judgment after sustaining general demurrer without leave to amend, but complaint was amendable so as to allege cause of action for tortious interference with contractual relations, only that part of judgment upholding demurrer to libel action and awarding costs and attorney fees to defendant was sustained, but costs on appeal were awarded to defendant. Rules on Appeal, rule 26.

J. B. Lawrence, San Bernardino, for appellant.

Thompson & Colegate, Riverside, and Giller Boyd, Palm Springs, for respondents.

GRIFFIN, Justice.

James J. Campbell, in propria persona, filed this action against defendants William and Clara Veith, and the Indian Land Development Company. The pleading was entitled "Amended complaint for libel—words in themselves not libelous", and alleged generally that he was renting from one Nielsen (a sub-tenant of defendants) a certain cabana in Palm Springs Trailer Village, and occupied it as an office in which to conduct his real estate business, notary public, etc.; that defendants were leasing the lands on which the cabana was located from Agua Caliente Band of Mission Indians; that on September 15, 1952, the Veiths wrote a letter to Nielsen concerning the plaintiff, as follows: "If you continue to rent to James J. Campbell, your rent will be raised. * * *" He then alleges that he has twice requested Nielsen,

without success, to give him the said letter or a copy thereof; that the letter in itself was not libelous but it was the opening wedge in the minds of those who read it, namely, Nielsen and his family, to determine the future attitude on their part, towards renting their property to plaintiff; that it was the intention of defendants "to deprive plaintiff of his business office location, in order to remove competition from him, as a licensed real estate broker, in the renting and/or selling cabanas" in Palm Springs Trailer Village; that the "defendants' greed, avariciousness, deceit, perjury and treacherousness is manifested in his concealment of his activities in the renting and selling of said cabanas and house trailers, by failing to display his sign as a licensed real estate broker"; that the income from "these commissions normally amount to between \$5,000.00 and \$6,000.00 annually"; that the defendants declared to Nielsen that the small additional rent they might demand, was no object, but that they wanted plaintiff evicted because they had "received complaints from the City and tenants in the trailer park regarding him"; and that unless plaintiff was evicted, Nielsen and his family would have to move; that Nielsen then caused plaintiff to vacate "by removing his signs, and refusing his rent"; that plaintiff sustained damages by reason "of said false and defamatory publication" in the sum of \$25,000. He prayed for judgment accordingly.

Plaintiff filed a bond under the provisions of Act 4317, Deering's General Laws, in reference to libel actions. Plaintiff failed to appear at the hearing on the demurrer to the original as well as the amended complaints. The demurrer to the amended complaint was sustained without leave to amend, and judgment went for the defendants. The court awarded attorneys' fees and costs to them, payable out of the bond.

In appealing from the judgment entered plaintiff obtained an attorney to represent him. He now concedes in his brief that plaintiff did attempt to frame a complaint for libel, but claims that plaintiff mistook the nature of his cause of action, and argues that having belatedly obtained an attorney, he is now able to identify his cause

of action in that it shows that defendants, by "fraud and economic pressure", actively and intentionally induced plaintiff's immediate landlord to terminate plaintiff's lease of his business premises and accordingly a cause of action for tortious interference with contractual relations is pleaded; that although this cause of action was apparently "overlooked" by plaintiff as well as the trial judge, nevertheless plaintiff should not be deprived of his opportunity to recover because of his erroneous legal conclusions. Counsel for plaintiff now concedes that no cause of action for libel was stated.

[1] Defendants rely upon the general proposition that the cause of action which was alleged in the complaint in the trial court cannot be changed in the appellate court and that where a case has been tried upon one theory, that theory will be adhered to on appeal, citing *Elliott v. Sims*, 91 Cal.App. 779, 781, 267 P. 584; *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750; *Baskett v. Crook*, 86 Cal.App.2d 355, 363, 195 P.2d 39; and *Haskins v. Certified Escrow & Mortgage Co.*, 96 Cal.App.2d 688, 690, 216 P.2d 90. This rule has not been applied to a ruling on a general demurrer to a complaint.

[2,3] It is the general rule that if a complaint can be sustained on any theory it is not vulnerable to a general demurrer. *Schumm by Whymer v. Berg*, 37 Cal.2d 174, 183, 231 P.2d 39, 21 A.L.R.2d 1051. The subject matter of an action and the issues involved are determinable from the facts alleged, rather than from the title of the pleading or the character of recovery suggested in connection with the prayer for relief. *Buxbom v. Smith*, 23 Cal.2d 535, 542, 145 P.2d 305. And it has been held that the form of action is immaterial if a cause of action is actually stated, the doctrine of "theory of pleading" having been repudiated in this state. *California Western States Life Insurance Co. v. Tucker*, 15 Cal.2d 69, 71, 98 P.2d 511.

[4] Examining the complaint, from the facts alleged it appears that Nielsen was notified by defendants Veith that if he "continued to rent to * * * Campbell

your rent will be raised"; that they wanted plaintiff evicted; that unless Nielsen breached his rental agreement with plaintiff, Nielsen and his family would have to move; and that as a result Nielsen refused Campbell's tender of rent and caused him to vacate his real estate office by reason of the financial pressure put upon Nielsen by defendants.

It is true that the complaint contains much surplusage and immaterial matter, and recites that defendants told Nielsen that they had received complaints regarding plaintiff from the City and tenants in the trailer park. It is not clear whether plaintiff intended to allege that this was or was not a false statement, but he does allege that by reason of "said false and defamatory publication" he suffered damages.

It may be that defendants did have an interest in the property to protect, i. e., to see to it that the subtenants were the proper type of persons and that Nielsen may have had the apparent right to terminate the tenancy regardless of any letter from defendants on the subject. However, these matters, as well as the claim of privileged competition, under the rule announced in *Katz v. Kapper*, 7 Cal.App.2d 1, 4, 44 P.2d 1060, were matters of defense, and could not be considered in ruling on a general demurrer where the allegations of the complaint sufficiently show that the conduct of the defendants is actionable. *Owen v. Williams*, 322 Mass. 356, 77 N.E.2d 318, 9 A.L.R.2d 223; *Sidney Blumenthal & Co. v. United States*, 2 Cir., 30 F.2d 247; Sec. 1981, Code Civ.Proc.

The rule applied in the *Katz* case, supra, to the test of "competition", is stated to be as follows [quoting from 15 R.C.L. p. 73, and cases cited]:

"Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, or the procurement of the violation of contractual relations."

Section 766, Restatement of the Law of Torts, defines the general principle as follows:

"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."

It cites several illustrations of this principle. Leading California cases have relied on this principle. *Remillard-Dandini Co. v. Dandini*, 46 Cal.App.2d 678, 680, 116 P.2d 641; *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631; *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867. See, also, *Bautista v. Jones*, 25 Cal. 2d 746, 155 P.2d 343; *Dominguez Estate Co. v. Los Angeles Turf Club*, 119 Cal.App. 2d 530, 259 P.2d 962; *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U. S. 350, 41 S.Ct. 499, 65 L.Ed. 983; *Miller v. McLaglen*, 82 Cal.App.2d 219, 186 P.2d 48; *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115.

While the complaint in the instant action is no model to be followed, the facts alleged do present a close question of its sufficiency to properly set forth a cause of action for tortious interference with contractual relations, and there still remains the possibility that the complaint could be amended so as to properly state such a cause of action.

[5] It is the established rule that when a complaint, by direct allegations, inferences or conclusions, however indefinitely or defectively drawn, shows that the plaintiff has a cause of action and that he is entitled to some relief, a general demurrer should not be sustained without leave to amend, and particularly so if the complaint is subject to amendment. *Kauffmah v. Bobo & Wood*, 99 Cal.App.2d 322, 221 P.2d 750; *Roberts v. Wachter*, 104 Cal.App.2d 281, 231 P.2d 540; *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 42, 172 P.2d 867.

It was hardly fair to the trial court and to opposing counsel to present a pleading

which on its face indicated that the only cause of action attempted to be pleaded was one for libel, particularly where a bond was posted as required in an action for libel and the only relief sought was for "damages by reason of false and defamatory publication", and then claim, for the first time on appeal, that it might possibly encompass some other and different cause of action not brought to the attention of the trial court at the time of its ruling. We find, and counsel for defendants have pointed to, no cases indicating any exception to the rules above enumerated pertaining to a ruling on a general demurrer.

[6] Accordingly, the order sustaining the general demurrer to the complaint without leave to amend was erroneous in this respect, and that portion of the judgment based thereon refusing plaintiff the right to so amend must be reversed.

[7] A question, however, does arise as to that portion of the judgment which allows a recovery in favor of defendants for costs and reasonable attorneys' fees on the theory that defendants properly recovered a judgment in their favor on the cause of action for libel attempted to be alleged in the complaint. If this claimed cause of action had been separately stated, a demurrer thereto sustained without leave to amend, and judgment entered thereon against plaintiff, the operation of the judgment as to this claimed cause of action and the awarding of costs and attorneys' fees therein would have been sustained.

We therefore conclude that that portion of the judgment pertaining to the claimed cause of action for libel and allowing costs and attorneys' fees must be and is affirmed; and that the portion of the judgment sustaining the general demurrer without leave to amend, insofar as it precludes plaintiff from attempting to amend his complaint to state a cause of action for tortious interference with contractual relations and ordering that plaintiff take nothing by said action in this respect, must be and is reversed.

In the interests of justice and in view of the negligence of plaintiff in the preparation of his pleadings and his failure to ap-

pear and properly present his contentions to the trial court in the first instance, it is directed that plaintiff be allowed no costs on appeal and that defendants be awarded and allowed to recover from plaintiff their costs on appeal. Rule 26, Rules on Appeal.

Judgment is accordingly affirmed in part and reversed in part.

BARNARD, P. J., and MUSSELL, J., concur.



122 Cal.App.2d 57

PEOPLE v. UNGARO et al.
Cr. 5075.

District Court of Appeal, Second District,
Division 3, California.

Dec. 15, 1953.

Hearing Denied Jan. 14, 1954.

Defendants were convicted of bookmaking and receiving money as a wager on a horse race. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgments of conviction and order denying motions for new trial, and defendants appealed. The District Court of Appeal, Parker Wood, J., held, *inter alia*, that evidence was insufficient to establish defense of entrapment.

Judgments and order affirmed.

1. Criminal Law ⇨1023(10)

Appeals from a verdict or sentence were not authorized and hence purported appeals from verdict and sentence would be dismissed.

2. Criminal Law ⇨569

In prosecution for bookmaking and receiving money as a wager on a horse race, where evidence was that intent to commit offenses originated in minds of defendants and that such intent did not originate in mind of police officer who testified against defendants, evidence was in-

sufficient to establish defense of entrapment. Pen.Code, § 337a, subds. 1, 3.

3. Criminal Law ⇨448(4), 1169(9)

In prosecution for bookmaking and receiving money as a wager on a horse race, where there was evidence that police officer saw a defendant write in his hand and go to telephone booth but there was no evidence as to what was written or what was said on telephone, opinion evidence that writing on hand was the recording of a wager and that telephone conversation was the calling of the bet into a "phone spot," should not have been received, but such error was not prejudicial, in view of strong evidence of guilt. Pen.Code, § 337a, subds. 1, 3.

4. Criminal Law ⇨338(4), 1169(1)

In prosecution for bookmaking and receiving money as a wager on a horse race, police officer should not have been permitted to testify as to conversation between officer and another witness concerning placing of a bet, where there was no evidence which connected transaction with defendants, but such ruling was not prejudicial, in view of other evidence of guilt. Pen.Code. § 337a, subds. 1, 3.

Herbert Resner, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and James D. Loeb, Dep. Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendants were charged with violating subdivision 1 of section 337a of the Penal Code (bookmaking) and subdivision 3 of said section (receiving money as a wager on a horse race). In Count I it was charged that Tony F. Ungaro violated subdivision 1 on December 10, 1952. In Count II it was charged that he violated subdivision 3 on said date. In Count III it was charged that Tony and Michel M. Ungaro violated subdivision 1 on December 12. In Count IV it was charged that they violated subdivision 3 on December 12. In Count V it was charged that they violated subdivision 1 on December 13. In

Count VI it was charged that Michel violated subdivision 3 on December 13. In a trial by jury defendants were found guilty as charged. Their applications for probation were denied. Judgment, upon each count, was that each defendant be imprisoned in the county jail for ninety days, said terms to run concurrently. The notice of appeal recites that each defendant appeals from the judgment, verdict, sentence, and order denying his motion for a new trial. Since an appeal from a verdict or sentence is not authorized, the purported appeals therefrom will be dismissed. *People v. D'Elia*, 73 Cal.App.2d 764, 766, 167 P.2d 253.

[2] Appellants contend that the defense of entrapment was established by the evidence. They argue that the evidence shows that the acts of bookmaking originated as an idea of the police officers, and that the idea was generated by them in the minds of defendants. "It is true that when the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense in order to prosecute him, such entrapment will constitute a defense." *People v. Cherry*, 39 Cal.App.2d 149, 151, 102 P.2d 546, 547.

A police officer testified that on December 9, about 12:30 p. m., he went into the bar of a cafe in San Pedro; he saw Michel, who was at the bar, accept \$3 or \$4 from one man and a piece of white paper from another man; Michel put the money and the paper with a roll of bills and then placed the bills in his pocket; the next day, December 10, the officer went to the cafe about 12:30 p. m.; Willie, the bartender, introduced Tony to the officer; the officer showed a piece of paper with "a selection" written on it to Tony, who said that he would "take the bet on the sixth and seventh races" but not on the fourth race; he told the officer to get rid of the paper because they could all be pinched for having it in their possession; the officer gave Tony \$5, and Tony gave him \$1; about thirty persons were in the bar, and they had racing forms in their possession; the next day, December 12, about 12:30 p. m., the officer went to the cafe; he told Tony that

his horse had won, and Tony paid him \$4; the officer then told Tony that he wanted to bet "Two to win" on a horse by the name of "Mithra," which was running in the fourth race, and he gave Tony \$2; Tony made a telephone call and then told the officer that if he (Tony) was not there for the pay off, his brother Michel would be there, and that the officer had been given the code name "Willie X.," because he was a friend of Willie, the bartender; about 2:45 p. m. on that day Michel told him that Tony had said that he (officer) was one of their customers, and Michel also said, "I'll take your money"; the officer told Michel that he wanted to bet \$2 on a horse by the name of "First Pass" in the sixth race, and he gave Michel \$2; about 3:45 p. m. on that day the officer told Michel that he wanted to bet on a horse by the name of "White Fleet" in the eighth race; the officer then gave him money for the bet; thereafter he saw another man pass some money to Michel; Michel then wrote something with a pencil on the palm of his left hand, and went to the telephone booth; while he (officer) was in the cafe on that day he saw Michel and Tony take money from approximately fifteen men (neither defendant was an owner or employee of the cafe); on December 13, the officer went to the cafe, and about 1:25 p. m. he saw Michel in the telephone booth; Tony asked the officer if he wanted to make a bet, and he replied that he wanted to bet \$2 on "Beamer's Champ"; thereupon Tony opened the telephone booth and said to Michel, "Two dollars on Beamer's Champ for Willie X."; Tony then told the officer to give \$2 to Michel; later the officer paid \$2 to Michel while they were in the rest room; Michel said, "Before I take your money let me wash this chalk off my hand"; then Michel washed his hands; thereafter Michel told him that Beamer's Champ had won; the officer then said that he wanted to bet on "Respondent and Clara D."; Michel paid him the difference between the amount of that bet and the amount he had won; later the officer told Michel that he wanted to bet \$2 on a horse by the name of "Lovely Sight," and he paid \$2 to Michel.

On the days, above referred to, the officer was not wearing an officer's uniform—he wore a khaki shirt, khaki trousers, and a green jacket. On cross examination he testified to the effect that he led Tony to believe that he was a seaman who was waiting for a ship to come in; it was his purpose to deceive Tony and to try to make a bet with him; he solicited all the bets except one.

Appellants' contention that entrapment was established is not sustainable. The evidence shows that the intent to commit the offenses originated in the minds of the appellants and that it did not originate in the mind of the officer. It appears that appellants willingly committed the offenses. "Where an accused has a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment [citations]. * * *" *People v. Roberts*, 40 Cal.2d 483, 489, 254 P.2d 501, 504.

[3] Appellants contend further that the court erred in allowing a police officer to answer a hypothetical question regarding bookmaking. They argue that the question called for an opinion as to the ultimate fact which was to be determined by the jury, namely, whether the alleged acts constituted bookmaking and receiving wagers. Another officer, after having qualified as an expert in the manner in which bookmaking is conducted in Los Angeles County, was asked to make assumptions of facts which were in substance as follows: That in a public bar a man approached another man and said, "Give me three dollars across the board on White Fleet in the 8th race"—one to win, one to place, and one to show; that the man so spoken to had a chalky material on the palm of his hand and he appeared to make marks with a pencil in the chalk; that he then took \$3 from the man who spoke to him, went to a telephone booth, and made a telephone call. He was also asked to consider, in connection with said assumptions, *People's Exhibit 3* which is a page of a newspaper of December 12, 1952 (on that page the name White Fleet is listed in the eighth race at Tanforan Track). The officer was then asked if he had formed an

opinion as to the significance of those circumstances. He replied in the affirmative. Counsel for appellants objected to the question and answer upon the grounds that the question was not a proper hypothetical question, in that it did not set forth the facts as they had been "elicited from the witness," and that the case was not one which "calls for any kind of a hypothetical question." They did not assert wherein the question was not based upon the facts as shown by the evidence. The objection was overruled. The witness then testified that in his opinion those facts regarding a bet across the board would indicate a bet on White Fleet, running in the eighth race at Tanforan on December 12; that the writing in the hand "on the chalk" would be the recording of the wager; and that having a telephone conversation would be calling the bet into "a phone spot." Appellants do not contend on appeal that the facts assumed in the hypothetical question were not based upon the evidence, but they contend that this is not a proper case for a hypothetical question. They argue in effect that the testimony of a bookmaking expert should be limited to an opinion as to the meaning of letters and figures appearing on betting markers and similar documents. Subdivision 1 of section 337a of the Penal Code provides in part as follows: "Every person, 1. Who engages in pool-selling or book-making, with or without writing * * * Is punishable by imprisonment * * *." As stated in *People v. Burch*, 118 Cal.App.2d 122 at page 124, 257 P.2d 44 at page 45, that provision "states clearly that the offense of bookmaking can take place without a writing." There is no requirement that the bet be recorded." It was stated further therein, in quoting from a New York case involving an identical statute, 118 Cal.App.2d 122 at page 124, 257 P.2d 44 at page 45, "The term [bookmaking] itself implies that some written memoranda be used. However, the Legislature, in order to cope with the clever devices and subterfuges employed, amended the section and gave a new meaning to the word bookmaking. * * * It is clear, therefore, that oral bookmaking is as much a violation of the statute as is written book-

making.” The part of the hypothetical question relative to writing with pencil on a chalky material in the palm of the hand was not based upon the evidence. The officer was asked the following question: “And did you see him do anything at all that you know of?” He answered: “I observed him write either numbers or figures—write something on the palm of his left hand with his right hand, his palm being covered with a white chalk, using a pencil and recording something. I don’t know what it was.” The answer was stricken out, except the portion thereof to the effect that he saw him writing in his hand. Furthermore, there was no evidence as to what was written. The opinion evidence regarding the writing in the palm should not have been received. Also the opinion evidence regarding the making of a telephone call should not have been received. There was no evidence as to what was said on the telephone. The error in receiving such opinion evidence was not prejudicial in view of the strong evidence of guilt. Neither of the defendants testified. Since the defendants could reasonably have been expected to explain or deny the evidence against them, the jury was entitled to consider their failure to testify as tending to indicate the truth of the evidence against them. See *People v. Steccone*, 36 Cal.2d 234, 239, 223 P.2d 17.

[4] Appellants contend further that the court erred in permitting the police officer to testify, over objections by appellants, regarding a conversation between the officer and another witness out of the presence of defendants. The officer (first referred to) testified that on December 10, prior to being introduced to Tony, he went to a pool hall and told a man by the name of Jim that he wanted to make a bet on a horse; Jim told him to write the name of the horse; the officer said, “Tanforan, first race, Patmon, two to win”; then he gave Jim \$2, and Jim then walked toward the cafe. A witness, called by defendants, testified that he was known as Jim; that in December, 1952, that officer gave him \$2 and told him to place a bet; that he placed the bet with a man by the name of Louie. There was no evidence which connected

the said transaction with the defendants. The testimony should not have been received but the ruling was not prejudicial, in view of the other evidence herein.

The purported appeals from the verdicts and sentences are dismissed. The judgments and the order denying the motions for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



121 Cal.App.2d 656

GLASS CONTAINERS, Inc.

v.

INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15657.

District Court of Appeal, First District,
Division 2, California.

Dec. 3, 1953.

Rehearing Denied Dec. 31, 1953.

Hearing Denied Jan. 27, 1954.

Proceeding to set aside award of Industrial Accident Commission apportioning part of amount paid by insurer under contract conferring upon self-employed insured benefits available to eligible employees under Workmen’s Compensation Code against former employer of insured. The District Court of Appeal, Dooling, J., held that fact that insurer had submitted question of its liability under policy to commission as arbitrator did not give commission authority to apportion insurer’s liability against former employer of insured where former employer had objected to jurisdiction of commission at every stage of proceeding on basis that it could not be made party to proceeding.

Judgment in accordance with opinion.

I. Workmen’s Compensation — 201

Where disability or death results to employee from progressive occupational disease, employee or his dependents may recover full compensation benefits from any

employer in chain of causation, and Industrial Accident Commission must thereafter apportion liability among successive employers in proportion that each period of employment contributed to disabling or fatal disease.

2. Workmen's Compensation ☞1086

Legislature cannot confer upon Industrial Accident Commission power to adjudicate or to enforce a liability which does not arise out of relation of employer and employee. Const. art. 20, § 21.

3. Workmen's Compensation ☞1075

Liability arising out of insurance contract entitling self-employed insured to benefits identical with those provided under workmen's compensation law was purely contractual, and if insurer had not voluntarily submitted to jurisdiction of Industrial Accident Commission as arbitrator to determine liability on such contract, commission would have been without jurisdiction to have made any award against insurer. Const. art. 20, § 21; Labor Code, §§ 4903, and (c), 5300, and (b), 5308, 5501.

4. Workmen's Compensation ☞1075

Fact that insurer under policy conferring on self-employed insurer benefits as provided by workmen's compensation law to eligible employees, had voluntarily submitted question of its liability under policy to Industrial Accident Commission as arbitrator, did not give commission authority to apportion against former employer of insured portion of total death benefit to which insured's wife and child were entitled under policy where former employer had objected to jurisdiction of commission at every stage of proceeding that it could not be made party to proceeding. Const. art. 20, § 21; Labor Code, §§ 4903, and (c), 5300, and (b), 5308, 5501.

5. Workmen's Compensation ☞1075

Insurer under policy conferring on self-employed insured benefits available to eligible employees under workmen's compensation law, was not upon becoming liable on policy, "third person" within statute giving Industrial Accident Commission jurisdiction of proceedings for enforcement against employer, or insurer, of any liability for compensation imposed by commis-

sion in favor of injured employee, his dependents, or any third person, Labor Code, § 5300(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Third Person".

6. Workmen's Compensation ☞993, 1177

Liens provided for in statute authorizing Industrial Accident Commission to determine liens against workmen's compensation awards for medical care, or for amount due from injured employee for support of his deserted wife, are "liability for compensation imposed" within statute giving commission jurisdiction of proceeding for enforcement of any liability for compensation imposed in favor of injured employee, his dependents, or any third person. Labor Code, §§ 4903, 5300(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Liability for Compensation Imposed".

7. Workmen's Compensation ☞1075

In absence of showing of reasonable value of living expenses of wife and minor child of deceased self-employed insured, or that payment made to them by insurer bore any relation to reasonable value of their living expenses, payment by insurer of its liability under policy did not make insurer holder of "lien for living expenses" of employee or his dependents, within statute authorizing commission to determine and to allow liens against any amount paid as compensation, and commission was therefore without jurisdiction to apportion insurer's liability between insurer and former employer of deceased self-employed insured. Labor Code, § 4903.

See publication Words and Phrases, for other judicial constructions and definitions of "Lien for Living Expenses".

8. Workmen's Compensation ☞1004

Provision of workmen's compensation law authorizing commission to determine and to allow living expenses of employee or dependents as lien against amount paid as compensation, is to protect persons who advance credit or loan money to dependents for necessary living expenses, and is not intended for benefit of debtor who pays

debt legally owing under contractual obligation. Labor Code, § 4903.

9. Workmen's Compensation ⇨1086

Provision of Workmen's Compensation Law authorizing filing of an application before commissioner by any party in interest, must be read with provision setting out proceedings authorized to be instituted before commission, and does not enlarge jurisdiction of commission to cover parties whose rights do not arise under statute authorizing proceedings to be instituted before commission. Labor Code, §§ 5300, 5501.

10. Workmen's Compensation ⇨1086

Jurisdiction of Industrial Accident Commission is necessarily limited to those matters over which it is given jurisdiction by legislature. Const. art. 20, § 21; Labor Code, §§ 4903, and (c), 5300, and (b), 5308, 5501.

Rinaldo Sciaroni, Jr. and Brobeck, Phleger & Harrison, San Francisco, for petitioner.

Herlihy & Herlihy, Los Angeles, for respondent Industrial Indemnity Co.

Edmund J. Thomas, Jr. and T. Groezinger, San Francisco, for respondent Industrial Acc. Commission.

DOOLING, Justice.

Petitioner attacks an award of the Industrial Accident Commission apportioning against it, as a former employer of Thomas B. Hart, deceased, and in favor of respondent Industrial Indemnity Company, a portion of the total death benefit to which the decedent's wife and child would be entitled by reason of decedent's death from silicosis.

At the time that the disease became disabling the decedent was self-employed and was insured by Industrial Indemnity Company (hereafter referred to as Industrial) against disability and death resulting from his occupation by a policy which conferred the same benefits as those prescribed by the workmen's compensation provisions of the Labor Code for employees of others

who suffered similar disability or death in the course of their employment.

The proceeding before the commission was commenced by decedent's widow against Industrial to recover on its policy, and the minor child through a guardian ad litem was afterwards joined as an applicant. An award for death benefits was made against Industrial and Industrial in turn sought an apportionment of its liability against petitioner and other former employers of decedent and their insurers. The commission thereafter made the award here attacked in favor of Industrial and against petitioner for a portion of the total liability.

[1] It is now settled in cases where disability or death results to an employee from a progressive occupational disease such as silicosis, that the employee or his dependents may recover the full compensation benefits from any employer in the chain of causation and that the commission must thereafter apportion the liability among the successive employers in the proportion that each period of employment contributed to the disabling or fatal disease. *Colonial Ins. Co. v. Industrial Accident Commission*, 29 Cal.2d 79, 172 P.2d 884. This is apparently the first case to come before the courts in which the commission has attempted to extend this rule of apportionment in favor of an insurer who has incurred a liability by a policy which confers upon a self-employed person and his dependents the same benefits as the compensation law would confer were he employed by another. It is petitioner's position that the commission is without jurisdiction to make such an award.

[2] Certain preliminary observations will lend clarity to the discussion and determination of this question. It is settled that under sec. 21 of art. XX of the constitution the legislature cannot confer upon the Industrial Accident Commission the power to adjudicate or enforce a liability unless the liability arises out of the relation of employer and employee. *Employers' Liability Assurance Corp. v. Industrial Acc. Commission*, 187 Cal. 615, 203 P. 95. With this constitutional limitation in mind,

undoubtedly, the legislature adopted sec. 5308 of the Labor Code, providing:

"The commission has jurisdiction to determine controversies arising out of insurance policies issued to self-employed persons, conferring benefits identical with those prescribed by this division.

"The commission may try and determine matters referred to it by the parties under the provisions of Part III, Title X, of the Code of Civil Procedure, with respect to controversies arising out of insurance issued to self-employed persons under the provisions of this division. Such controversies may be submitted to it by the signed agreement of the parties, or by the application of one party and the submission of the other to its jurisdiction, with or without an express request for arbitration. * * *

"In acting as arbitrator under this section, the commission has all the powers which it may lawfully exercise in compensation cases, and its findings and award upon such arbitration have the same conclusiveness and are subject to the same mode of reopening, review, and enforcement as in compensation cases."

[3] It was pursuant to this section that the proceedings leading to the original award against Industrial were taken. Had Industrial not voluntarily submitted to the jurisdiction of the commission, not as the Industrial Accident Commission but *solely as an arbitrator* pursuant to the provisions of sec. 5308, the commission would have had no power or jurisdiction to make the original award against it. This is so because the liability enforced against Industrial by that award was not one created by law under the authority of Cal.Const. sec. 21, art. XX and arising out of the relation of employer and employee, but was a purely contractual liability arising from the contract of insurance between Industrial and the decedent.

Respondents rely upon that portion of sec. 5308 reading:

"In acting as an arbitrator under this section, the commission has all the powers

which it may lawfully exercise in compensation cases * * *." From this they argue that once the insurer and the insured's dependents had voluntarily submitted the question of the insurer's contractual liability under its policy to the commission as an arbitrator other parties could, in the same proceeding, be involuntarily brought before the commission as commission. We are satisfied from a reading of the whole section that it was not intended by the last quoted language to extend such a broad power to the commission in what is no more than a specialized type of arbitration proceeding in which the authority of the commission to act at all is, and must be, dependent upon the voluntary act of the parties in submitting a question of contractual liability to the commission solely as arbitrator. This is made clear by other language in the section: "*The commission may try and determine matters referred to it by the parties* under the provisions of Part III, Title X, of the Code of Civil Procedure, *with respect to controversies arising out of insurance* issued to self-employed persons * * *. Such controversies may be submitted * * * *by the signed agreement* of the parties, or by the application of one party and *the submission of the other* to its jurisdiction * * *."

[4] From the italicized portions of the above quotation it is clear that the commission's authority under sec. 5308 is limited to "controversies arising out of insurance issued to self-employed persons" and that even as to such controversies it can only obtain jurisdiction by the express or implied agreement of the parties. Since petitioner herein objected to the jurisdiction of the commission at every stage of the proceedings it could not be made a party under sec. 5308, even if it might be held that the liability sought to be imposed on it is one "arising out of insurance issued to self-employed persons". Petitioner's liability does not in fact arise out of Industrial's contract insuring decedent as a self-employed person. Any liability that it may be under arises out of the past relationship of employer and employee and is imposed upon it by law (the workmen's

compensation provisions of the Labor Code).

[5] Alternatively respondents argue that the liability here enforced is authorized by the provision of the Labor Code sec. 5300(b), giving the commission jurisdiction of proceedings "(f)or the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person." Industrial conceives itself to be a "third person" in whose favor a liability is imposed for compensation by "this division", Division 4, Labor Code. We look in vain through Division 4 for any such liability imposed in favor of the insurer of a self-employed person.

[6] Sec. 4903 imposes certain liens which the commission may allow "against any amount to be paid as compensation". It has been held that the holders of such liens may enforce them by proceedings before the commission, e. g. a lien for medical care: *Independence Indemnity Co., by Mitchell v. Industrial Acc. Commission*, 2 Cal.2d 397, 41 P.2d 320; a lien for support for living expenses of a wife deserted by the injured employee: *Northwestern Redwood Co. v. Industrial Acc. Commission*, 184 Cal. 484, 194 P. 31. Since these liens are expressly created by sec. 4903 they may fairly be said to fall within the language of sec. 5300(b) as a "liability for compensation imposed * * * by this division in favor of * * * (a) third person."

[7,8] Sec. 4903(c) imposes such a lien for "(t)he reasonable value of the living expenses of an injured employee or of his dependents * * *." Industrial claims a lien under this provision. It is sufficient answer that no showing was made of the reasonable value of the living expenses of the wife and minor child of the decedent in this case nor that the payments made by Industrial under its policy bore any relation thereto. Furthermore it seems clear that this provision is to protect persons who advance credit or loan money to such dependents for necessary living expenses and is not intended for the bene-

fit of a debtor who pays a debt legally owing under a contractual obligation.

[9] Sec. 5501, Labor Code authorizing the filing of an application before the commission by "any party in interest" must be read with sec. 5300 and cannot be held to enlarge the jurisdiction of the commission to cover parties whose rights do not arise under Division 4 of the Labor Code.

[10] The scope of the jurisdiction of the commission is necessarily limited to those matters over which it is given jurisdiction by the legislature, and we can find no provision of the Labor Code conferring on the commission the jurisdiction which it attempted to exercise in making the apportionment award against petitioner.

The award against petitioner is annulled.

NOURSE, P. J., and GOODELL, J., concur.



121 Cal.App.2d 675

AARON et al. v. PUCCINELLI et al.

Civ. 15610.

District Court of Appeal, First District,
Division 1, California.

Dec. 4, 1953.

Action to establish trust in lease of a market. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered decree in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that where meat, grocery, and fish and vegetable departments of market were leased to three partnerships, partnerships attempted to reach agreement among themselves and with landlords relative to remodeling of market and renewal of lease but negotiations were terminated and thereafter partners operating meat department attempted to negotiate lease for themselves, fiduciary relationship between cotenants

was terminated and partners operating meat market would not be entitled to establish trust in lease thereafter negotiated by certain cotenants for themselves.

Judgment affirmed.

1. Landlord and Tenant ⚖️79(1)

An assignment by operation of law takes place by the landlord's acceptance of a new tenant and the consent of the old tenant.

2. Tenancy In Common ⚖️10

Where landlords leased meat, grocery, and fish and vegetable departments of market to three separate partnerships, thereafter personnel of partnerships was changed and landlords accepted new partnership members without releasing the old and, although all partners in three departments were not formally parties to lease, they were recognized by landlords and each other as cotenants, each partner, as cotenant, bore to his other cotenants a fiduciary relationship.

3. Trusts ⚖️110

In action to establish a trust in favor of plaintiffs in lease held by defendants who had been cotenants with plaintiffs in leased market, evidence supported finding that, after cotenants were unable to reach agreement among themselves and with landlords relative to remodeling of market and renewal of lease, plaintiffs without consent or knowledge of cotenants sought to secure lease for themselves.

4. Trusts ⚖️102(1)

Where meat, grocery, and fish and vegetable departments of market were leased to three partnerships, partnerships attempted to reach agreement among themselves and with landlord relative to remodeling of market and renewal of lease but negotiations were terminated and thereafter partners operating meat department attempted to negotiate lease for themselves, fiduciary relationship between cotenants was terminated and partners operating meat market would not be entitled to establish trust in lease thereafter negotiated by certain cotenants for themselves.

5. Equity ⚖️65(2)

In action by partners who had operated meat department in market to establish

trust in favor of such partners in lease of market held by former cotenants, where there was evidence that such partners, after negotiations between cotenants and landlord relative to renewal of former lease had terminated, attempted to negotiate lease for themselves, evidence supported finding that partners did not come into court with clean hands.

Barrett & Harkleroad, Healy & Walcom, San Francisco, for appellants.

Morris M. Grupp, San Francisco, for respondent.

BRAY, Justice.

From a decree in declaratory relief in favor of defendants, plaintiffs appeal.

Question Presented.

Did plaintiffs' own acts terminate the fiduciary relationship then existing between them and defendants?

Evidence.

This action was brought to establish a trust in favor of plaintiffs in a certain lease held by defendants. Since about 1920 certain premises in San Francisco have been known as "Coliseum Market." The business of the market was operated under lease from the owners of the realty by three distinct departments, a meat department, a grocery department, and a combined fish and vegetable market. Each department was owned by a separate partnership and operated independently of any other department. The personnel of these partnerships varied from time to time as members died or partnership interests were sold. No partner in one department ever had any interest in any other department. In 1941, a ten year lease was obtained. This lease was not signed by all of the then partners in the three departments. The lease provided that no assignment of any interest in it could be made without consent of the lessors. No formal consents to assignments of the lease interests were made when changes were made in ownership of interests in any of the departments. However, the lessors accepted the new partnership members without releasing the old,

even though they refused to recognize an assignment from the outgoing member. At the time of the occurrences upon which this suit is based, the meat department was owned by the three plaintiffs, the grocery department by Vincent P. Nicolai and Angelo Nicolai, and the vegetable and fish department by defendants. Of the original signatories to the lease, there were then left only Vincent P. Nicolai of the grocery department, and defendants Puccinelli and Dell 'Osso of the fish and vegetable department. Although none of plaintiffs were signatories to that lease, the landlord by reason of plaintiffs' having succeeded to the interests of the original meat department partners, recognized them as tenants along with the partners in the other two departments.

Over the years each department paid one-third of the rental prescribed in the lease, and of the costs incident to the maintenance of the premises, such as janitorial services, utilities, watchmen, insurance, also one-third of the advertising. Otherwise the departments were independently operated, except that all departments cooperated for the common good. Of course, each department bore its own losses and retained its own profits.

In 1949 the lease had approximately three years to run. The departments desired to continue operations as in the past, remodel the market by interior and external changes, and obtain a renewal of the lease. Conferences with the landlord and between the departments were held. The departments could not agree on the changes to be made. The record is highly controversial concerning these discussions, but all parties agree that no agreement was reached and that the discussion terminated in December, 1949.

Termination of Fiduciary Relationship.

[1, 2] Before proceeding to the next occurrences, it would be well to consider the legal relationship of the parties at that time. Although all of the partners in the three departments were not formally parties to the lease, they were recognized by the landlord and each other as cotenants. An assignment by operation of law takes place by

the landlord's acceptance of a new tenant and the consent of the old tenant. *Baker v. J. Maier & Zobelein Brewery*, 140 Cal. 530, 74 P. 22. As cotenants, each bore to his other cotenants a fiduciary relationship.

[3] After the negotiations between the departments themselves and with the landlord had terminated in December, 1949, the Nicolai brothers wanted to sell their grocery department to one Scagolia, who apparently would not buy unless a longer lease could be obtained than then existed. The Nicolais commissioned their attorney, Young, to obtain such a lease. Young contacted the landlord. The latter was not satisfied with Scagolia's financial responsibility. What occurred from then on is highly controverted. However, there is substantial evidence to support the court's finding that then plaintiffs without the consent or knowledge of defendants engaged Young to secure a lease for them alone. After the landlord's refusal to execute a lease to Scagolia, Young met with plaintiffs, and then negotiated with the landlord for a lease to plaintiffs alone, stating that the departments could not get together and the landlord should lease to plaintiffs and the others could sublet from plaintiffs. Besides talking to the landlord about it, Young wrote a letter to him dated December 30, 1949, proposing terms for such a lease. The landlord requested a statement of the financial responsibility of the three plaintiffs and on January 19, 1950, Young sent him such a statement. Late in December, defendant Puccinelli in a conversation with the landlord learned that plaintiffs had been negotiating a lease for themselves. Puccinelli then suggested a lease to him and his partners. The landlord asked for a financial statement. Apparently the landlord preferred defendants' financial responsibility to that of plaintiffs, for on January 25, 1950, a ten year lease was executed with defendants. Defendants did not disclose to plaintiffs the existence of the lease. Plaintiffs in April, 1950, learned of it for the first time. In May defendants offered plaintiffs a sublease which they refused. Defendants then served on plaintiffs notice of an increase of rental effective June 1st, and a notice to quit effective September 1st.

[4] Plaintiffs contend that the evidence shows that defendants in obtaining the 1950 lease were obtaining it as joint venturers for themselves and plaintiffs. While there was evidence from which the court could have so concluded, there is substantial evidence to the contrary. Undoubtedly at the time the parties first negotiated with the landlord for an extension of the existing lease, there existed a fiduciary relationship between the parties, and even after the negotiations were broken off, had defendants obtained a new lease it would necessarily have been for the benefit of plaintiffs as well as of defendants. *Koyer v. Willmon*, 150 Cal. 785, 90 P. 135; *Thayer v. Leggett*, 229 N.Y. 152, 128 N.E. 133; *Hendrickson v. California Talc. Co.*, 55 Cal.App.2d 467, 130 P.2d 806; *Stewart v. Shearman*, 22 Cal. App.2d 198, 70 P.2d 702; *Munson v. Fishburn*, 183 Cal. 206, 190 P. 808. But, after the negotiations were terminated and plaintiffs for themselves alone started to negotiate with the landlord, the fiduciary relationship was terminated and it became a case of each party for himself.

"As is said in *Beck v. Cagle*, 46 Cal.App. 2d 152, 162, 115 P.2d 613, 619, 'The abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance.' See also, *Middleton v. Newport*, 6 Cal.2d 57, 62, 56 P. 2d 508; and *Fooshe v. Sunshine*, 96 Cal. App.2d 336, 343, 215 P.2d 66, 16 A.L.R.2d 1142." *Richards v. Plumb*, 116 Cal.App.2d 132, 138, 253 P.2d 126, 130. In *Smith v. McNutt*, 156 Cal. 769, 106 P. 70, it was held that the principle that a cotenant or person placed in a situation of trust or confidence who purchases trust property holds it in trust for the others, can have no application in the absence of the relationship which constitutes the whole reason for its existence. Obviously the same rule would apply to leasing as well as purchase.

[5] In our case the court found that plaintiffs did not come into court with clean hands. Their attempt to get the lease for themselves alone supports this finding.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

BABCOCK v. BERKSON et al.

Civ. 19729.

District Court of Appeal, Second District,
Division 3, California.

Dec. 4, 1953.

Rehearing Denied Dec. 28, 1953.

Hearing Denied Jan. 27, 1954.

Action for rescission of an exchange of real properties, for cancellation of deeds, a bill of sale and a note, and for damages, arising out of allegedly fraudulent misrepresentations of defendants as to condition of property exchanged for that of plaintiff. One defendant filed cross complaint for damages for alleged fraud of plaintiff in the exchange. On trial, action was dismissed as to all defendants except the cross complainant. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment for defendant on complaint and against defendant on his cross complaint, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that each of the allegations of fraud was untrue.

Judgment affirmed.

1. Cancellation of Instruments ⇨42

In action for rescission of an exchange of real properties, for cancellation of deeds, a bill of sale and a note, and for damages, for alleged fraud of defendants in misrepresenting condition of property exchanged for that of plaintiff, court did not abuse its discretion in refusing to permit amendment of complaint to allege that the hotel building exchanged by defendants had been constructed in 1907 rather than in 1915.

2. Cancellation of Instruments ⇨47

Deeds ⇨211(3)

Exchange of Property ⇨8(4)

Fraud ⇨58(2)

In action for rescission of an exchange of real properties, for cancellation of deeds, a bill of sale and a note, and for damages, for alleged fraud of defendants in misrepresenting condition of property exchanged for that of plaintiff, evidence sustained finding that each of the allegations of fraud was untrue.

3. Appeal and Error ⇨901

District Court of Appeal was not required to read entire transcript in order to become better acquainted with the testimony and the alleged misconduct of trial judge.

4. Trial ⇨29(2)

In action for rescission of exchange of real properties and other relief, on ground of fraud, judge's remarks, during questioning of plaintiff, that plaintiff was bound to lose, and that there was not much court could do to protect her, which remarks were prompted by testimony of plaintiff from which it clearly appeared that she made little effort to investigate condition of defendants' property before the exchange, showed neither bias nor prejudice, nor that the court failed to give to evidence of plaintiff the judicial consideration which it deserved.

5. Appeal and Error ⇨1010(1)

District Court of Appeal cannot disturb findings that have substantial support in the evidence.

6. Appeal and Error ⇨836

Justice cannot be accomplished by disregarding established rules of procedure or constitutional limitations upon jurisdiction of reviewing court.

Clarence Hansen, Los Angeles, for appellant.

Avery M. Blount and Hunt & McCann, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff brought this action for rescission of an exchange of real properties, for cancellation of deeds, a bill of sale and a promissory note, and for damages for alleged fraud. Defendant Harry Berkson filed a cross-complaint seeking damages for the alleged fraud of plaintiff in the exchange. In a trial to the court the action was dismissed as to all defendants except Harry Berkson, and findings were in his favor on the complaint and against him on his cross-complaint. Plaintiff appeals.

The complaint alleged that in January, 1950, plaintiff owned real and personal

property of the value of \$55,000, located in the mountainous region of San Bernardino County, with improvements thereon consisting of the equipment of an apple orchard and also a hotel of 13 furnished rooms, together with other structures. Defendant Berkson was the owner of a hotel property located at 1120 South Grand Avenue in Los Angeles. The property was encumbered by a trust deed with an unpaid balance of \$58,791.97, payable at the rate of \$600 per month including interest, and another trust deed in the sum of \$15,678.59, payable \$200 per month, including interest. Defendants Ed Chapin and W. F. Bonner were real estate brokers in the employ of Berkson. Pauline Hastings was an employee of defendant Thomas, a real estate broker. All the defendants were charged with fraud in bringing about an exchange of plaintiff's property for that of Berkson. The exchange was consummated on or about February 8, 1950. There was an exchange of possession and on March 23, 1950, plaintiff gave notice of rescission. Before the time of trial plaintiff defaulted in payments on the encumbrances and lost the hotel property through foreclosure.

The complaint alleged that defendants Berkson and Chapin made the following representations, all of which were alleged to have been false and made with intent to deceive plaintiff: (1) That the income from Berkson's hotel for January, 1950, was \$2,750, when it was no more than \$2,140; (2) that for several years prior to January 1, 1950, the hotel actually averaged income of \$93 per day; (3) that the rents received in 1948 amounted to \$30,000 gross; (4) that there had been a net profit of \$650 a month for the past two years and that such condition would continue in the future; (5) that the hotel was in excellent and first class condition, but that there were large areas of dry rot covered up beyond recognition on cursory examination; (6) that there was plenty of linen and a sufficient number of usable blankets and sheets, whereas, most of the blankets were old, burned and torn, and the sheets, which were in insufficient number, were in almost unusable condition; (7) that the hotel would make plaintiff a net profit of over \$7,000 per year; (8) that the lot on which the hotel stood had recently

been appraised at \$80,000; (9) that Berkson represented there were no vacancies in the hotel, whereas there were many vacancies; and (10) that all the rooms and apartments were in excellent condition and were in the same condition as one or two rooms that were shown to plaintiff. The court specifically found that each of said allegations was untrue.

In a second cause of action plaintiff sought cancellation of a promissory note which she executed in connection with the exchange in favor of defendant Thomas. The ground upon which cancellation was sought was alleged conspiracy of Thomas with the other defendants to commit the alleged fraud. A separate cause of action sought damages for fraud in the amount of \$55,000, as well as cancellation of the note, and there was a prayer also for exemplary damages. The second cause of action was dismissed by plaintiff and in her opening brief she says that a dismissal was filed as to all defendants other than Berkson.

Three points are made on the appeal: (1) That the findings are unsupported by the evidence; (2) the court abused its discretion in denying plaintiff's motion to file a second amended complaint to conform to the proof; and (3) the trial judge was guilty of prejudicial misconduct during the trial.

[1] We find no abuse of discretion in the court's refusal to permit an amendment of the complaint to allege that the Berkson hotel building had been constructed in 1907 rather than in 1915.

[2] The presentation of the contention that the findings are not supported by the evidence is entirely inadequate. It is asserted that plaintiff was told the income for January, 1950, was \$2,750, when it was no more than \$2,139.47. On this point there was a conflict in the testimony of plaintiff and that of Chapin and a Mr. Joyce. Plaintiff asserts that both Berkson and Chapin testified they told plaintiff the gross income for 1948 was \$30,000, and that the income was shown to have been only \$22,931.31. The exhibit upon which plaintiff relies to substantiate her statement of the income omits the months of January and February,

1948. The average monthly income for the ten months would indicate an income of \$30,000 for the year. Reference is made in plaintiff's brief to the testimony of plaintiff concerning other alleged representations, but without references to the testimony of the defendants and their witnesses on the same subjects. Plaintiff states little of the evidence except that which favors her case. Nevertheless we have made an extensive examination of the reporter's transcript and find that the testimony of plaintiff was contradicted by that of one or more of the defendant's witnesses in all material particulars. At the conclusion of the arguments the court made a comprehensive summary of the evidence. The allegations of fraud were taken up one by one and the court's decision on each factual issue was stated, with the reasons therefor. The court stated it was satisfied there was no representation that the hotel would average \$1.50 per room per day; no representation that the hotel would show a net profit of \$650 per month or \$7,000 per year; and no evidence that the property had not been recently appraised at \$80,000. With reference to the condition of the various rooms in the hotel the court remarked that the building was at least 30 years old and the condition was not materially different from that which had been represented; there was need for repairs and renovation, but not to a greater extent than would be expected in a building of that age which had not been kept in perfect repair. The court also stated that the furnishings, such as sheets and blankets, were in a normal condition for a cheap lodging house, and that they were not in the sad condition described by plaintiff, remarking that if they had been unusable, as plaintiff testified, the hotel could not have been operated as it had been without their having been replaced. The basis of the decision is disclosed in the court's statements: "Now, I am convinced that I must give more credence to the testimony of Mr. Chapin and Mr. Berkson than I can give to that of the plaintiff. Their testimony is corroborated to a much greater extent than is her testimony." With respect to the alleged representations as to the operating revenue and expenses, the court pointed out that the facts known to plaintiff refuted her

charges of misrepresentation as to profits the hotel was earning. The court referred to the testimony of plaintiff that before the close of the escrow she knew the monthly expenses normally to be expected, without replacements of furniture, furnishings, renovation, repair and upkeep, would amount to over \$25,000 per year, and the court commented: "It is perfectly apparent from the testimony that she either closed her eyes or she simply refused to consider what the expenses of that hotel would be." The court also commented upon the fact that the evidence did not show that the hotel property was worth less than the property given by plaintiff in the exchange. Plaintiff has not shown in her brief that the court was mistaken in any respect concerning the testimony upon the fraud issue, nor that any statement of the court lacked support in the evidence.

In support of her third point plaintiff quotes a few isolated passages from the testimony which contain questions asked by the court and comments on the evidence. The judge, during the questioning of plaintiff, made the remark that plaintiff was bound to lose. In her brief this is construed as a reference to the possible outcome of the case, and it is contended that the remark indicated that the court had prejudged the case. It is clear, however, from the record, that the court's remark had reference to the manner in which plaintiff had made her investigation, which was such as to cause the court to believe that she would be likely to lose in the transaction with the defendants. The court also remarked: "Then, madam, there's not much a court can do to protect you." This remark also was prompted by the testimony of plaintiff from which it clearly appeared that she made little effort to avail herself of the opportunities she had for investigation of the Berkson property and its earnings.

[3,4] We are asked in plaintiff's brief to read the entire reporter's transcript of 780 pages in order to become better acquainted with the testimony and the alleged misconduct of the trial judge. Although the invitation is one which we were under no compulsion to accept (*In re Guardianship of Di Carlo*, 3 Cal.2d 225, 233, 44 P.2d

562, 99 A.L.R. 990), we have read the record in order to satisfy ourselves as to the merits of plaintiff's case in all of its phases. We find that the charge of misconduct is unfounded. The transaction in question was one which would naturally excite the sympathy of the court and if, as plaintiff complains, the court exhibited a sceptical attitude toward the merits of her case it was because of what the court considered to have been the careless and inadequate manner in which she investigated the Berkson property. The statements indicated no more than that the court had gained impressions from the testimony of plaintiff as the trial progressed, although it also appears that the court was not satisfied with her testimony concerning the alleged misrepresentations. If it is wrong for a trial judge to disclose that he is impressed favorably or unfavorably with testimony as it is given it would be equally wrong for him to be impressed—a manifest absurdity. None of the court's comments tended to show bias or prejudice, nor that the court failed to give to the evidence of plaintiff the judicial consideration which it deserved.

As previously stated Berkson filed a cross-complaint alleging that he had been defrauded in the transaction. He has not appealed from an adverse judgment on the cross-complaint.

[5] The action was fully and fairly tried, as evidenced by the lengthy reporter's transcript. We are asked to reverse the judgment by holding that plaintiff's charges of fraud were established as a matter of law. Of course we may not disturb findings that have substantial support in the evidence, and when we have concluded there was substantial evidence to support the material findings further discussion of the evidence would be fruitless. That plaintiff has suffered a grave misfortune cannot be questioned. Her investigation of the Berkson property was casual and evidenced a striking incapacity for the business she undertook and also a hazardous degree of credulity. Yet notwithstanding the comments to that effect which the court made, it was also clearly stated by the court that plaintiff had a right to rely upon any representations made by the defendants as to

matters concerning which they had superior knowledge. It is apparent from the record that the judgment would have been different had the court given greater credence to the testimony of plaintiff that the defendants made the misrepresentations to which she testified.

[6] As to plaintiff's final appeal: "Let justice be done tho the Heavens Fall," we reply that justice cannot be accomplished by disregarding established rules of procedure or the constitutional limitations upon the jurisdiction of a reviewing court.

The judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., concurs in the judgment.



121 Cal.App.2d 758

HANNAGAN et al.

v.

FEATHER RIVER PINE MILLS, Inc.

Civ. 8229.

District Court of Appeal, Third District,
California.

Dec. 8, 1953.

Rehearing Denied Jan. 7, 1954.

Hearing Denied Feb. 3, 1954.

In suit for balance due under contract whereby plaintiff sold lumber to defendant at price specifically made subject to adjustments mutually agreed upon, but permitting termination in event of inability to agree, the Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence sustained trial court's finding that oral modification, relied upon by defendant as converting agreement into oral contract subject to two year statute of limitations, had in fact been in accordance with terms of the contract.

Affirmed.

1. Contracts $\hookrightarrow$ 245(1)

An executory contract is not necessarily extinguished by mere execution of another by same parties, even though latter concerns same subject matter as first, since it is entirely competent for parties to executory contract to modify or waive their rights under it; and to ingraft new terms upon it, and original contract may expressly provide for modifications.

2. Sales $\hookrightarrow$ 90

In suit for balance due under contract whereby plaintiff sold lumber to defendant at price specifically made subject to adjustments mutually agreed upon, but permitting termination in event of inability to agree, evidence sustained trial court's finding that oral modification, relied upon by defendant as converting agreement into oral contract subject to two year statute of limitations, had in fact been in accordance with terms of the contract. Code Civ.Proc. § 339.

Clewe, Martin & Blade, Oroville, for appellant.

Price & Morony, Chico, for respondents.

PEEK, Justice.

This is an appeal by defendant from an adverse judgment for the balance due and unpaid under a contract for the sale and purchase of lumber.

On April 16, 1948 the parties entered into a written agreement wherein the plaintiffs agreed to sell and the defendant agreed to buy, at the prices specified therein, certain lumber produced by plaintiffs. Among other things the contract provided:

"Either party may ask for an adjustment in this price following a general price change of 10% or more as indicated by the Western Pine Association's price index.

"Unless a satisfactory adjustment can be agreed to this contract may be cancelled by either party upon 90 days' notice in writing."

Thereafter in September of that year defendant, in accordance with the permissive provisions of the contract, requested

an adjustment in the price of the lumber as of September 26, to which request plaintiffs agreed. The adjustment was limited solely to the question of price. Thereafter the parties continued operations under the contract as adjusted. However, the following month, although it had not been agreed upon, the defendant arbitrarily made a further reduction in the price of the lumber to be delivered to it. Plaintiffs thereupon informed defendant they could not accept the arbitrary price set by defendant and would hold defendant to the terms of the contract. Thereafter and until the conclusion of the season plaintiffs continued to deliver lumber and the same was accepted and paid for by defendants at the arbitrary price set by it. The money so paid by defendant was accepted by plaintiffs but they continued to bill defendant at the adjusted rate.

After considerable negotiation and more than two years thereafter, the present action was filed on March 12, 1951. The complaint contained three counts. The first was on the written contract and the second and third were common counts, all of which were generally denied by defendant. The court granted a nonsuit as to the common counts and granted plaintiffs leave to amend the first count to conform to proof so as to incorporate therein the price modification orally agreed upon in September 1948. Judgment was thereafter entered for plaintiffs as prayed.

[1,2] It is now the contention of defendant that when the change in price was orally agreed upon in September 1948 the entire agreement thereby became, in legal effect, an oral agreement and hence the statute of limitations applicable to oral contracts, to-wit, two years, applied. Code Civ.Proc. § 339. The basis of the contention is that the finding of the court that the oral modification was "in accordance with the terms of said contract", is unsupported by the evidence, and hence in the absence of evidentiary support the statute must apply.

Contrary to defendant's contention, an "executory contract is not necessarily extinguished by the mere execution of another by the same parties, even though the latter

concerns the same subject matter as the first." 4 Cal.Jur. Ten Year Supp. sec. 225, page 159. Furthermore as the writer of that text states on that same page, "it is entirely competent for the parties to an executory contract to modify or waive their rights under it, and to ingraft new terms upon it, and the original contract may expressly provide for modifications."

Here the parties in evident anticipation of a price change made specific provision for such possibility by providing in the original written contract the circumstances and procedure under which either party could ask for an adjustment, but if they were unable to agree on an adjustment then either party could terminate "this contract" as provided therein. Stated otherwise, if a "satisfactory adjustment" could be mutually agreed upon, then "this contract" would remain in full force as the sole agreement of the parties. Thus, when the very thing which had been anticipated did occur, and for which provision had been made in the contract, to-wit, a decline in the price of lumber, the parties proceeded as agreed and by oral agreement of September 26 altered the written contract accordingly. In all other particulars the written contract remained the same as it was. This was the precise situation presented in *Snow Mountain Water & Power Co. v. Kraner*, 191 Cal. 312, 323, 216 P. 589, 593. There the parties anticipated that it might become necessary to vary certain construction plans. They contracted accordingly, and as anticipated it became necessary to alter the plans. In holding that the parties were bound by the contract as altered, the court said: "The various alterations ordered by the respondent and carried out by the appellant * * were all in conformity with changing conditions * * * they were clearly within the scope and object of the contract * *." Likewise in the instant case the price adjustment was carried out under the provisions of, and was clearly the object of, the contract.

Not alone does this appear from the contract itself but the acts of the parties in their subsequent operations thereunder also

show that the modification of price was interpreted by them as an "adjustment" of the same within the terms of the contract.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



122 Cal.App.2d 45

FRANK v. DOMINICK.

Civ. 19270.

District Court of Appeal, Second District,
Division 3, California.

Dec. 15, 1953.

Action by partner against his co-partner for a breach of agreement of partnership, and for rescission of an agreement dissolving the partnership, on grounds of fraud and mistake. The Superior Court, Los Angeles County, J. A. Smith, J., entered judgment adverse to plaintiff, and plaintiff appealed therefrom, and from orders denying jury trial and denying plaintiff's request for extension of time within which to file additional affidavits in support of his motion for new trial. The District Court of Appeal, Vallée, J., held that evidence sustained findings that there was no breach of agreement, and no fraud or mistake, and that the orders appealed from were nonappealable.

Appeals from orders dismissed; judgment affirmed.

1. Appeal and Error ⇨931(1), 989

On appeal by plaintiff from adverse judgment, evidence and reasonable inferences therefrom would be stated in light most favorable to defendant, disregarding conflicting evidence and inferences.

2. Partnership ⇨296(3)

In action by partner against his co-partner for rescission of an agreement dissolving the partnership, on grounds of

fraud and mistake, evidence sustained finding that there was no fraud.

3. Appeal and Error ⇨989

Where finding is attacked as unsupported by evidence, function of District Court of Appeal begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding.

4. Partnership ⇨296(1)

In action by partner against his co-partner for rescission of an agreement dissolving the partnership, on grounds of fraud and mistake, wherein partner charged that alleged inadequacy and consideration was a badge of fraud, fact that partner may have given up more than he received was of no consequence, in view of finding, supported by evidence, that there was no fraud.

5. Partnership ⇨296(3)

In action by partner against his co-partner for rescission of an agreement dissolving the partnership, on grounds of fraud and mistake, evidence sustained findings that there had been a complete accounting between the partners, that plaintiff executed the dissolution agreement with full knowledge of its contents and of his legal rights under it, and of his own free will, that, at the time, plaintiff was fully advised and informed, and had knowledge of the assets and liabilities of the partnership, and that there was no concealment of any kind by defendant.

6. Appeal and Error ⇨1011(1)

Where evidence respecting partner's claim that, at time agreement of dissolution was entered into, there were various errors in bookkeeping in his co-partner's favor of which partner had no knowledge, and that the agreement should have been cancelled on that ground, was highly conflicting, court's conclusions with respect thereto could not be disturbed.

7. Partnership ⇨296(3)

In action by partner against his co-partner for rescission of an agreement dissolving the partnership, on ground of mutual mistake of fact in that the parties allegedly believed the dissolution agreement

was only an agreement for purchase by defendant of plaintiff's interest in certain fire salvage and in accounts receivable, evidence sustained finding that plaintiff knew at the time he signed agreement that he was transferring all of his interest in the partnership, including all of its assets, business, and good will, and hence, that there was no mistake of fact.

8. Appeal and Error ◌242(4)

Where documents offered by plaintiff were marked for identification only and were not offered in evidence at trial, and, at conclusion of trial, an order was made that parties submit authorities within ten days and upon expiration of that time the cause would stand submitted, and plaintiff's counsel, in a letter sent with authorities, asked that the documents marked for identification be received in evidence, and defendant's counsel, in letter with authorities, objected to their admission, and court took no cognizance of the letters, plaintiff, under such circumstances, could not complain of fact that such documents were not admitted in evidence.

9. Evidence ◌350

Documents were not admissible in evidence merely to afford a party an opportunity to check them against evidence in the record, but such opportunity was afforded by the marking of such documents for identification.

10. Cancellation of Instruments ◌53

Findings that neither fraud, mutual mistake nor insufficiency of consideration were involved in execution of agreement to dissolve partnership, were sufficient to support judgment denying rescission of such agreement.

11. Appeal and Error ◌959(3)

Pleading ◌236(5)

Whether plaintiff's request for leave to file an amendment to complaint to conform to proof should have been granted was matter within sound discretion of trial judge which would not be disturbed on review in absence of showing of abuse.

12. New Trial ◌118, 153

Where plaintiff duly filed notice of intention to move for new trial, but failed

to file any affidavits within ten-day period provided therefor and plaintiff on last day to which the time for filing such affidavits could be extended, presented an affidavit to be used on the motion as well as an affidavit in support of request for extension of time in which to file amendment to notice of intention, and court declined to order that affidavits be filed, but subsequently, on hearing of motion, offered to permit their filing, which offer was refused by plaintiff, court did not abuse its discretion in refusing to extend time within which to file amendment to motion for new trial and within which to file affidavits in support of the motion. Code Civ.Proc. § 659a.

13. Appeal and Error ◌1010(1)

District Court of Appeal may not reject the findings of trial court and substitute findings of its own, even though it might arrive at a different conclusion.

14. Appeal and Error ◌106, 110

An order denying jury trial, and an order denying request for extension of time within which to file additional affidavits in support of motion for new trial, are nonappealable.

McCarroll & McCarroll and Mary H. McCarroll, Los Angeles, for appellant.

Arthur V. Kaufman, Fleming, Robbins & Tinsman, C. S. Tinsman and Clay Robbins, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action for damages for breach of an agreement of partnership, and for rescission of an agreement dissolving the partnership on the grounds of fraud and mistake. The court found there was no breach of the agreement, and no fraud or mistake.

[1] The evidence and the reasonable inferences therefrom will be stated in the light most favorable to defendant-respondent, disregarding conflicting evidence and inferences. *Berniker v. Berniker*, 30 Cal. 2d 439, 444, 182 P.2d 557.

On April 1, 1946, plaintiff and defendant entered into a written agreement of partnership to conduct a battery separator business for 15 years. Defendant had been conducting the business for many years and owned the land and building in which it was conducted. Defendant agreed to rent the land and building to the partnership for the term at \$500 a month. The business was operated successfully until October 5, 1949. On that date, a large part of the stock and machinery was destroyed by fire. After the fire, the parties discussed dissolution of the partnership, that one or the other would buy or sell; offers and counteroffers were made. Settlement with an insurance company was had; and, on December 1, 1949, the parties divided the proceeds, each receiving \$29,000. They also divided the cash

on hand with the exception of sufficient to take care of outstanding checks. On December 5, 1949, the parties met in an attorney's office and discussed dissolution with him. After much conversation back and forth, the parties agreed that defendant would buy plaintiff's interest in the partnership for \$16,000. The attorney prepared a written agreement of dissolution which was read and signed by both parties.¹ Defendant on that day gave plaintiff a check for \$16,000. On January 10, 1950, plaintiff gave defendant a written notice of rescission of the dissolution agreement on the claimed grounds of fraud, mistake, want of consideration, and failure of consideration.

[2, 3] Plaintiff asserts the findings are not supported by the evidence. He claims that after the fire, and prior to the disso-

1. The dissolution agreement read: "This Agreement of Dissolution of Partnership made and entered into this 5th day of December, 1949, by and between Jack Dominick, hereinafter designated as the 'Continuing Partner', and Conrad Frank, hereinafter designated as the 'Retiring Partner'.

"Whereas, the parties hereto, on the first day of April, 1946, entered into a written agreement of Articles of Copartnership for the operation of a business under the name of Signal Battery Separator Co., in the City of Los Angeles, County of Los Angeles, State of California, and

"Whereas, said parties are desirous of terminating said agreement and dissolving said partnership as from the 2nd day of January, 1950, and

"Whereas, it has been agreed that as from that day, the business shall belong to, and be carried on by, Jack Dominick, the Continuing Partner, solely, and that the share and interest of Conrad Frank, the Retiring Partner, in the assets and good will of the partnership shall be assigned and made over to the Continuing Partner, and

"Whereas, an account and valuation has been taken and made by the partners of the business, and the assets and good will thereof, and the value of the share and interest of the Retiring Partner therein, after providing for the payment and satisfaction of the debts and liabilities thereof on the 2nd day of January, 1950, has been ascertained to be \$16,000.00.

"Witnesseth:

"1. That in pursuance of the agreement in this behalf, the parties do hereby declare that the partnership between them shall be considered as determined and stand dissolved as from the 2nd day of January, 1950; and that in pursuance of the agreement, and in consideration of the premises and of \$16,000.00 to be paid by the Continuing Partner to the Retiring Partner on January 2, 1950; the Retiring Partner does hereby assign and transfer unto the Continuing Partner, his executors and assigns, all of his share and interest in and to said business, including all machinery, equipment, accounts receivable, assets, business and good will of the partnership.

"2. The Retiring Partner hereby agrees with the Continuing Partner that he, the Retiring Partner, has not at any time, except as appears by the books of the partnership, contracted any debt or obligation which can or may affect the said Continuing Partner or the assets or effects of the partnership.

"3. Each of the parties hereby releases and forever discharges the other of them, his heirs, executors and assigns, from all actions, claims and demands whatsoever which such respective releasing party or his heirs, executors or assigns now has, or hereafter might have, against the other of them, his heirs, executors or assigns, on account of the partnership or anything relating thereto, but so nevertheless that this present release shall not prejudice or effect any of the provisions herein contained or the rights of the respective parties, their heirs, executors or assigns hereunder."

lution agreement, defendant falsely represented to him that he (defendant) did not intend to go back into the separator business, and that it was only because of this representation that he entered into the agreement. A short time after December 5, 1949, defendant went back into the separator business at a new location. There was evidence he intended to do so at the time the dissolution agreement was entered into. Plaintiff himself testified that on December 5, 1949, in the discussion as to what the dissolution agreement should contain, he said he wanted it to provide that defendant would not go into the same business again for a year so he (plaintiff) "would have a year of freedom from competition," and that defendant said, "[N]o, he wouldn't do that, * * * he wouldn't agree to that." The agreement was then prepared by the attorney and, later in the day, read, and signed by both parties. This evidence is sufficient to support the finding that there was no fraud. While there was much evidence from which a different conclusion could have been drawn, the function of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding.

At the time of dissolution, the term of the partnership had 11½ years to run. Defendant paid plaintiff \$16,000 for his half interest. Plaintiff claims the consideration for the agreement was grossly inadequate and that it should have been canceled on that ground. The building in which the business was conducted was completely destroyed by the fire; the machinery and equipment were substantially destroyed and rendered unuseable without the expenditure of a large sum of money. Plaintiff was thoroughly familiar with the business of the partnership and with the assets remaining after the fire. He employed an adjuster to act for the parties in adjusting the losses sustained with an insurance company; assisted the adjuster in making an inventory of the stock on hand after the fire; and, with the adjuster, determined the salvage value of the stock on hand to be \$4,000. The salvage value of the machinery was about \$30,339.06. Plaintiff says

that by the agreement, in addition to the value of the stock and machinery, he also gave up a half interest in \$5,000 worth of lumber, 2¼ million separators, a \$1,500 truck, and accounts receivable of \$4,200.

[4, 5] The claimed inadequacy of consideration is apparently argued as a badge of fraud. Since the court found there was no fraud, and since the finding is supported by the evidence, the fact that plaintiff may have given up more than he received is of no consequence. The court found there had been a complete accounting between the partners, and that plaintiff executed the dissolution agreement with full knowledge of its contents and of his legal rights under it, and of his own free will; that at the time plaintiff was fully advised and informed, and had knowledge, of the assets and liabilities of the partnership; and that there was no concealment of any kind by defendant. These findings are supported by substantial evidence.

[6] The dissolution agreement has a provision by which each party released all claims he might have against the other. Plaintiff claims that at the time the agreement was entered into there were various errors in bookkeeping in defendant's favor of which he had no knowledge, and that he did not discover the errors until he was preparing for trial. He says that a general release does not extend to claims which the creditor does not know or suspect exist in his favor at the time of executing the release, and that the agreement should have been canceled on that ground. The books were kept by one Ward. Ward testified that proper charges and credits were made in the books as to all transactions. An illustration of the items of which plaintiff complains is the crediting of \$22,491.15 to defendant's investment account in 1949. Ward testified the \$22,491.15 was an overage in the deposits over and above what was shown on the books; that before he credited it to defendant's investment account he "got both" plaintiff's and defendant's consent to it; that between the 10th and the latter part of November 1949, when plaintiff and defendant were present, "they both agreed on my suggestion that it belonged to Mr. Dominick because there

was just approximately that difference in their capital account." Defendant testified he "left the money in the bank to carry on the business." Defendant also testified that after April 1, 1946, plaintiff received half of everything. The evidence concerning the items of which plaintiff complains was highly conflicting, and the court's conclusions with respect to them may not be disturbed.

[7] It is argued that there was a mutual mistake of fact and that the dissolution agreement should have been canceled on that ground. The asserted mutual mistake of fact is that the parties believed the dissolution agreement was only an agreement for the purchase by defendant of plaintiff's interest in the fire salvage and in the accounts receivable. A few days after the fire defendant selected another location for the business, but plaintiff would not agree to it. Plaintiff testified he made a complete survey of the machinery and equipment that was in the premises after the fire; that he had full knowledge of it when he went to the attorney's office; and that he knew what it would cost to place each item of machinery back in good operating condition. Plaintiff further testified that in the discussion prior to going to the attorney's office defendant told him he (defendant) was through; that he asked defendant what they were "going to do with the business," and defendant said "Well, we just have to figure a price and then either you buy or I buy." Again, plaintiff testified that on December 1, 1949, it "was agreed to see an attorney that following Monday to turn the business over to me." That day the cash, amounting to some \$60,000, was divided. Plaintiff knew that the sales tax permit issued to the partnership by the board of equalization had to be canceled on termination of the partnership, and he knew prior to going to the attorney's office that it had been canceled. The conclusion of the discussion in the attorney's office was that defendant would buy plaintiff's interest in the partnership for \$16,000. The attorney then dictated a rough draft of the agreement in the presence of plaintiff and defendant. The dictation was read in evidence. The

parties left the attorney's office and returned later the same day. In the meantime the attorney had prepared the agreement. When they returned the attorney handed each party a copy. Each party then read the agreement. As he read it plaintiff said to the attorney, "Here is a clause that wasn't in the draft of the agreement that you prepared or dictated when the girl was here," referring to the clause by which each partner agreed there were no debts other than shown on the books. The attorney explained its meaning to plaintiff. Both parties then signed the agreement and a notice of dissolution, the purpose of which the attorney explained to them. It was clear from the dictation of the rough draft and from the agreement that plaintiff knew at the time he signed that he was transferring all of his interest in the partnership, including all of its assets, business, and goodwill. The evidence supports the finding that there was no mistake of fact.

[8,9] Plaintiff contends the court erred in not admitting a number of documents in evidence. Some of these were marked for identification only and were not offered in evidence at the trial. At the conclusion of the trial, an order was made that the parties submit authorities within 10 days and upon the expiration of that time the cause would stand submitted. Plaintiff says his counsel sent a letter with her authorities asking that these documents be received in evidence and that defendant's counsel in a letter with his authorities objected to their admission. It does not appear that the court took cognizance of the letters. No ruling appears in the record. Under these circumstances, plaintiff has no ground for complaint. A batch of checks, which plaintiff says should have been admitted in evidence, were read into the record. Plaintiff offered 12 bank statements of the partnership for 1949 in evidence. Defendant objected. The court stated: "I am going to order that they be marked * * * for identification." Plaintiff says the court admitted copies of the partnership's bank statements from May 20, 1946, to April 1, 1949, in evidence, and that if the rest of the statements had been received, "it would be possible to check them against the work-

sheets of the bookkeeper and the amount of sales shown thereon and was highly material to show whether or not an accounting would reveal that respondent had defrauded appellant." Documents are not admissible in evidence merely to afford a party an opportunity to check them against evidence in the record. Such opportunity was afforded by the marking of the statements for identification. There is no affirmative showing of error.

[10] It is next contended that two findings and parts of others are not supported by the evidence. No purpose would be served in examining this contention in detail. The findings complained of are largely evidentiary in character and immaterial. The findings of fact, with respect to the claims of fraud, mutual mistake, and consideration, are sufficient to support the judgment.

[11] At the close of the trial, plaintiff requested leave to file an amendment to the complaint to conform to proof. The proposed amendment added a cause of action alleging that defendant "misapplied and appropriated to his own use large sums of money from the partnership property in excess of his proportion thereof." It alleged that plaintiff did not know the amount, but that it was about \$35,417.33; that defendant fraudulently concealed the misappropriations; that no accounting had been had; that plaintiff did not discover the facts until the trial; that he would not have entered into the dissolution agreement had he known of the misappropriations. The prayer was for dissolution of the partnership and an accounting. The request was denied. Plaintiff assigns error. The court found there had been no misappropriations and that an accounting had been had. Further, whether the amendment should have been allowed was a matter within the sound discretion of the trial judge which will not be disturbed on review in the absence of a showing of abuse. (21 Cal.Jur. 181, § 126.) No such showing is made.

[12] Plaintiff contends the court abused its discretion in refusing to extend the time within which to file an amendment to his

motion for a new trial and within which to file affidavits in support of the motion. Plaintiff duly filed a notice of intention to move for a new trial. Affidavits to be used upon such motion must be filed within 10 days after serving the notice; the time may, for good cause shown by affidavits or written stipulation, be extended for an additional period of not exceeding 20 days. Code Civ.Proc. § 659a. Plaintiff did not file any affidavits within the 10 days. On the last day to which the period could be extended, plaintiff presented to the trial judge an affidavit of one Lem Mon to be used upon the motion and an affidavit of his counsel in support of a request for an extension of time in which to file an amendment to the notice of intention to move for a new trial. The affidavit of Lem Mon stated facts purporting to show concealment of the books of the partnership by defendant. The judge declined to sign an order that the affidavits be filed. On the hearing of the motion, counsel for plaintiff asked leave to file the affidavits. The court said, "File them now." Plaintiff's counsel did not file them, but discussed the matter of the time for filing them with the court. Counsel for defendant then offered to stipulate that the affidavit of Lem Mon be filed and considered provided counsel for plaintiff stipulated that defendant denied the facts stated. The court said if that was done the affidavit of Lem Mon could be filed. Counsel for plaintiff refused to accept the stipulation. The motion to file the affidavits was then denied. The court did not abuse its discretion. Having had an opportunity to file the affidavits after the time for doing so had expired and to have them considered, plaintiff may not now complain.

[13] No other points require comment. The questions in this case were factual. There is evidence that would have supported contrary findings. We may not reject the findings of the trial court and substitute findings of our own, even though we might arrive at a different conclusion. The trial court having found the evidence to weigh more heavily for defendant, the matter is at an end.

[14] Plaintiff also appeals from an order denying a jury trial and from the order denying his request for an extension of time within which to file additional affidavits in support of the motion for a new trial. Since these orders are non-appellable, the appeals therefrom will be dismissed.

The appeals from the orders are dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



122 Cal.App.2d 92

GRIFFIN v. GRIFFIN et al.

Civ. Nos. 15444 and 15445.

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1953.

Rehearing Denied Jan. 15, 1954.

Hearing Denied Feb. 10, 1954.

Reciprocal divorce actions. An attorney intervened to obtain interest in a fund. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment awarding wife divorce, awarding support and alimony, and granting injunction. Husband and attorney appealed, and Superior Court awarded wife fees and costs to defend appeal. The District Court of Appeal, Nourse, P. J., held that the court, while presiding over divorce proceeding, had no jurisdiction to decide ownership of fund which each of parties claimed was his separate property.

Affirmed in part, reversed in part with directions.

1. Divorce ⇨124

In divorce action, wife's allegations and evidence that she had lived in San Francisco for several years, although uncorroborated, supported finding that she was a resident of San Francisco.

2. Domicile ⇨8

A residence once established is presumed to exist until another residence is acquired.

3. Divorce ⇨130

In divorce action, evidence of husband's violent and abusive conduct was sufficient to support finding of extreme cruelty.

4. Divorce ⇨130

In divorce action evidence, although conflicting, supported finding that wife was not guilty of extreme cruelty, and therefore wife's action for divorce on ground of husband's extreme cruelty was not barred by recrimination.

5. Divorce ⇨179

In divorce action brought by wife, where no objection was made to evidence of husband's conduct prior to interlocutory decree previously obtained by husband, and where it was not pleaded as a defense that evidence of conduct prior to such decree would not serve to support present action, such defense could not be raised for first time on appeal.

6. Divorce ⇨226, 239

In divorce action, evidence of wife's need and of husband's ability to pay, although conflicting, supported award of alimony and counsel fees to wife.

7. Divorce ⇨228

Where wife's complaint in divorce action requested counsel fees, and trial court entered order, after order to show cause and hearing, awarding \$125 on account, the order implied that decision on motion was deferred, and award after trial for services counsel rendered at trial was proper.

8. Divorce ⇨281

Where decree in divorce action awarded business to husband and a disputed fund to wife, husband could not contend on appeal that Superior Court had no power to make absolute disposition of property, since he could not appeal from part of judgment favorable to him.

9. Courts ⇨37(1), 39

Lack of jurisdiction is not waived by failure to demur, and can be raised at any

time, even for the first time on appeal. Code Civ.Proc. § 434.

10. Divorce ⇨206

Where both parties to divorce action claimed that fund on deposit in Superior Court in husband's name was their separate property, and where husband objected to wife's request for injunction preventing husband from disposing of the fund, Superior Court had no jurisdiction to decide the ownership of the property. Code Civ.Proc. §§ 427, subd. 8, 434.

11. Divorce ⇨8

Request for injunction to prevent husband from disposing of fund which was on deposit in Superior Court in husband's name, but which wife claimed was her separate property, was not improperly joined with divorce action. Code Civ.Proc. § 427, subd. 8.

12. Divorce ⇨194

In divorce action, evidence of husband's inability to pay and of wife's need did not justify award of \$620 to wife for costs on defense of appeal, and wife was entitled only to costs actually incurred.

A. Don Duncan, San Francisco, for appellants.

Charles Reagh, San Francisco, for respondent.

NOURSE, Presiding Justice.

These are reciprocal divorce actions in which the husband appeals from the adverse judgment in the main action (15445) and from an order awarding the wife fees and costs to oppose his appeal (15444). The husband's attorney, A. Don Duncan, intervened in the main divorce action to protect his assigned one-third interest in a fund deposited in court in the name of the husband in another action but which the wife in this divorce action claimed to be her separate property. Intervener appeals from the judgment (15445) in so far as it is adverse to him and awards the fund as a whole to the wife. The main appeal (15445) is on an engrossed statement of oral proceedings and a clerk's transcript,

the appeal 15444 on an engrossed statement only.

The parties were married in March, 1943. There are no children of this marriage. At the time of the trial in September, 1950, the husband was sixty-two, the wife fifty years old. Before and at the time of this marriage the wife was a waitress and had been twice married. After the marriage the husband opened a cleaning business in San Francisco. The wife also worked there, according to her "full time", according to the husband "half time." He complains that she put money of the business in an account under the name she had used prior to her marriage and that her conduct with regard to a certain fireman was improper. He instituted a divorce action in 1944 but he dropped the action on her promise not to see the fireman any more. In 1944 she made a gift of \$4000 of his money to her daughter by a prior marriage. In 1945 a new divorce action was started by the husband on the wife's resuming relations with the fireman and again dismissed. In March, 1947, the husband again started a divorce action after having found his wife with the fireman. He made a property settlement agreement with her in which he gave her \$10,500 in settlement of all community property, separate property and alimony claims, and she abandoned all claims to the business, book accounts and the Cadillac automobile to him, each otherwise to keep what they had or would earn in the future. He paid the \$10,500 and also \$2,500 to her attorneys, and on April 3, 1947, he obtained an uncontested interlocutory decree on the ground of extreme cruelty. However a few days thereafter he suffered a physical and nervous breakdown. He was in a hospital ten days, and a little later went back to his former home and wife. She testified that there was then a formal reconciliation and that they agreed that each would keep as separate property what each had received under the property settlement, but that for the future the former community relation would be resumed (without such financial agreement the effect of a reconciliation would have been the same. *Mundt v. Connecticut Gen. Life Ins. Co.*, 35 Cal. App.2d 416, 418, 95 P.2d 966; 9 Cal.Jur.

827.) In April-May, 1947, the husband sold the Chestnut Street cleaning business to a certain Comperes for \$37,500, of which \$10,000 was paid down, the balance to be paid in monthly installments of \$500 and secured by a chattel mortgage on the equipment of the business. He testified that he had to pay \$3,750 commission and deficiencies in federal income tax for several years amounting to some \$3,000 from the down payment. When he found early in 1948 that the Comperes had gone East and that some equipment was missing he filed a foreclosure suit on March 1, 1948, through Morris Lowenthal as his attorney. At the receiver's sale on August 9, 1948, he bid the property in for \$4,600 from the indebtedness of the Comperes, but a certain Williamson, who had acquired an interest in the business from them, objected and demanded payment in cash. Mr. Lowenthal advised that although he thought the objections without merit, cash deposit might be required. According to the wife's testimony, she then furnished the \$4,600 on the husband's and Mr. Lowenthal's assurance that it would be returned by the court to her in a short time. According to the husband's testimony he borrowed \$5,000 for the purpose from a friend. On August 20th Judge Kaufman required the cash deposit. The receipt is in the name of the husband. On August 25, 1948, Mr. A. Don Duncan was substituted for Mr. Lowenthal. The wife testified that she provided \$350 for his retainer. The sale was confirmed, the receiver getting \$460 of the deposit. Motions to release the balance to Mr. Griffin were denied. Considering the foreclosure suit prematurely filed because there had been no default in payment until June 10, 1948, Mr. Duncan dismissed the action without prejudice on October 29, 1948. On November 23, 1948, Williamson filed an action to quiet title to the fund. Both Mr. Griffin and Williamson tried repeatedly to have the money released on motion but without result. Griffin employed Mr. Duncan to defend against the Williamson quiet title suit and to cross-complain in it and assigned to him a 30% interest in the fund. Griffin obtained a judgment for the payment of the fund on July 7, 1949.

In the meantime he had opened a new cleaning plant at 745 O'Farrell Street on leased premises, in which he put the equipment which he had bought. He borrowed for the installation \$4000, giving a chattel mortgage, and opened the business in January, 1949. The wife again worked in the business. There were difficulties repeatedly between them. Twice the husband called the police to put her out of the shop. The final separation came in June 27, 1949, when he found her going through the pockets of his coat.

After the judgment as to the deposit Williamson made a motion for a new trial which was denied, and he later appealed. After the motion for a new trial had been denied, Mr. Griffin gave his wife a check for \$4,100 postdated September 13, 1949, but when her attorneys offered him an assignment of the fund for signature he refused to sign. On September 8, 1949, the wife's divorce suit was filed and he stopped payment of the check. Mr. Duncan obtained a dismissal of the appeal from Williamson's attorneys, which, however, he did not file when he heard Mrs. Griffin claimed the fund as he wished first to get his fee out of the matter.

The wife's complaint alleged domicile in San Francisco, extreme cruelty in general terms, that there was community property including the O'Farrell Street business, that the husband had under his control the sum of \$4,100 on deposit with the clerk of the San Francisco Superior Court, which sum is her separate property, that unless restrained the husband will do away with the community property and the deposit, with prayer for an interlocutory decree, all the community property, permanent and pendente lite support and maintenance, counsel fees and costs, a pendente lite injunction protecting the community property and the deposit of \$4,100 and general relief. After an order to show cause and hearing at which the husband objected to the jurisdiction of the court as to separate property, a preliminary order restraining defendant from transferring community property and the deposit and awarding the wife temporary alimony costs and fees was

granted. At the same time defendant demurred to the complaint on the ground that a divorce action and an action as to separate property were improperly united, which demurrer was overruled.

The husband's answer denied cruelty, the existence of community property and that the deposit was the wife's separate property or that she had ever claimed it, and alleged that the cleaning establishment and the deposit were his separate property, that he had litigated it as such and assigned 30% of it to his attorney and that the court in the divorce action had no jurisdiction to make any determination as to it, that plaintiff was able to support herself and that she had made a property settlement with him in which she released all community and separate property and alimony claims, which settlement was approved in an interlocutory decree granted him on the ground of the wife's extreme cruelty, which decree had become final, and that plaintiff was estopped from claiming anything contrary to that settlement. He cross-complained for a divorce on the ground of the wife's extreme cruelty alleged in general terms, for awarding of the cleaning business to him, reapproval of the property settlement of April 1, 1947, and that if the court should determine it had jurisdiction then to award 70% of the fund to himself, 30% to Duncan. The cross-complaint was amended to allege specific acts of cruelty of the wife.

In her answer to the amended cross-complaint the wife denied the allegations in general but admitted the property settlement and interlocutory decree and alleged reconciliation and resumption of her property rights for the future. After permission of the court was obtained, A. Don Duncan filed his complaint in intervention, alleging the facts as to the deposit stated before, and several instances in which the wife had been present when intervener took steps in court to obtain the release of the deposit to the husband without objecting or making any claim to it herself, that therefore the wife was estopped to claim that the 30% assigned to him was her property with prayer for a declaration that he was the owner of said 30% interest. The wife denied said allegations.

The court found among other things the wife's residency requirement, extreme cruelty of the husband, the 1947 property settlement and interlocutory decree, reconciliation of the spouses and oral agreement cancelling the settlement for the future only, that the O'Farrell Street business is in part separate property of the husband, in part community property, that the balance of the deposit, \$4140, was the separate property of the wife which she had deposited for the husband relying on his promise that he would cause the clerk of the court to release it to her immediately on termination of the action in which it was deposited, that the essential allegations of the husband's cross-complaint and the complaint in intervention are not true. The court granted the wife an interlocutory decree, awarded the O'Farrell Street business to the husband as his separate property, ordered him to pay to the wife for support and maintenance a total of \$4,500 in monthly instalments of \$150, and \$500 for counsel fees in two monthly instalments of \$250, and imposed a lien on the O'Farrell Street business to secure the payment of these amounts, awarded the deposit of \$4,140 to the wife and ordered the clerk of the court and the treasurer to forthwith pay said amount to her.

Both the husband and intervener appeal.

In the hearing as to the fees and costs on appeal before Judge Wollenberg, the wife furnished only an affidavit in which she stated that she was without funds and that the husband was able to pay a reasonable amount. The husband in a counteraffidavit and in oral testimony gave many details about his allegedly bad financial situation and the fact that the wife not very long before had received \$10,500 from him. Five hundred dollars counsel fees and \$620 costs were awarded.

In a 180 page brief appellant urged the following points:

I. *Insufficient corroboration of the wife's residence allegations.*

[1,2] There was evidence that Mrs. Griffin lived in San Francisco in the years 1947, 1948, and 1949. There was no evidence to the contrary. The allegations relating to her residence were not denied and

no controversy of that fact was raised during the trial. There is a well settled presumption that a residence once established is presumed to exist until another residence is acquired. See *Sheehan v. Scott*, 145 Cal. 684, 79 P. 350.

II. *Insufficiency of those acts of cruelty testified to by the wife and corroborated to justify a divorce.*

[3] Under the general allegation of cruelty the wife testified among other things, that defendant had a violent temper, that he repeatedly called her "vile and abusive" names in the presence of employees of the cleaning establishment, that he many times pushed and hit her. The witness Inuzka, an employee of the establishment, testified that he heard defendant address "improper" language to Mrs. Griffin and that a few times he had to take hold of defendant to stop him from harming plaintiff. This shows a sufficiently corroborated violent and abusive conduct to support a finding of extreme cruelty.

[4] III. *Relief to plaintiff was barred by recrimination* because the husband under his cross-complaint also established a cause of action for extreme cruelty. However the court found that the allegations of the husband's cross-complaint were not true (except in so far as they are found to be true in the express findings, which do not decide the cruelty of the wife). Appellant contends that this finding is contrary to the evidence and cites his testimony and corroborating evidence as to five alleged instances of cruelty of which, however, four are prior to the reconciliation of April 18, 1947. This was simply a question of fact based on conflicting testimony.

[5] IV, V, VI. These points, confusingly split up, will be treated together. The gist of the argument is that the court did not sufficiently take into consideration the fact that appellant obtained on April 3, 1947, an interlocutory decree because of the extreme cruelty of the wife which interlocutory decree has become final, and that thereafter according to the testimony of the wife, accepted by the court, there was a reconciliation. Because the wife had permitted the earlier interlocutory decree ob-

tained by the husband to become final, she is said to be barred from relying in her present action on any cruelty of his prior to that decree and because the findings do not show that the divorce awarded the wife was based on facts later than the decree, it must be reversed. For this contention *Wolford v. Wolford*, 216 Cal. 117, 13 P.2d 665, is cited. However in that case the earlier action followed by reconciliation as well as the final action were both by the wife and the husband pleaded against her second action that the allegations of cruelty were the same as those litigated in the first one. The reversal was because of lack of any finding as to said pleaded identity. Here there was no prior action by the wife, no special defense of the husband as to the allegation of cruelty. There was no objection by the husband to any testimony of the wife that could relate to facts antedating the interlocutory decree. He testified himself in rebuttal of all her contentions. There was no issue as to the wife being barred from showing any cruelty prior to any date, and no findings in that respect were required. It seems doubtful whether the defense would have been good if pleaded, but at any rate it was not pleaded and cannot be raised on appeal for the first time.

[6] VIII. *The imposing of \$4,500 alimony to be paid in instalments of \$150 a month and \$500 counsel fees to be paid in two equal instalments was an abuse of discretion.*

It is argued that the husband's testimony, books and documents showed that he had no capital of any importance outside of his business at 745 O'Farrell Street; that against this he owed more than \$9,500; that his income in 1949 had been (according to his income tax return) approximately \$1,000 and in the first quarter of 1950 \$51.43, and further that the wife concededly in 1947 received \$10,500 on the basis of the property settlement; that with \$1000 assistance of the husband she made from it a loan of \$5,000 yielding 6% interest; that she loaned \$2,000 to a friend on her automobile and that she allegedly provided the money deposited with the county clerk still amounting to \$4,140 which in the judgment

appealed from is held to be her separate property, whereas she also had some real property of little value and some life insurance money.

However, there seems to be sufficient evidence to cause a conflict: The wife testified that when she was working in the O'Farrell Street business up to June 27, 1949, the business was clearing \$200 per week above all expenses; and that Mr. Griffin habitually booked less than his true receipts. She received only \$50 a month from her loans and those loans plus the deposit had exhausted her means. An injured left arm and menopause trouble prevented her from working. The court could also consider that the husband testified that for the deposit in court he had borrowed \$5,000 from a friend, whereas the court believed and found, based on the evidence among others of the husband's former attorney, Morris Lowenthal, that the wife provided the money and the further fact that in 1947 he had to pay \$3,000 for income tax delinquencies over prior years. Appellant cites contradictions in the wife's testimony indicating that she also is unreliable, but which of the unreliable parties should be believed was for the trier of facts.

[7] IX. *The court had no power to grant \$500 counsel fees for past services.* Respondent answers that the complaint prayed for counsel fees and costs; that after order to show cause and hearing, \$125 on account of counsel fees and costs were granted on November 22, 1949, which order was not appealed and that therefore the determination as to the total amount could be postponed until the final judgment, citing *Brockmiller v. Brockmiller*, 57 Cal.App.2d 623, 626, 135 P.2d 184. Though a stipulation for that purpose was made in the *Brockmiller* case we do not deem that of importance. Here the motion for counsel fees was made before the services were rendered. The wording of the order "\$125 on account of counsel fees" clearly implies that the court refrained from passing on the motion finally until evidence of value was given.

[8] X. *The court had no power to make any present absolute disposition of prop-*

erty, to wit, the cleaning business and the deposit in court. Respondent points out that the decision as to the cleaning business is favorable to the husband and cannot be appealed by him.

[9, 10] XI. *The court had no power in the divorce proceeding to decide, over the objection of appellant, the ownership of the deposit which each of the parties claimed to be its separate property.* There is no doubt that appellant strenuously and repeatedly objected, stating the lack of jurisdiction. It is argued that only where questions as to separate property are put in issue by both parties without objection the divorce court can make decisions about them. *Roy v. Roy*, 29 Cal.App.2d 596, 603, 85 P.2d 223; *Marshall v. Marshall*, 138 Cal.App. 706, 709, 33 P.2d 416. Respondent contends that the court had jurisdiction of the property status ancillary to the determination of the power to pay of the husband and need of the wife. No authority is cited and none can be found. That the wife could unite the property claim to the divorce action under section 427, subd. 8, Code of Civil Procedure as a claim arising out of the same transaction or transactions. No authority is cited and the argument is clearly unsound. That appellant failed to object by demurrer to the jurisdiction. This is not supported by the record; furthermore lack of jurisdiction is not waived by failure to demur, § 434, Code of Civil Procedure, and can be raised at any time, even for the first time on appeal. 3 Cal.Jur.2d 605. The question seems dubious. *Huber v. Huber*, 27 Cal.2d 784, 793, 167 P.2d 708, 714, holds that the court cannot "assign the separate property of one of the spouses to the other" but may determine character and quiet title "when the issue has been made". It leaves the matter of objection open.

The rule is fairly stated in *Citizens Nat. Trust & Savings Bank of Los Angeles v. Hawkins*, 87 Cal.App.2d 535, 542, 197 P.2d 385, 389, where the court, quoting from *Roy v. Roy*, 29 Cal.App.2d 596, 603, 85 P.2d 223, said: "The jurisdiction of the court with respect to the disposal of property in a divorce action is found in section 137 et seq. of the Civil Code. As a general rule, and

subject to certain exceptions not material here, the power of the court is limited to a disposition of the community property and the court is without power to pass upon a dispute as to separate property or the disposition of the same [citations].” See *Fox v. Fox*, 18 Cal.2d 645, 646, 117 P.2d 325; *Rose v. Rose*, 50 Cal.App.2d 432, 435, 123 P.2d 37. There is a suggestion in some of the authorities that the court may assume such power if all parties agree. But the appellant by demurrer, motion to strike, and repeated objections to the evidence disclosed that there was no agreement.

[11] XII. *It was error to overrule the husband's demurrer to the complaint on the ground of misjoinder of actions.* Respondent contends again that joinder is permitted under section 427, subd. 8, Code of Civil Procedure. (See XI.) *Marshall v. Marshall*, supra, cites examples of dual actions as to divorce and separate property. But it seems that the complaint did not ask a final decision as to the deposit but only an injunction to dispose of it.

XVIII. *Intervener Duncan contends that it was error to find and hold against his 30% interest in the deposit.* But as this issue must be retried it would serve no purpose to discuss the point here.

[12] XX. *The award of \$500 attorneys fees and an amount not to exceed \$620 for costs of transcript to the wife to resist the appeal were error because the husband's inability to pay was not controverted, the need which the wife asserted was shown not to exist and the \$620 for transcript was granted although the court was informed that the appeal was being made on a settled statement and that respondent would be provided with a copy of the statement and the clerk's transcript, which was done.* The award for counsel fees is not out of line with the accepted practice in cases of this kind, but the award of costs is clearly excessive. The respondent incurred no costs on the appeal except that of filing a typewritten brief of eighteen pages.

The remainder of the twenty points raised do not require discussion.

The portion of the interlocutory decree determining the title to the cash deposit is

reversed; in all other respects the decree is affirmed, the intervener to have his costs on appeal against the wife, and between husband and wife the costs on the main appeal to be apportioned in such a manner that the husband receive his costs as to the part of the appeal relating to the cash deposit, the wife her costs as to all other matters.

With respect to the order awarding counsel fees and costs on appeal, the award of \$500 counsel fees on appeal is affirmed, and the award of \$620 for costs on appeal is reversed with direction to allow respondent her actual costs on the main appeal as against the husband in the manner as stated above; the husband to have his costs on the appeal of this order

GOODELL and DOOLING, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



122 Cal.App.2d 135

HAYS v. VISCOME et al.
Civ. 19752.

District Court of Appeal, Second District,
Division 3, California.

Dec. 17, 1953.

Passenger's action against owner and driver of automobile in which she was riding, and owner and driver of other automobile for injuries sustained in collision. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment upon verdict in sum of \$700 as damages, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that exclusion of evidence that passenger had submitted to request of owners and drivers for physical examination, and that owners and drivers had failed to call doctor performing physical examination as witness, and that doctor if called would have testified that

passenger was seriously injured, was prejudicial error.

Judgment reversed.

1. Evidence ⇨77(1)

Where party has an opportunity to call witness who is prepared and qualified to testify as to fact in issue and party fails to do so, it may be inferred by trier of fact that evidence if given would be adverse to such party.

2. Evidence ⇨78

If evidence is found to have been wilfully suppressed it will be presumed to have been adverse to party suppressing evidence.

3. Appeal and Error ⇨1056(1)

Evidence ⇨116

In passenger's action against owners and drivers of colliding automobiles, exclusion of evidence that passenger had submitted to examination by doctor selected by owners and drivers, and that doctor had not been called by owners and drivers as witness, and that doctor had stated that in his examination he had discovered lesion at first sacral vertebrae, was prejudicial error. Code Civ.Proc. § 2061, subds. 6, 7.

4. Continuance ⇨26(3)

In passenger's action against owners and drivers of colliding automobiles, refusal to grant continuance to give passenger opportunity to bring in physician who, at request of owners and drivers, had performed physical examination on passenger, was an abuse of discretion in view of fact that owners and drivers had failed to call physician as witness.

5. Trial ⇨18

Litigant is entitled to fair share of court's time, and may not be deprived of an opportunity to present his case fully and fairly because some one else is being inconvenienced by having to wait his turn.

6. Appeal and Error ⇨1064(1)

Trial ⇨234(8)

In passenger's action against owner and driver of automobile in which she was riding, and owner and driver of other automobile, for injuries sustained in colli-

sion, giving instruction that jury was to disregard failure of owners and drivers to call physician who, had at their request, examined passenger as witness was prejudicial error.

7. Appeal and Error ⇨1060(1)

Trial ⇨121(1)

In passenger's action against owner and driver of automobile in which she was riding, and owner and driver of other automobile, for injuries sustained in collision, inaccurate reference by attorney of owners and drivers, to answers given by passenger to court concerning irrelevant matter, was prejudicial error.

8. Trial ⇨29(4)

Jurors are quick to observe attitude of court toward litigants and their counsel, whether favorable or unfavorable, and to be influenced thereby.

9. Trial ⇨29(4), 106

In trial of jury case, court has constant duty to exercise high degree of patience and forbearance with counsel and witnesses.

10. Appeal and Error ⇨1046(5)

When complaint is made that conduct of trial judge was prejudicial to litigant, District Court of Appeal may not ignore or minimize assignments of misconduct made with conviction and in good faith, notwithstanding its lack of disposition to be critical of conduct of trial judge.

Dee B. Tanner, Tanner & Thornton, Los Angeles, for appellant.

Early, Maslach, Foran & Tyler, Victor E. Williams, Donald J. Pierr, Los Angeles, for respondents Viscome & Wekerle.

C. F. Jorz and John G. Zelezny, Los Angeles, for respondent Haworth.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment entered upon a verdict in the sum of \$700 as damages for injuries suffered in an automobile accident. She was a passenger in a car driven by John M. Teyshak, with the consent of the owner, John E. Ha-

worth. The car collided with one driven by Cecelia Wekerle, which belonged to John A. Viscome, and was being driven with his consent. She sued the four named persons; all of them except Teyshak were served with process and filed answers. She made a motion for a new trial, which was denied.

Plaintiff's brief contains numerous assignments of error and also urges as a ground for reversal inadequacy of the award of damages.

The ultimate question on the appeal is whether upon a review of the record, including the evidence and a consideration of the claimed errors, we feel reasonably assured that plaintiff has suffered a miscarriage of justice. We are satisfied that this question requires an affirmative answer, and without discussing at length the several claims of error, we shall set forth only a sufficient number of them to support our conclusion that the judgment should be reversed.

The award of damages was small, and clearly inadequate if plaintiff suffered the severe injuries she claimed, but we find it unnecessary to decide whether the inadequacy was such as to justify a reversal upon that ground. The errors and other matters to which we shall refer related directly to the evidence which bore upon the extent of the injuries and probably had a distinct influence upon the amount of the verdict. The amount of the verdict implies that the jury found that plaintiff suffered only minor injuries.

When the collision of the cars took place, plaintiff was thrown forward and her head struck the dash board. There was evidence that the blow raised a bump on her head and that she lost consciousness for 10 or 15 minutes; within about an hour after the accident plaintiff was attended by Dr. Walter Wilson, a general practitioner in Redondo Beach; she was in bed, complaining of headache and back pain, and difficulty with her vision; she was immediately removed to a hospital where she was confined in bed for a week, under treatment; she exhibited "marked tenderness lumbosacral joint space and

third, fourth, fifth lumbovertebrae" according to the hospital records, and also "blurring of vision, right eye especially" and "dizziness." X-rays of the back and head were negative. After returning home she suffered dizzy spells and fainted several times; she was attended by a practical nurse for four weeks at a cost of \$25 per week. Dr. Wilson testified that plaintiff sustained a cerebral concussion and contusion. The accident occurred July 24, 1951. In September, 1951, Dr. Wilson operated on plaintiff to correct a retroverted uterus and remove an ovarian cyst, conditions which predated the accident. Plaintiff was employed at the time as a plastic fabricator for Douglas Aircraft Company. In October she returned to her employment but because of pain was unable to continue her work. She later obtained other employment which would not require her to stand, but found that work painful and gave up the position. She has not been employed since that time. Between the date of the accident and the time of trial Dr. Wilson saw plaintiff 45 times. He testified that in his opinion she was suffering from a ruptured intervertebral disk which caused pressure on a nerve; that her condition would become worse, and that the ruptured disk required surgery, the cost of which would amount to about \$750 and would be followed by a convalescence period of about three months. In April, 1952, Dr. Alberto Marinacci, a nerve specialist, gave plaintiff a thorough examination in a hospital. He testified to an opinion that plaintiff was suffering from "a moderate involvement of the fifth lumbar nerve on the right" and that that nerve was "moderately defective in function, in performance."

On October 28, 1952, a week before the commencement of the trial, at the request of one of the attorneys for defendants Viscome and Wekerle, plaintiff submitted to an examination by Dr. Berryman. At the request of defendants she was also examined by Dr. Stanley Haft, an orthopedic specialist who testified for the defendants. In brief, his testimony was that he found nothing the matter with plaintiff.

On Friday afternoon, near the close of the trial, Dr. Berryman had not been called by defendants as a witness. Plaintiff called to the stand Victor E. Williams, one of the attorneys for defendants Viscome and Wekerle. He was asked the following question by Mr. Tanner, one of plaintiff's attorneys:

"Q. Mr. Williams, did you arrange for a medical examination of Mrs. Gladys Hays with your doctor, Dr. Berryman in Beverly Hills?

"Mr. Jorz: I object to that as immaterial. I assign it as immaterial, inflammatory and prejudicial, not only to the defense of that man's client but my client and I want the record to show my assignments.

"The Witness: For the record, I am going to put in the same objection, your Honor, for the sake of the record." Then followed a lengthy colloquy out of the presence of the jury. Mr. Tanner explained that the purpose of his question was to put in evidence the fact that plaintiff had submitted to an examination by Dr. Berryman at the request of the defendants; that Dr. Berryman had not been called by the defendants as a witness; that therefore plaintiff's counsel would be privileged to comment upon that fact to the jury, in view of the rule of law that it was to be presumed that the evidence of Dr. Berryman, if produced, would have been adverse to the defendants. He was told to state his offer of proof and he did state that the witness would testify that he demanded that plaintiff submit to the examination by Dr. Berryman, and if she refused that he would insist upon an order of court for an examination, consisting of "an electro-myography study of the nerve roots flowing from the lumbar vertebra." The court questioned: "Is that all?" and Mr. Tanner responded: "That is all." Mr. Tanner then made a further offer to prove by the witness that Dr. Berryman had stated to the witness that he had discovered in his examination a lesion at the first sacral vertebrae. A lengthy colloquy followed out of the hearing of the jury. The court sustained ob-

jections to the offers of proof. Inasmuch as the situation with relation to the second offer of proof is unlikely to arise upon a retrial we shall consider only the rejection of the first one. As to this offer the court specifically held that plaintiff did not have a right to show that plaintiff submitted to the examination upon demand of the defendants. According to the law books the objections of the defendants to the question propounded to Mr. Williams were unsound.

[1,2] It is not questioned by defendants on the appeal that Dr. Berryman examined plaintiff at their request and was available as a witness. At the time of the proceedings related above, defendants had closed their case without calling Dr. Berryman and Mr. Williams had been called by plaintiff in rebuttal. The omission to call Dr. Berryman was intentional and calculated. It was a situation which made peculiarly applicable the rule that where a party has an opportunity to call a witness who is prepared and qualified to testify as to a fact in issue and fails to do so, it may be inferred by the trier of fact that the evidence if given would be adverse to such party. Plaintiff has cited many cases holding the rule applicable under comparable facts. *Gluckstein v. Lipsett*, 93 Cal.App. 2d 391, 397, 209 P.2d 98 is directly in point. In *Bone v. Hayes*, 154 Cal. 759, at page 765, 99 P. 172, at page 175, the court said: "It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." [Citing cases.] The general principle is stated in section 2061, subds. 6, 7; Code of Civil Procedure, and in *Wigmore on Evidence*, 3rd Ed., Vol. II, secs. 285, 286, pp. 162, 166. If the evidence is found to have been wilfully suppressed it will be presumed that it would have been adverse. Code Civ.Proc., sec. 1963(6); see *Freitas v. Peerless Stages, Inc.*, 108

Cal.App.2d 749, 239 P.2d 671; 10 Cal.Jur. p. 781, sec. 87.

[3] In reply, defendant Haworth answers that the court gave an instruction that: "If, and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him or her on that point." This is no answer to the point made by plaintiff. The instruction states the best evidence rule declared in section 2061(7) of the Code of Civil Procedure but omits the more pertinent rule of subdivision 6: "That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; * * *." Defendants Viscome and Wekerle in their brief evade the question. They say that plaintiff's only purpose was to improperly bring before the jury a claimed statement of Dr. Berryman as to plaintiff's injuries, and they do not otherwise endeavor to justify the court's ruling on the first offer of proof. Their position is not supported by the record. It shows that plaintiff claimed the right to prove that Dr. Berryman's examination was pursuant to defendants' demand. The error was prejudicial, and seriously so. Not only would minds trained in the law at once gain the firm impression that Dr. Berryman would have been called as a witness if his evidence would have favored the case of the defendants, but any intelligent juror, if properly instructed, could well believe that the defendants were concealing material evidence which, if produced, would be unfavorable to their cause.

The critical question in the case was whether plaintiff had suffered an injury which resulted in nerve pressure. The physicians who testified were in sharp disagreement. Had the significance of the failure of the defendants to call Dr. Berryman been explained to the jury, the conclusion as to the extent of plaintiff's injuries might have been altogether different. As previously noted, the small ver-

dict manifests disbelief on the part of the jury that plaintiff's injuries were serious. Plaintiff should have been permitted the full benefit of the rule of evidence which, by the court's ruling, was excluded from consideration by the jury.

[4] When the court rejected the offers of proof at about 2:30 Friday afternoon, plaintiff's attorneys requested a continuance until Monday morning in order to give them an opportunity to bring in Dr. Berryman, whose office was in Beverly Hills. They explained that they were taken by surprise by defendants' failure to call Dr. Berryman and by the court's rulings; that they had not placed the doctor under subpoena because they had not anticipated that it would be necessary to call him as a witness for plaintiff. The court refused the requested continuance upon the ground that plaintiff should have had the doctor under subpoena. There were too many cases, the court said, to permit of the delay and the loss of a half day's time of the court; also that it would be an abuse of discretion to grant the continuance. We think it was an abuse of discretion to refuse it.

[5] In view of the conflicting evidence as to the extent of plaintiff's injuries, Dr. Berryman's testimony as to the result of his examination might have been vital. The court stated to counsel that they should have known much earlier that they would have to call Dr. Berryman. They could not have known this unless they had known that defendants did not intend to call him, and to assume this would be to assume that defense counsel knew that the doctor's testimony would be adverse. The matter arose as soon as defendants had rested their case and it was not until then that plaintiff's counsel knew that defendants would not call the doctor. The fact that there were other cases awaiting trial did not warrant a denial of the requested continuance. A litigant is entitled to a fair share of the court's time, and may not be deprived of an opportunity to present his case fully and fairly because some one else is being inconvenienced by having to wait his turn. No lawyer can foresee or predict all the vicissitudes that will occur in the course of a contested trial, which often

consist of unpredictable rulings of the court. Plaintiff's attorneys were not negligent in failing to anticipate that defendants would not call Dr. Berryman. They acted promptly and their request for a continuance was reasonable. As a matter of fact, it is stated in plaintiff's brief and not denied by defendants that the court was occupied with other testimony until 3:50 p. m. and at 4:05 p. m. the case was continued to Monday morning. Moreover, so far as wasting the court's time is concerned, the record shows that when court was adjourned shortly after 4:00 o'clock on Friday afternoon, the court stated that inasmuch as Tuesday was a legal holiday there would be a court session on Monday morning, but not on Monday afternoon, and the jurors were instructed that they should be prepared to return to court, after the adjournment Monday noon, at 9:00 o'clock a. m. on Wednesday. By adjourning the case from about 3:50 p. m. on Friday until Monday morning probably a quarter of an hour's time would have been lost; by adjourning the trial from Monday noon until Wednesday morning, a good half day would have been lost. However, we deduce from the record that the verdict was reached on Monday. The court stated no sound reason for denying the continuance and we can discover none. Had we been in the position of the trial judge we would have considered denial of the requested continuance to be an abuse of discretion. As a reviewing court, our views are not different, and we cannot put them aside merely because the trial judge believed it would be an abuse of his discretion to grant the continuance. We must be guided by the dictates of our own judgment and experience, and we hold that plaintiff's case was prejudiced for no good reason by denial of her request of a short continuance. Defendants' discussions of the point are perfunctory and without the citation of authority. We pass to another ruling of the court which emphasizes the harm of the ones we have discussed.

[6] During the argument, at the request of one of defendants' attorneys that the jury be instructed to draw no inferences with respect to the discussion in the presence of the jury concerning Dr. Berry-

man, the court made the following statement: "The Court: Yes. I will generally instruct the jury now in that respect without making a formal instruction on it. As already indicated to you, ladies and gentlemen, when questions of law arise which are wholly the responsibility of the Judge and occasional arguments, as I say, sometimes it gets out into the open so that you hear some part of them and you hear some names mentioned. I will instruct you formally at the conclusion of the case that any thoughts expressed by me or any statements made by counsel are to be disregarded by you in so far as the facts of the case are concerned. It is only fair to state on behalf of all parties that since Dr. Berryman's name has been mentioned and now all parties have rested, meaning he is not to be produced as a witness by anybody, that you shall draw no inference one way or the other as to which side might have called him, what his testimony might have been, what cross examination might have taken place, who he would favor, the fact of who he was. We sometimes ask the impossible. This is one of those times. Forget it. Go ahead, Mr. Tanner." This, of course, was to tell the jury that they should not even consider, for any purpose, the failure of defendants to call Dr. Berryman as a witness. It would be expounding upon the obvious to point out the harmful error in this instruction.

[7] Plaintiff received an interlocutory decree of divorce in Contra Costa County October 15, 1950. On October 8, 1951, she had a marriage ceremony in Tiajuana. Obviously confused, she made a statement, when questioned by the court, that she obtained the interlocutory decree in October 1951. Thereupon, the court asked "Did you tell the Judge on October 15th when you appeared before him to get your interlocutory judgment of divorce what had happened in respect to your trip to Tiajuana the week before?" and plaintiff answered "No". Plaintiff then explained that she had obtained an interlocutory decree the previous year; but the fact remained that she had married within a year, which she endeavored to excuse by insisting that she understood she could lawfully do so. The tendency of the questioning by the

court was to bring to light misconduct of plaintiff, if such existed. It was an accusatory inquiry into plaintiff's conduct, clearly irrelevant to the issues. We might not have mentioned the incident had not Mr. Jorz taken advantage of it in his argument. He said: "The plaintiff has changed her testimony on the witness stand and right in there there is one thing that occurred during the course of this trial which was not material to the issues in this case but it should indicate to you that it is important in weighing the credibility of her testimony. That was this: It was a matter developed by the Court. She came in here and asked our courts for a divorce. She had gone down to Tiajuana and married another man. The Judge said, 'Did you inform the Court here that you had gone to Tiajuana and gone through a marriage ceremony when you asked for a divorce here,' and she said no. Does that indicate a tendency on her part to cover up? Does that indicate a tendency on her part to be fair and open, free and frank? No, if she would withhold on a court trying a divorce case, she might withhold in this instance" etc. "* * * but that incident, while it related to an immaterial matter to the issues in this case, indicates what she would do in answering questions of a Judge on the witness stand." This was not a fair or accurate statement of the record, and it was highly prejudicial. Plaintiff did not assign the statements of Mr. Jorz as misconduct, nor did she request that the jury be admonished to disregard them. We do not decide whether an admonition would have undone the harm since we are not considering the incident, even when coupled with the improper questioning by the court, as a separate ground for reversal.

[8-10] Plaintiff contends that she was prejudiced by the conduct of the trial judge, consisting of constant interruptions of her counsel and her witnesses, comments of a critical nature and innumerable rulings sustaining objections upon trivial grounds, all of which, it is claimed, indicated that the court was out of sympathy with her case. We have examined the passages in the transcript to which reference has been

made and many others. They support plaintiff's contention that she experienced difficulty in presenting her case in an orderly manner. Although there is no evidence of prejudice in a legal sense, there is abundant evidence of a failure to exercise the high degree of patience and forbearance with counsel and witnesses which is the constant duty of the court in the trial of a jury case. It has been emphasized, time and again, that jurors are quick to observe the attitude of the court toward litigants and their counsel, whether favorable or unfavorable, and to be influenced thereby. *Delzell v. Day*, 36 Cal.2d 349, 223 P.2d 625. When complaint is made upon this score, we have no disposition to be critical of the conduct of a trial court, and yet we may not ignore or minimize assignments of misconduct made with conviction and in good faith.

There are other assignments of error which we need not discuss. It should not be assumed, however, upon a retrial, that they are without merit.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



122 Cal.App.2d 1

HENLEY v. FRANCHISE TAX BOARD.
Civ. 19674.

District Court of Appeal, Second District,
Division 1, California.
Dec. 14, 1953.

Rehearing Denied Jan. 1, 1954.

Action for refund of state income taxes. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment for taxpayer and defendant appealed. The District Court of Appeal, Doran, J., held that dividends received on Canadian stock were derived from sources without California, and hence Canadian in-

come tax on such dividends was a proper credit against California income taxes, even if the stock had a situs at the California residence of the taxpayer.

Judgment affirmed.

1. Taxation ⇨1045

Dividends received on Canadian stock were derived from sources without California, and, hence, Canadian income tax on such dividends was a proper credit against California income taxes under statute allowing credit in amount of net income taxes paid to another state or country on income derived from sources within that state or country, even if the stock had a situs at the California residence of the taxpayer. Revenue and Taxation Code, § 17976.

2. Taxation ⇨1045

Purpose of statute granting taxpayer a deduction for income taxes paid in another state or country on income derived "from sources without this state", is to prevent double taxation. Revenue and Taxation Code, § 17976.

3. Taxation ⇨1037

The entire costs of accounting services which were actually paid by estate and which were reasonable in amount and were necessary expenditures by the executrix in operating business of the estate were deductible expenses under state personal income tax law. Probate Code, § 900.

4. Taxation ⇨1099

In suit for refund of state income taxes, finding that deductions taken by executrix for costs of accounting services in operating business of the estate were both reasonable and necessary was supported by the evidence. Probate Code, § 900.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Edward Sumner, Deputy Atty. Gen., for appellant.

Wood, Crump, Rogers, Arndt & Evans, Stanley M. Arndt, Los Angeles, for respondent.

DORAN, Justice.

The within appeal is taken from a judgment in favor of the respondent executrix,

for refund of state income taxes, paid under protest, for the years 1938, 1939, 1940 and 1941. The case involves two different claims for refund, namely, credit on the California tax of a 5% Canadian income tax on dividends paid by a Canadian corporation which neither did business in, nor had an office or agent in California; and a deduction for accounting expenses incurred in connection with management of personal investments.

[1] Under Section 17976 of the California Revenue and Taxation Code (formerly Section 25 of the California Personal Income Tax Law), residents of California are allowed a credit against income taxes here imposed, in the amount of the "net income taxes imposed by and paid to another State or country on income taxable under this part". In sub-paragraph (a) of this section it is provided that "The credit shall be allowed only for taxes paid to the other State or country on income *derived from sources within that State or country* which is taxable under its laws irrespective of the residence or domicil of the recipient." (Respondent's italics.)

As stated in respondent's brief, "Appellant makes no attack on any ruling of the trial court. Appellant makes no claim that any finding is not supported by the evidence but concedes that the pertinent facts are not disputed by the parties. It is appellant's contention that "Taxpayers were not entitled to credit for the full amount of the Canadian tax inasmuch as that tax was not paid on income derived from Canada within the purview of Section 25(a) (1) of the Personal Income Tax Act of 1935 as amended".

Quoting further from respondent's brief: "The deceased, (Mr. March) was a California resident. He owned stock in Canadian corporations, none of which operated in or had assets or even an office in California. On his death his heirs were required to and did pay an inheritance tax in Canada on the value of his stock. It was distributed to the California heirs after his death by virtue of the Canadian decree of distribution. Canada had imposed a 5% income tax on dividends from Canadian corporations and

required all corporations to withhold that 5% from all dividends, whether residents or nonresidents. This 5% was deducted as taxes and remitted to and thus collected by Canada. Mr. March during his lifetime and his estate thereafter and up to the time of distribution, took credit for this 5% Canadian income tax under Section 17976 of the California Revenue and Taxation Code".

The Franchise Tax Commissioner refused to allow this credit on the ground that it was not a tax on "net income". The taxes were then paid under protest and this action followed. No claim was then made that the income tax was not "on income from sources without the state", and as found by the trial court, this claim was not made until just before the trial. As stated in respondent's brief, the case of *Burgess v. State of California*, 71 Cal.App.2d 412, 162 P.2d 855, decided in 1945 that this 5% Canadian withholding tax was a tax on "net income", which decision represented the law when the present case came on for trial.

The first issue presented to the trial court, therefore, was whether the dividends received on the Canadian stock were derived from sources without California, to-wit, from sources within Canada, and hence a proper credit against California income taxes. The trial court found as a matter of fact, that "Said dividends were income derived from sources within Canada and were not income derived from sources within California".

In this connection it was further found that "At the time that the Franchise Tax Commissioner sent out the formal notices of the claimed deficiency he knew that the tax imposed was a tax on dividends withheld at the source by the Dominion of Canada and that the dividends were being paid by a Canadian corporation. With this knowledge he made no claim that the income tax was not 'on income from sources without this state' but conceded that the income was from Canadian sources"; and that such a contention was not raised until at a conference between counsel previous to the trial. As hereinbefore indicated, there is

no claim that these findings of fact are not supported by substantial evidence.

Appellant relies upon the cases of *Robinson v. McColgan*, 17 Cal.2d 423, 110 P.2d 426, and *Miller v. McColgan*, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424. The *Robinson* case did not involve the question now at issue, but in the *Miller* case it was held in the language of the headnote, that "a California resident owning stock in a Philippine Island corporation who pays the Philippine Government an income tax on dividends received is not entitled to a credit therefor, since the source of the dividends is the stock itself as distinguished from the income of the corporation, and under the doctrine of *mobilia sequuntur personam* the stock has a situs at the residence of the taxpayer."

The respondent's brief, however, calls attention to the fact that the *Miller v. McColgan* case, 17 Cal.2d 432, 110 P.2d 419, just cited, was based upon *First Nat. Bank of Boston v. State of Maine*, 1932, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, which latter case was specifically overruled in *State Tax Commissioner of Utah v. Aldrich*, 316 U.S. 174, 180, 62 S.Ct. 1008, 86 L.Ed. 1358, for which reason "*Miller v. McColgan* is not the law today". Appellant's reply brief makes no comment on this situation.

By way of analogy, respondent's brief also notes that under Section 13303 of the Revenue and Taxation Code, the State of California taxes Canadian residents upon inherited stock in California, thus taking the position the stock has a situs in California; directly discountenancing the *mobilia* doctrine of the *Miller* case just cited and relied upon by appellant. The *Miller* decision, it is also pointed out, dealt not with the estate of a decedent but with individuals.

Consideration of the record, and of the case law on the subject, leads to the conclusion that the decision of the trial court allowing credit for the Canadian income taxes paid by respondent on dividends from stock of Canadian corporation, supported as it is by substantial evidence, must be affirmed. As hereinbefore mentioned, the pertinent

facts are not in dispute, and, for the most part, were the subject of stipulation at the trial.

In *Belden v. McColgan*, 72 Cal.App.2d 734, 165 P.2d 702, plaintiff, a California resident, received income during 1935 from sources in this state, and also from a partnership in the State of New York. Plaintiff filed a New York tax return as a non-resident and paid the indicated tax of \$3,646.38 upon income from the New York partnership. In 1936 the taxpayer filed a California income tax return including both New York and California income, and deducted as a credit, (as did the taxpayer herein), the tax paid in New York, which credit was disallowed by the California Tax Commissioner; the tax was paid under protest, as was done in the instant case. The taxpayer was notified of the rejection of the claim for credit in California after expiration of the time within which a claim for refund might have been made in New York. The reviewing court held that the taxpayer was entitled to credit for the tax paid in New York.

Both the *Belden* case and the present controversy involve personal property, and as said in respondent's brief, "If income derived from a New York brokerage partnership is income derived from sources without this state", (in the language of the California statute), then surely dividends received from a Canadian corporation doing business solely in Canada is income derived "from sources without this state", and the taxpayer was entitled to a California deduction for the income taxes paid in Canada.

[2] The purpose of such a statute granting the taxpayer a deduction for income taxes paid in another state or country on income derived "from sources without this state", is the salutary one of preventing double taxation. It is neither fitting nor proper that taxing agencies or judicial tribunals, in construing such a provision, should seek to adopt a rigid, forced, or unduly strict interpretation in order to add a few dollars, (\$68.39 in the instant case), to the state treasury, where the practical effect of such interpretation is to bring about

the very thing that the statute sought to prevent.

[3, 4] Respondent's second claim for refund involves accounting expenses incurred by the executor, deducted in determining net taxable income for state income tax purposes, and disallowed by the taxing authorities. As found by the trial court, there was no dispute as to the amount, "The entire costs of the accounting services were actually paid by the estate, were reasonable in amount, and were necessary expenditures by the Executrix in operating the business of the estate and should be and are proper items of deductible expenses under the California Personal Income Tax Law for the years here involved".

In disallowing this claim, as found by the trial court, "The Board of Equalization applied a formula whereby it took the gross income from real estate and the gross income of the estate from securities, found the ratio between the gross income from real estate and the total gross income from both real estate and securities, applied the ratio to the accounting expenses and allowed as a deduction for state income tax purposes, the result, and refused to allow as a deduction the balance of the accounting expense. The use of such a formula was unreasonable and arbitrary as applied to the facts in this case." This phase of the case involves a matter of only \$6.76.

The appellant seeks to justify this refusal to deduct accounting expenses by citing *Meanley v. McColgan*, 49 Cal.App.2d 203, 121 P.2d 45, in which certain extraordinary attorney fees incurred in the management of investment securities were held not deductible. As pointed out in the respondent's brief, the *Meanley* case did not involve accounting expenses, and cannot be accepted as authority for applying a formula which, as found by the trial court, "was unreasonable and arbitrary as applied to the facts in this case".

Under Section 900 of the Probate Code, executors are allowed "all necessary expenses in the care, management and settlement of the estate". In *re Estate of Boggs*,

33 Cal.App.2d 30, 90 P.2d 814, 816, involving accounting expenses incurred by an executrix in an estate consisting of both real estate and corporate stock, the reviewing court said, "An executrix should be allowed expert assistance in handling the estate if * * * reasonably necessary and it is largely within the discretion of the probate court to determine whether such employment is reasonably necessary." The trial court in the instant case found, as a matter of fact, that the deductions made herein were both reasonable and necessary, and that the formula adopted by the taxing agency was arbitrary and unreasonable. These findings appear to be amply supported by both law and evidence, and no cogent reason has been presented why they should now be disregarded.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



121 Cal.App.2d 790

MARTIN BROS. ELECTRIC CO.

v.

SUPERIOR COURT, IN AND FOR STANISLAUS COUNTY et al.

Civ. 8524.

District Court of Appeal, Third District,
California.

Dec. 9, 1953.

Petition for writ directing Superior Court to desist from further proceedings in personal injury action against petitioner and to vacate order denying petitioner's motion to quash. The District Court of Appeal, Paulsen, J. pro tem., held that where manufacturer, a foreign corporation, maintained no office, warehouse or stock of materials in California and did business with establishments handling its products on a completely independent basis whereby title to all merchandise passed to buyers

and manufacturer engaged in no selling, purchasing, manufacturing or other business within California, manufacturer was not amenable to service of process in California.

Petition granted.

1. Corporations ⇨642(1)

Where manufacturer, a foreign corporation, maintained no office, warehouse or stock of materials in California and did business with establishments handling its products on a completely independent basis whereby title to all merchandise passed to wholesale buyers and manufacturer engaged in no selling, purchasing, manufacturing or other business within California, manufacturer was not amenable to service of process in California. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6500 to 6504.

2. Corporations ⇨642(1)

While a foreign corporation may be doing business within the state when its manufactured products are distributed and sold within the state by independent distributors, some other activity connected therewith must be engaged in by the corporation within the state to make it amenable to process in state.

3. Corporations ⇨642(1)

It is the combination of local activities, their manner, extent and character, which determines whether a foreign corporation is doing business within state such as will make it amenable to process.

4. Corporations ⇨668(16)

Where a defendant moves to quash service of summons because it is not doing business within state as will make it amenable to service of process within that state, burden of proof is on the plaintiff to produce evidence from which the court can determine which course is just and equitable to both parties.

Keith, Creede & Sedgwick, San Francisco, for petitioner.

John Said, Fresno, Honey & Mayall, Stockton, C. Ray Robinson, by F. Leon

Edlefsen and William B. Boone, Merced, for respondents and real parties in interest.

PAULSEN, Justice pro tem.

Petitioner seeks a writ directing the Superior Court in and for the County of Stanislaus to desist from any further proceedings against it in a personal injury action brought against it and others by Peggy Bernice Barnes and to vacate an order denying petitioner's motion to quash the substituted service of summons made on it in said action.

Petitioner is a corporation organized, existing and doing business under the laws of Ohio. It manufactures and sells to wholesalers electric hair dryers, one of which, according to the complaint of Peggy Bernice Barnes, exploded and burned her when she was a customer in a beauty parlor in Oakdale, California. Substituted service of summons was made on it through the Secretary of State pursuant to Section 411, subd. 2, of the Code of Civil Procedure, and Sections 6500 to 6504 of the Corporations Code. Motion to quash such service was denied and thereafter on petitioner's application this Court issued an alternative writ to show cause why further proceedings against petitioner in said action should not be prohibited, and temporarily restraining further action therein.

The complaint alleges that "at all times herein mentioned, the defendant, Martin Brothers Electric Company, was and now is a corporation doing business within the State of California by and through the defendants, Reid and Sibell, Inc., a corporation * * *;" that Reid and Sibell, Inc. "were and now are dealers and distributors of beauty shop equipment, including electric drying machines manufactured by" petitioner.

Petitioner supported its motion with the affidavit of one of its California attorneys and the affidavit of its vice-president and secretary. Plaintiff relied on her verified complaint and the depositions of a salesman for Reid and Sibell and of Herbert L. Reid, president of that company.

[1] The depositions show that Reid and Sibell is a California corporation en-

gaged in selling about 1,500 items of merchandise, including dryers manufactured by petitioner; that several other groups sell such machines in this State; that its only place of business is in San Francisco; that it has no written contract with petitioner and purchases the dryers from petitioner in Ohio when it wants them; that petitioner does not control the price for retail sales; that no dryers are shipped on consignment; that Reid and Sibell has its own salesmen and that petitioner has had no salesmen in California for at least two years; that petitioner does no local advertising but does advertise its products in the national trade journals. It is further stated that when a machine is purchased from petitioner by Reid and Sibell, a factory guaranty against mechanical defects accompanies the dryer and is passed on to the ultimate purchaser; that if repairs are needed they are made by any independent repair man available. There is no evidence in the record of the terms of the guaranty certificate.

The affidavits offered by petitioner show that it is an Ohio corporation, and maintains offices and a place of business for the manufacture and sale of electrical products at Cleveland, Ohio; that it maintains no office, warehouse or stock of materials in California; that all persons and business establishments in California handling petitioner's products are independent of and have no financial interests in petitioner; that petitioner owns no interest in these or any other business establishments in California and has no control whatsoever over any such establishment or persons; that all such person and establishments in California are free at all times to purchase any product or products of any manufacturer, whether said product or products be competing or non-competing with products of petitioner; that petitioner ships no merchandise to any business establishment or persons in California on consignment or on any other basis whereby ownership would remain in petitioner; that all prices quoted are prices in effect at the factory in Cleveland and that all shipments to California or anywhere else are made at the factory to agents or carriers specified by the buyers of the merchandise; that petitioner has had

no salesmen living in California for at least two years and does no selling, purchasing, manufacturing or other business within California; that petitioner has never designated an agent for service of process in California; that it has no bank accounts therein; and that it has no real or personal property in this state.

Respondents argue that petitioner is doing business in this state through Reid and Sibell and that the evidence is "sufficient to make it just and equitable that it be amenable to process within the state."

[2] It has been held that a foreign corporation may be doing business within the state where products manufactured by the corporation are distributed and sold in the state, even though the distributors are independent. *Kneeland v. Ethicon Suture Laboratories*, 118 Cal.App.2d 211, 257 P.2d 727; *Fielding v. Superior Court*, 111 Cal. App.2d 490, 494, 244 P.2d 968; *Sales Affiliates, Inc., v. Superior Court*, 96 Cal. App.2d 134, 214 P.2d 541. But we have found no case holding that these facts, standing alone, are sufficient to make the foreign corporation amenable to process in this state. In the *Kneeland* case it was established, among other things, that the corporation was engaged in its own sales promotion work in the state. In the *Fielding* case the corporation had agreed to insure the distributor against action on behalf of the Federal Government under the Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq., and the corporation set the retail sales prices and required from the distributor a report of stock on hand each month. In the *Sales Affiliates* case the distributor operated through licensing agreements granted by the corporation and thereby controlled its activities. In every case that has come to our attention there was evidence of activities in addition to sales through a distributor, such as sales promotion work in the state, or the right of the distributor to settle the corporation's accounts.

[3] Not "any activity" of a foreign corporation in the state will make it amenable to process and there is no precise test that

can be applied in all cases. It "is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question." *West Pub. Co. v. Superior Court*, 20 Cal.2d 720, 728, 128 P.2d 777, 781. In the language of *Sales Affiliates, Inc., v. Superior Court*, supra [96 Cal.App.2d 134, 214 P.2d 542], it must be shown that the corporation "maintained in the state" a representation which "gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force". The allegation of the complaint that petitioner is doing business in this state through Reid and Sibell is a conclusion of law and there is not sufficient evidence of any single activity or combination of activities to indicate that petitioner enjoys the advantage mentioned.

Respondent relies heavily on the holding in the *Fielding* case [111 Cal.App.2d 490, 494, 244 P.2d 972] that, "In the final analysis it would seem that this is really not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. See 20 C.J.S., Corporations, § 1918, p. 148; *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95."

[4] Such a statement does not imply that a court may, without supporting evidence, exercise its absolute discretion and apply its own ideas of justice and equity in the determination of such questions. Where a defendant properly moves to quash service of summons and the evidence presented is conflicting, the burden of proof is on the plaintiff to produce evidence from which the court can determine which course is just and equitable to both parties. *Briggs v. Superior Court*, 81 Cal.App.2d 240, 183 P.2d 758; *Jameson v. Simonds Saw Co.*, 2 Cal.App. 582, 84 P. 289. The facts adduced at the hearing of the motion in this case are not sufficient to make petitioner amenable to the process of the courts of this state.

The petition is granted. Let the writ issue as prayed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



122 Cal.App.2d 147

In re CUTLER'S ESTATE.

KIRKWOOD v. WHITE.

Civ. 19795.

District Court of Appeal, Second District,
Division 3, California.

Dec. 18, 1953.

Probate proceeding. The Superior Court of Los Angeles County, Victor R. Hansen, J., vacated inheritance tax appraiser's determination and fixed inheritance tax at lower figure, and controller appealed. The District Court of Appeal, Vallée, J., held that, where property of California resident was transferred to a corporation exclusively for and to be devoted exclusively to charitable work, and, at date of resident's death, such corporation was organized under laws of a "reciprocal" state in that laws of such other state complied with conditions prescribed in statute determining conditions under which property transferred would be exempt from inheritance tax, such property was not subject to inheritance tax even though corporation was not limited to using such property to do charitable works to beneficiaries in California or reciprocal states.

Affirmed.

1. Taxation ☞876(2)

Statute which determines conditions under which property transferred to a corporation exclusively devoted to charitable work or to a corporation in trust exclusively for charitable work is to be exempt from inheritance tax should not be construed so that burden of inheritance taxes is laid upon property devoted to such uses. Revenue and Taxation Code, § 13842.

2. Taxation ☞876(6)

Where property of California resident was transferred to a corporation exclusively for and to be devoted exclusively to charitable work, and, at date of resident's death, such corporation was organized under laws of a "reciprocal" state in that laws of such other state complied with conditions prescribed in statute determining conditions under which property transferred would be exempt from inheritance tax, such property was not subject to inheritance tax even though corporation was not limited to using such property to do charitable works to beneficiaries in California or reciprocal states. Revenue and Taxation Code, § 13842.

3. Taxation ☞859(5)

There is nothing unfair, unreasonable or contrary to legislative intention in fact that transfer of property to corporation exclusively devoted to charitable work or to any corporation in trust exclusively for charitable work must be limited for use within California if transferee is a California corporation and fact that use is not so limited if transferee is a corporation organized for profit under law of a foreign reciprocal state. Revenue and Taxation Code, § 13842.

4. Taxation ☞859(5)

Justification of reciprocal provision in inheritance tax statute providing that transfer of property, under stated conditions, to corporation organized under state allowing a similar exemption shall not be subject to inheritance tax, lies in fact it may well serve to encourage other states to extend their laws exempting charities to include those located in California and so redound to mutual public benefit on a strictly quid pro quo basis. Revenue and Taxation Code, § 13842.

James W. Hickey, Sacramento, Walter H. Miller and Arthur K. Marshall, Los Angeles, for appellant.

Catlin & Catlin, Frank D. Catlin, Henry W. Catlin, George L. Catlin, Los Angeles, and William E. Catlin, North Hollywood, for respondent.

VALLÉE, Justice.

Appeal from an order fixing the inheritance tax. The matter was submitted to the probate court on a stipulation of facts.

Decedent died May 21, 1951, a resident of California. On April 2, 1932, Newton Trust Company, since 1947 known as Newton-Waltham Bank and Trust Company, a Massachusetts banking corporation, referred to as Newton, executed a declaration of trust by which it agreed to accept and hold gifts made to it either inter vivos or by devise or bequest. The property to be accepted and held was designated as the "Permanent Charity Fund." The declaration provided: "The income of this Fund, less proper charges, expenses and deductions, shall each year forever be applied to such charitable purposes as the Committee hereinafter provided for shall in its own uncontrolled discretion from time to time select or determine. Without in any way limiting the charitable purposes for which said income may be used, the said Committee may from time to time select or determine objects or purposes of benevolence or charity, public or private, including educational and charitable institutions, whether incorporated or not, and the relief of individual needs regardless of race or creed. The Committee shall however give special consideration to the relief of the needs of residents of, and charitable and educational institutions whether incorporated or not located in, the City of Newton [Massachusetts]."

On October 11, 1940, decedent and Newton executed a trust agreement by which decedent transferred certain property to Newton in trust. Newton agreed to pay the net income of the trust to decedent for life. The agreement provided: "Upon the decease of the Donor, the Trustee is directed to pay the remainder of the property to Newton Trust Company in its capacity as Trustee of the 'Permanent Charity Fund' under an agreement and Declaration of Trust dated April 2, 1932 to be held upon the trusts of said Agreement and Declaration of Trust, and which shall be known as the 'William H. Cutler and Annah W. Cutler Fund', and at the discretion of the Trustee any property coming into its hands

through the will of the Donor or from his estate may be combined with and included in this fund, and the Trustee is directed in making payments from this fund to give preference to needy individuals who are residents of the City of Newton rather than using the fund or any part thereof to assist charitable corporations or organizations, * * *"

Decedent's will and a codicil thereto were admitted to probate. The will devised and bequeathed the residue of certain trust property and the residue of the estate to "Newton-Waltham Bank and Trust Company, in its capacity as Trustee of the Permanent Charity Fund under an agreement and declaration of trust dated April 2, 1932, to be held upon the trusts under said agreement and declaration of trust, which fund so given shall be added to the fund given hereinbefore to the said Newton-Waltham Bank and Trust Company, as Trustee, to be known as the 'William H. Cutler and Annah W. Cutler Fund', with the same provision as to payments from the said fund."

Massachusetts was at the date of death of decedent, and is now, a "reciprocal" state, as referred to in section 13842(c) (2) of the Revenue and Taxation Code.

The appraised value of the property transferred by decedent to Newton was \$160,802.20. The Inheritance Tax Appraiser reported a tax of \$30,674.29 of which \$17,542.76 was on the transfers to Newton and \$13,131.53 on other transfers.

The executor of decedent's will filed objections to the report in so far as it included a tax on the transfers to Newton. The court concluded that the tax assessed and fixed on the value of the property transferred to Newton was erroneously assessed and fixed. It vacated and set it aside and fixed the tax at \$13,131.53. The controller appeals.

The question as stated by the controller is: "Where a decedent transfers moneys to a business corporation in Massachusetts, in trust exclusively for charitable works, and does not limit such charitable works to beneficiaries in California or states having reciprocal provisions for charities can the

State of California collect inheritance tax thereon?"

The pertinent parts of section 13842 of the Revenue and Taxation Code provide that property transferred 1) to any corporation exclusively engaged in or devoted to any charitable work, or 2) to any corporation in trust exclusively for or to be devoted exclusively to any charitable work, is exempt from the inheritance tax if any of the following conditions is present: "(c) In the event that the society, corporation, institution, or association is organized or existing under the laws of a territory or another state of the United States or of a foreign state or country, at the date of the decedent's death either of the following occurred: * * *

"(2) The laws of the territory, other state, foreign state, or foreign country contained a reciprocal provision under which property transferred to a similar society, corporation, institution, or association organized or existing under the laws of another territory or state of the United States or foreign state or country was exempt from legacy, succession, or death taxes of every character, if the other territory or state of the United States or foreign state or country allowed a similar exemption in respect to property transferred to a similar society, corporation, institution, or association organized or existing under the laws of another territory or state of the United States or foreign state or country."

Appellant contends that an exemption from inheritance tax of the transfers involved would cause discrimination against trust companies and other pecuniary corporations organized in California, which would be unfair, unreasonable, and contrary to the intent of the Legislature. He argues that exemption of the transfers would mean that an organization incorporated for profit and a recipient of a gift by a resident of California would be exempt from tax if the recipient were organized outside of California, but would be taxable if the same corporation were organized in California, where in either case such transfer were not limited for use in this state. He further contends that section 13842(c) (2) does not relieve the transferee of the tax as it

exempts from tax only transfers to charitable institutions located in "reciprocal" states. He argues that because under the trust indenture the trustee may dispense the charitable funds to recipients who are not residents of Massachusetts, the facts are not within the section.

[1] The statute should be liberally construed so as to favor and encourage charitable funds and should not be construed so as to lay the burden of inheritance taxes upon the property devoted to such uses and thus, to the extent of such burden, hamper or limit the resources of the trust intended for such beneficial uses. Estate of Irwin, 196 Cal. 366, 373, 237 P. 1074; Estate of Barter, 30 Cal.2d 549, 554-555, 184 P.2d 305; Estate of Yule, 57 Cal.App.2d 652, 654, 135 P.2d 386.

We are of the opinion that the reasoning of Estate of Bendheim, 100 Cal.App.2d 398, 223 P.2d 874, 875, controls the decision in the case at bar. In Bendheim, the devise and bequest was to Wells Fargo Bank & Union Trust Company, in trust, with direction to pay the net income "to the Mother Church, The First Church of Christ Scientist, Boston, to be used one-half for the Christian Science Pacific Coast Sanitarium in San Francisco, and one-half for the Pleasant View Home, Christian Science Home, in Concord, New Hampshire". The evidence showed that the Mother Church was a Massachusetts religious corporation engaged in religious and charitable work only; that Massachusetts was a "reciprocal" state within the meaning of section 13842; that one of the charities of the Mother Church was Pleasant View Home in Concord, New Hampshire, which was a corporation organized under New Hampshire law solely for the purpose of charitable activities under the direction of the Mother Church; that New Hampshire was a "non-reciprocal" state. After quoting from section 13842, the court said: "Since it is stipulated that the transferee 'Mother Church' is a corporation organized and existing under the laws of the State of Massachusetts a 'reciprocal' state, it is apparent that if the transfer had been made to that corporation without any limitation as to the use of the fund the transfer would

have been exempt from the tax under the plain terms of the code. Hence the real question arises whether the directions in the will as to the use of the funds in a 'non-reciprocal' state defeats the exemption.

"It is settled law that taxing statutes are acts *in invitum* and that the courts will not adopt a strained construction to impose a tax which is not a part of the legislative act. The same reasoning applies to exemptions. If the legislative act expresses an intention to exempt certain property judicial construction is not appropriate to defeat the exemption. Here the statute exempts property transferred 'to' a charitable institution to be devoted exclusively to charitable activities. Hence, if the transfer here had been made to the Mother Church alone, an institution admittedly engaged exclusively in religious and charitable work, there could be no doubt that it would be exempt from the tax in this state since Massachusetts is a 'reciprocal' state. But there is nothing in the statute supporting appellant's argument that the transferred fund must be used exclusively in some 'reciprocal' state. The plain words of the statute relate to a transfer 'to' a charitable institution in a 'reciprocal' state, 'to be devoted' exclusively to charitable work. It is inconceivable that the legislature intended to impose on the taxing authorities the duty of visitation and inspection of the alien charitable institution to determine the beneficiaries of the charitable transfer.

"It is a matter of knowledge many large charitable institutions engaging in nationwide activities like the American National Red Cross, the Salvation Army, and others do not restrict their charities to any particular state or territory, but spread them to many parts of the world. A transfer to the Red Cross to aid its charitable work among those engaged in our military service in foreign countries would be manifestly a transfer 'to' a charitable institution 'to be devoted' to charitable work and, as such, exempt from the tax.

"There are no authorities directly in point, but the trend of the California cases is that the question of exemption from the tax is to be determined on the basis of the character of the 'transferee' rather than

on the basis of the character of the beneficiaries under the grant. Somewhat similar is Estate of Barter, 30 Cal.2d 549, 184 P.2d 305. The bequest was made to the British government for the benefit of British refugee children. The British government was not eligible to act as trustee and the trial court substituted a California charitable corporation. In holding that the transfer was exempt under the code section the Supreme Court said, 30 Cal.2d at page 555, 184 P.2d at page 308: 'Rather it would appear that it is the character of the *transferee* not the character of the transfer—whether "in trust or otherwise"—that is the first consideration under the terms of the proviso; and it is only in the event that the transferee does not so qualify in purpose and place of organization that the restriction as to "use within this State" becomes material. Such view coincides with the principle of liberal construction of exemptions in favor of charitable organizations. Cooley, Taxation, Fourth Edition, Vol. 2, sec. 673, p. 1415; Sutherland, Statutory Construction, Third Edition; Horack, Vol. 3, sec. 6702, p. 296.' Following this statement the court said, 30 Cal.2d at page 556, 184 P.2d at page 308, after approving the act of the trial court in substituting a qualified California corporation as trustee: 'Hence, in no view of its rights or of its relation to the beneficiaries of the trust does it necessarily follow that the residuary estate was transferred to the British Government, but rather such estate passed by due and proper order of the court to a charitable corporation of this state qualified to administer a charitable trust. That event exempted it from liability within the scope of the inheritance tax law.' * * *

"But without further discussion we may conclude that the plain meaning of the code section is to exempt from the inheritance tax property transferred 'to' a charitable institution located in a 'reciprocal' state without regard to the locale of the recipients of the charities in which such institution may be engaged."

[2] Section 13842 makes no distinction between a transfer to a charitable corporation and a transfer to a corporation organized for profit if the transfer to a corpora-

tion of the latter character is "in trust exclusively for or to be devoted exclusively to any charitable * * * work," and the corporation is organized under the laws of another state which is a "reciprocal" state. The stipulated facts come squarely within the exemption. The property was transferred to a corporation exclusively for and to be devoted exclusively to charitable work. The corporation was organized under the laws of another state at the date of decedent's death. It was stipulated that the other state, Massachusetts, is a "reciprocal" state, which means that the laws of Massachusetts comply with the conditions prescribed in paragraph (2) of subsection (c) of section 13842. Newton qualifies "in purpose and place of organization." The statute does not say that a corporation organized for profit in a "reciprocal" state shall use the trust property in that state. As held in *Estate of Bendheim*, *supra*, 100 Cal.App.2d 398, 223 P.2d 874, the place of residence of recipients and the ultimate use of the benefits are of no consequence in qualifying Newton for the exemption. Thus the *Bendheim* case decides this case and the transfers are exempt.

We find nothing in *Estate of Fleming*, 31 Cal.2d 514, 190 P.2d 611, contrary to the views we have expressed. The court there held that an educational bequest, in trust, to a California corporation organized for profit must, in order to qualify for the exemption, be limited for use within this state. The court gave no consideration to the condition expressed in (c) of section 13842. Dicta in the *Fleming* opinion is to the effect that a transfer to the American Red Cross, a charitable corporation not organized under California law, is exempt, although the transfer is not limited for use within this state.

[3,4] We find nothing unfair, unreasonable, or contrary to the intention of the Legislature in the fact that the transfer must be limited for use within this state if it is to a corporation of this state organized for profit, and the fact that the use is not so limited if the transfer is to a corporation organized for profit under the law of a "reciprocal" state. The exemption applies only when the other state is a "recip-

rocal" state. Justification for such reciprocal provision, enacted in 1929, Stats.1929, ch. 844, p. 1840, "lies in the fact that it may well serve to encourage other states to extend their laws exempting charities to include those located here (*McLaughlin v. Poucher*, 127 Conn. 441, 17 A.2d 767, 769) and so redound to mutual public benefit on a strictly *quid pro quo* basis." *Estate of Fleming*, 31 Cal.2d 514, 520, 190 P.2d 611, 614.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



122 Cal.App.2d 155

SHIYA et al. v. REVIEA et al.
Civ. 4730.

District Court of Appeal, Fourth District,
California.

Dec. 18, 1953.

Rehearing Denied Jan. 7, 1954.

Hearing Denied Feb. 10, 1954.

Action by widow and heirs of automobilist for death of automobilist in intersectional collision with automobile owned by one defendant and operated by the other. The Superior Court, Orange County, Robert Gardner, J., entered judgment adverse to plaintiffs, and they appealed therefrom, as well as from an order denying motion for new trial. The District Court of Appeal, Griffin, J., held that whether decedent was contributorily negligent was question for jury, and that the order denying motion for new trial was nonappealable.

Judgment affirmed; attempted appeal from order dismissed.

1. Appeal and Error $\S$ 110, 782

Order denying motion for new trial was not appealable, and attempted appeal therefrom would be dismissed.

2. Death $\S$ 58(1)

In action by widow and heirs of automobilist for wrongful death of automobilist

in intersectional collision with automobile owned by one defendant and operated by the other, plaintiffs were entitled to the so-called presumption that decedent, in his conduct at time of and immediately preceding the accident, was exercising ordinary care and obeying the law.

3. Negligence ⇨136(8, 9, 26)

Question of contributory negligence is usually one for jury, and becomes question of law for court only when facts are undisputed, and even then, only where, on those facts, reasonable minds can draw but one conclusion on issue of plaintiff's negligence.

4. Appeal and Error ⇨994(2), 1002

In automobile collision cases, all conflict of evidence must be substantial and real; otherwise, an appellate court will not interfere with jury's determination as to credibility of witnesses where evidence is conflicting, except where testimony of witness is inherently improbable and impossible of belief.

5. Appeal and Error ⇨994(2)

Amount of credit to be given to positive testimony of witness is solely a question for trial tribunal.

6. Automobiles ⇨245(80)

In action by widow and heirs of automobilist for death of automobilist in intersectional collision with automobile owned by one defendant and operated by the other, whether decedent was contributorily negligent was question for jury.

7. Appeal and Error ⇨1005(2)

District Court of Appeal is bound by different rules, on a motion for new trial, from those which guide trial court in its consideration of evidence and credence to be given to the several witnesses, and where there was some evidence to justify trial court's refusal to grant new trial in automobile intersectional collision case, District Court of Appeals could not, on appeal, disturb the order.

8. Automobiles ⇨171(11)

Requirement of statute providing that driver of automobile upon approaching intersection signposted with a stop sign, shall "stop" before entering such intersection, is

not satisfied by merely slowing down. Vehicle Code, § 577(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Stop".

9. Automobiles ⇨171(8, 13)

Driver of automobile on through highway has right to assume that driver of vehicle approaching an intersection marked with a stop sign will obey law and stop, and yield right of way, but driver on through highway must also be exercising due care at the time, and it is only when there is nothing in the situation to warn him of impending danger that he is not guilty of negligence in relying upon such assumption. Vehicle Code, §§ 552, 577(a).

10. Negligence ⇨136(14)

The reasonableness of conduct of a person relying upon the assumption that another will obey the law is primarily a question for determination by trier of facts.

11. Appeal and Error ⇨882(1)

Generally, a party cannot successfully complain of error which he himself has invited.

12. Appeal and Error ⇨882(12)

In action arising out of intersectional collision between automobiles, the giving of an instruction, requested by defendants, on right of way, which instruction was given in language of statute, and the giving of another instruction, also requested by defendants, which was merely an application of the right of way rule, should jury determine that the statute was applicable, did not constitute prejudicial error of which plaintiffs could complain, where plaintiffs themselves offered an instruction in the language of the statute, and thus invited any error. Vehicle Code, § 552(b).

13. Appeal and Error ⇨1064(1)

In action for death of automobilist in intersectional collision with automobile owned by one defendant and operated by the other, where sufficiency of evidence to establish fact that defendant driver was guilty of negligence as matter of law and that such negligence was proximate cause of decedent's death, was questionable, giving of instruction on unavoidable and inevitable accident was not prejudicial error.

Joseph A. Lazaroni, Edmund M. Bluth, and Henry F. Walker, Los Angeles, for appellants.

Clarence Sprague, Santa Ana, for respondents.

GRIFFIN, Justice.

On July 14, 1951, about 5 a. m. Albert J. Shiya was driving his car (a 1939 Pontiac sedan in which was seated as a guest Victoria Zieda) west on Orangethorpe Avenue, near Buena Park. Defendant Robert Hendrix was driving north on Walker Avenue, an intersecting street (in a 1950 Dodge convertible coupe automobile belonging to defendant Odis Reviea.) Orangethorpe Avenue was a through highway, protected by stop signs, with four marked traffic lanes. Walker Avenue was a two-lane street running north and south, with a center line. Stop signs existed on two corners regulating traffic on Walker Avenue. The intersection was located in a more or less open territory. The two cars met in the intersection and a collision occurred. Mrs. Zieda, the guest, and defendant Hendrix were severely injured. Mr. Shiya was killed.

[1] The widow and heirs of Mr. Shiya brought an action for wrongful death against Reviea and Hendrix. Mrs. Zieda, as guest, brought a separate action for damages for personal injuries against the same defendants. Both cases were tried together before the same jury which returned a verdict against plaintiffs in each case. Upon separate motions for new trial the court granted the motion of the guest, Mrs. Zieda, on the ground of insufficiency of the evidence, but denied such a motion as to the Shiya action. The order granting the motion has become final. Plaintiffs Shiya appeal from the judgment and from the order denying their motion for new trial. Since such latter order is not appealable, the attempted appeal therefrom must be dismissed. *Pearson v. Hill*, 86 Cal.App.2d 664, 195 P.2d 45; 6 West's California Digest, Appeal & Error, ¶ 782, p. 79.

There was no evidence of contributory negligence on the part of Mrs. Zieda and the court so instructed the jury. The granting of a new trial to her clearly in-

dicated that the court disagreed with the jury's verdict that there was no negligence on the part of the defendants, and in effect held that there was negligence on their part and that such negligence was the proximate cause of her injuries.

As to the Shiya action, the evidence clearly establishes negligence on the part of Hendrix. The only question we see here presented is whether there is a failure of proof of any contributory negligence on the part of Albert J. Shiya, the deceased, which would support the finding of the jury on this issue.

All indications, both from the photographs introduced and the description given by the witnesses, are that the intersection is an open one in the immediate vicinity of the accident, at least to the East and South, from which the two colliding vehicles were approaching. There was a conflict in the evidence as to whether it was dark at the time of the accident and as to the extent of visibility, other than that there were lights on the cars. It was agreed that it was incumbent on Hendrix, who was driving north on Walker Avenue, to observe the boulevard stop, since Orangethorpe was a through street.

Mrs. Zieda was knocked unconscious and did not remember anything leading up to the accident. There were only two eye witnesses, defendant Hendrix and a Mr. Van Arkel, whose truck had been traveling south on Walker Avenue with its lights burning, but which truck had been stopped at the stop sign approaching Orangethorpe Avenue. He testified that while in that position he first saw the headlights of decedent's car and it was traveling west on Orangethorpe about 400 feet from the intersection, and when he first saw the defendants' car coming north on Walker Avenue with its lights burning it was about 900 feet from the intersection; that he continued to watch the defendants' car up to the point of collision; that he was experienced in judging the speed of cars, having clocked cars for that purpose; that he estimated the speed of defendants' vehicle at the time it entered the intersection, and without making the boulevard stop, at 70 miles per hour; that it did not slow down at any time before the colli-

sion with the Shiya car; that he estimated the speed of the decedent's car at 45 miles per hour but did not notice whether it reduced its speed prior to the accident because he was watching the faster moving car; that he did not notice any change in direction of the Hendrix car on its entering the intersection, and did not see any signal given by its driver indicating any intention to turn to his left; that the last time he observed the Shiya car it was about 60 feet from the intersection and Hendrix was then about 60 feet from him; that it was at that time he first thought there was going to be an accident.

Hendrix testified he borrowed the convertible from Reviea and took a girl to a dance in Anaheim; that he had three bottles of beer and later returned to his home but did not sleep much; that he decided to go to Firestone and Lakewood Boulevard to look at a car, and then was going to borrow some money from an uncle to purchase a convertible Buick; that he drove up Walker Avenue at a speed of between 40 and 50 miles per hour with his lights turned on; that it was dark at the time; that he began to slow down about 200 yards south of the intersection and started applying his brakes; that he knew there was a boulevard stop at the intersection; that he was going "real slow" as he came up to the intersection and at no time did he make a complete stop before entering it but estimated his slowest speed at the boulevard stop sign about "maybe one or two miles per hour * * * something like that" or "maybe one-half mile per hour"; that after entering the intersection he waited to see if the south-bound truck of Van Arkel was going to stop at the intersection; that he looked or glanced, but saw no cars approaching on Orangethorpe Avenue in either direction; that when he was about in the middle of the intersection he stopped his car to see whether the truck was going to stop; that when the accident happened he had started to make a left-hand turn and his car was in a northwesterly position or angle, and had passed over the center line of Orangethorpe at that time; that he did not see and had no knowledge of how far the defendant's car was from

him at the time he entered the intersection; that all he saw was a flash of lights right on top of him at the time of the collision; that he remembered when he started to make a left turn in the intersection; that he set his left-hand signal light and "just stepped on the throttle and started away" when the collision occurred.

An officer of the highway patrol testified he conversed with Hendrix about 11:45 a. m. on July 16, at the hospital, and Hendrix said he was traveling about 40 miles per hour at the time of the accident; that a car was approaching him on the same highway and came over into his lane of traffic and hit him; that he did not remember seeing any boulevard stop sign, and did not remember where the accident occurred; that he knew nothing more because he was knocked unconscious.

Hendrix testified he did not remember any such conversation. The coroner testified he smelled Hendrix' breath that morning about 7 a. m. in the hospital and "it had a strong alcoholic" odor.

From an examination of the photographs of the respective cars and their location after the collision, it indicates that the right-hand one-half of the Hendrix car was practically demolished and the left-hand half of the Shiya car was crushed to some extent. The Shiya car did not progress any great distance beyond the point of impact. The Hendrix car was found in the field at the northwest corner of the intersection after crashing into a stack of boxes or lumber which was lying there.

[2] At the outset it is conceded by all parties that plaintiffs were entitled to the so-called presumption, as instructed by the court, that the decedent, in his conduct at the time of and immediately preceding the accident, was exercising ordinary care and obeying the law. *Hill v. Ralph*, 117 Cal. App.2d 434, 256 P.2d 48.

The contention is made by defendants, on this appeal, that from certain facts testified to by Hendrix, and by mathematical calculation, the jury could infer that Shiya was not looking and did not see the Hendrix car as it approached the intersection or that Hendrix entered the intersection first and accordingly Shiya was obligated,

under the law, to yield the right of way to Hendrix. In this connection it is argued that the jury was authorized to believe that Hendrix, although he did not completely stop at the stop-sign, did slow down to one mile or less per hour, and that this was a stop for all practical purposes, and the section of the Vehicle Code requiring him to stop was not violated and he was excusable under the circumstances. It is then argued, mathematically, that if Hendrix was traveling at one mile per hour or less, as he entered the intersection, and did not increase his speed and traveled at least 25 feet at that speed before he stopped his car, and if he stopped his car for a period of one or two seconds as he said he did before the time of impact, Hendrix' car was in the intersection for 18 full seconds and was there in plain view of decedent for an approximate period of 16 seconds and accordingly, traveling at 45 miles per hour, the deceased was negligent in not seeing the Hendrix car and in not stopping his car and avoiding the collision; or that the jury may have concluded that each car approached the intersection in complete disregard of the other, arriving there at the same time, and that both were negligent; or that decedent should have seen what Van Arkel saw, i. e., that Hendrix was approaching at 70 miles per hour without slowing down, and that if deceased did not observe this he was negligently inattentive, or if he did see it and did not slow down he was likewise careless, citing such cases as *James v. American Buslines*, 111 Cal.App.2d 273, 244 P.2d 503; and *Dickinson v. Pacific Greyhound Lines*, 55 Cal. App.2d 824, 131 P.2d 401.

[3-7] The question whether one is guilty of contributory negligence is usually one for the jury and becomes a question of law for the decision of the court only when the facts are undisputed, and even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. However, these observations are subject to the qualification that, in cases involving collisions with automobiles, as in other cases, all conflict of evidence must be substantial and real. (3 Cal.Jur. p. 984, sec. 219.) Otherwise, an

appellate court will not interfere with the jury's determination as to the credibility of witnesses where the evidence is conflicting except where the testimony of the witness is inherently improbable and impossible of belief. (27 Cal.Jur. p. 186, sec. 157.) The amount of credit to be given to the positive testimony of a witness is solely a question for the trial tribunal. (2 Cal.Jur. p. 916, sec. 541.) In the face of the testimony of the disinterested witness and the circumstances and facts related, the testimony of the defendant Hendrix does not appear very convincing to us. However, it is apparent that the trial court and jury must have believed his story, and the deductions made by counsel for defendants from the facts related by him. To us, from the cold record, it would seem that the trial court might well have granted the motion for new trial in respect to these plaintiffs also. However, we are bound by different rules, on a motion for new trial, from those which guide the trial court in its consideration of the evidence and the credence to be given to the several witnesses, and conclude that we may not, on appeal, disturb this order. *Bramble v. McEwan*, 40 Cal.App.2d 400, 104 P.2d 1054; *Dickinson v. Pacific Greyhound Lines*, 55 Cal.App.2d 824, 131 P.2d 401; *Clark v. Wallman*, 116 Cal.App. 278, 2 P.2d 562.

In *Inouye v. McCall*, 35 Cal.App.2d 634, 96 P.2d 386, relied upon by plaintiffs, under a similar set of facts there was a finding of the trial court that the plaintiff was not guilty of contributory negligence and the appellants therein contended that the facts related constituted contributory negligence as a matter of law. The court there held that such facts did not constitute negligence as a matter of law.

In *Angelo v. Esau*, 34 Cal.App.2d 130, 93 P.2d 205, decided by this court, which is factually similar, the question of plaintiff's contributory negligence was left to the jury to determine under instructions similar to those given in the instant case and about which plaintiffs complain.

The court gave, at defendants' request, an instruction in the language of section 552 of the Vehicle Code reading:

"Vehicle entering through highway.

(a) The driver of any vehicle shall stop as required by Section 577 of this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard.

"(b) Said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

At the defendants' request the trial court also instructed the jury:

"When the law says that one person has a right of way over another, its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment of time, two persons, neither of whom occupies the space in question, desire to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. The privilege is his right of way.

"Failure to yield to one to whom the law has given the right of way is negligence unless circumstances resulting from causes beyond the control of the driver are such as to excuse and justify him in such failure, judging his conduct in the light of what reasonably might have been expected from a person of ordinary prudence."

The record indicates that the plaintiffs also requested the court to give to the jury the same instruction set forth in section 552, containing both subdivisions (a) and (b). It did give one instruction offered by plaintiffs in the language of section 552, subdivision (a) only.

It is plaintiffs' contention that the giving of the instruction in the language of section 552(b) and the following instruction was erroneous under the evidence, since Hendrix admittedly did not bring his car

to a full stop before entering the intersection, and that therefore the question of right of way was not involved; that one cannot claim or secure the right of way by means of disobeying the law; and that under the instruction the jury, or at least one of the 9 jurors who voted for a verdict for the defendants might have been misled into believing that defendant driver was entitled to claim the right of way, citing *Thompson v. Dentman*, 131 Cal.App. 680, 688, 21 P.2d 1009; and *Inouye v. McCall*, 35 Cal.App.2d 634, 638, 96 P.2d 386.

Section 577 of the Vehicle Code, mentioned in section 552, supra, provides:

"The driver of any vehicle upon approaching any entrance of a highway or intersection * * * signposted with a stop sign as provided in this code * * * shall stop:

"(a) Before * * * entering such highway or intersection * * *."

In *Angelo v. Esau*, supra, 34 Cal.App.2d at page 139, 93 P.2d at page 210, it is said:

"While it seems tolerably clear that Pimental did not come to a full stop before entering the intersection, the instruction by its terms excludes his right to rely on the care of others while thus negligent himself. Whether his failure to stop proximately contributed to the accident or whether, contrariwise, he had so slowed down as to amount in practical effect to the same thing as a stop, were questions for the jury. Though he were negligent in failing to stop it would not necessarily follow that the effect of such negligence continued to influence his position or action as he actually entered the intersection. By reading section 577 of the Vehicle Code, St.1935, p. 190, as in force when the accident occurred, the court fully informed the jury of Pimental's duty to make such stop."

[8-10] It is true that the word "stop" does not mean to require a person "only to slow down". In *Wixon v. Raisch Improvement Co.*, 91 Cal.App. 129, 266 P. 964, it was said that the difference between the words "stop" and "wait" is infinitesimal, and in *Goldberger v. Market Street Ry. Co.*, 130 Cal.App. 597, 606, 20 P.2d 351, 355,

it is said that an "order to wait" is a "command to stop." In *Inouye v. McCall*, supra, a truck driver said he did not stop at a stop-sign-marked intersection but slowed down to two to four miles per hour and then proceeded into the intersection. The court stated that the driver of the car on the through highway had the right to assume that the driver of the truck would obey the law and stop, and yield the right of way. However, this statement is subject to the general rule that the driver on the through highway must also be exercising due care at the time. It is only when there is nothing in the situation to warn him of impending danger that he is not guilty of negligence in relying upon such assumption. The reasonableness of the conduct of a person relying upon the assumption that another will obey the law is primarily a question for determination by the trier of fact. *Poe v. Lawrence*, 60 Cal.App.2d 125, 140 P.2d 136; see, also, *Podeszwa v. White*, 99 Cal.App.2d 777, 222 P.2d 683.

[11,12] Since plaintiffs' complaint is based solely on the giving of an instruction containing subdivision (b) of section 552 of the Vehicle Code and the instruction that followed, we do not conclude that they are entitled to complain of this instruction because they themselves offered an instruction in the language of section 552 of the Vehicle Code, both subdivisions (a) and (b), and it was apparently refused only on the ground that it was covered by a similar instruction offered by defendants. Therefore, any claimed error in giving defendants' proffered instruction in the language of the statute would be invited. It is the general rule that a party cannot successfully complain of error which he himself has invited. *Jentick v. Pacific Gas & Electric Co.*, 18 Cal.2d 117, 114 P.2d 343; *Shapiro v. Equitable Life Assurance Society*, 76 Cal.App.2d 75, 94, 172 P.2d 725; *Lyle v. Lyle*, 53 Cal.App.2d 552, 127 P.2d 1006; *Van Der Veer v. Winegard*, 41 Cal.App.2d 518, 107 P.2d 97. The instruction offered by defendants was merely an amplification of the right of way rule if the jury determined that section 552, subdivision (b) was applicable. Under the circumstances, no prejudicial error resulted

Defendants requested and the court gave an instruction on unavoidable and inevitable accident to the effect that "Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from" such an unavoidable or inevitable accident which occurred without having been caused by negligence.

An instruction offered and given in *Hyman v. Market Street Ry. Co.*, 41 Cal.App.2d 647, 650, 107 P.2d 485, where there was no direct or indirect evidence that the collision was a result of an unavoidable accident, was, under the facts of that case, held to be prejudicial error and misleading to the jury. In support of the reversal the court cited *Scandalis v. Jenny*, 132 Cal.App.307, 22 P.2d 545. In the instant case it is pointed out, with considerable reasonableness, that defendant driver was negligent; and that it did not appear from the evidence that the acts committed by him were unavoidable, and that since defendants claim that the deceased was guilty of contributory negligence, if true, such fact would remove any suggestion that the accident was unavoidable. A similar claim was made, however, in *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823, and the minority opinion sustained this contention and cited the *Hyman* case as authority. However, the majority opinion appears to have overruled, or at least modified, the ruling in the *Hyman* case in respect to the giving of such an instruction insofar as it applies to an automobile accident at an intersection unless the plaintiff's evidence shows the negligence of the defendant as a matter of law, and that such negligence was the proximate cause of the collision or death. It was there said, 37 Cal.2d at page 120, 230 P.2d at page 826, quoting from *Polk v. City of Los Angeles*, 26 Cal.2d 519, 159 P.2d 931, that: "'* * * the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury.'"

[13] Since, in the instant case, it may be questioned whether the evidence was sufficient to establish the fact that defend-

ant driver was guilty of negligence as a matter of law and that such negligence was the proximate cause of decedent's death, in the face of the majority opinion in the Parker case, we are unable to hold that it was prejudicial error to give such an instruction. See, also, *Freedman v. Wilford*, 121 Cal.App.2d 145, 262 P.2d 642.

Attempted appeal from order denying a new trial dismissed. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.



121 Cal.App.2d 800

BATES v. NEWMAN.

Civ. 19681.

District Court of Appeal, Second District,
Division 2, California.

Dec. 11, 1953.

Rehearing Denied Dec. 30, 1953.

Hearing Denied Feb. 3, 1954.

In personal injury action against surgeon for alleged negligence, the Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the record was free from error.

Affirmed.

1. Evidence ⇨537

In personal injury action against surgeon for alleged negligence in performing circumcision, competent doctors who had examined plaintiff were entitled to express their opinions.

2. Evidence ⇨509, 532

A medical expert may testify as to nature of injury or condition and as to ability or inability of person to do certain acts.

3. Physicians and Surgeons ⇨18(9)

In considering weight to be given to testimony of doctors, jury, in personal injury action against surgeon for alleged negligence in performing circumcision, could

consider contradictory testimony of plaintiff and his wife.

4. Witnesses ⇨248(3)

Trial court did not err in denying plaintiff's motion to strike as unresponsive the whole answer of witness, where part of answer was responsive.

5. Trial ⇨81, 90

Burden is upon party objecting to admission of evidence to make proper objection and motion.

6. Trial ⇨96

Where testimony is admitted, some of which is relevant and competent and is intermingled with that which is improper, a motion to strike should be directed to that portion attacked, so that no uncertainty may remain as to testimony challenged; and otherwise a refusal to grant motion is not error.

7. Appeal and Error ⇨206(1), 237(2)

Error could not be predicated in appellate tribunal upon reception of testimony, where no objection or motion to strike such testimony had been made.

8. Trial ⇨75

Error could not be predicated upon overruling of objection to testimony where similar evidence had been received without objection.

9. Appeal and Error ⇨882(8)

Plaintiff who had, on direct examination, asked doctor on number of occasions for doctor's professional opinion on various subjects, could not urge on appeal alleged error in permitting such doctor to express "an expert opinion" in answer to questions asked him.

10. Trial ⇨62(3)

Under circumstances of personal injury action against surgeon for alleged negligence, trial court did not err in refusing to receive plaintiff's rebuttal evidence.

11. Trial ⇨63(1)

One who has affirmative of issue may not reserve a portion of his evidence until opposite party has exhausted his evidence to negative that offered in first instance, and if he does so court may refuse to allow

him to introduce additional evidence on subject after defendant rests.

12. Trial ⚡56

It is within discretion of trial court whether or not to receive cumulative evidence. Code Civ.Proc. § 2044.

13. Evidence ⚡188

Trial court, in personal injury action against surgeon for alleged negligence, did not err in refusing plaintiff the right to introduce demonstrative evidence, where such evidence would have been merely cumulative of evidence previously received. Code Civ.Proc. § 2044.

14. Trial ⚡228(1)

Formula instructions are not favored in law.

15. Trial ⚡295(1)

Instructions must be read together and harmonized.

16. Trial ⚡296(3)

On appeal from judgment for defendant, in personal injury action against surgeon, error could not be predicated upon trial court's deletion, from proposed instruction as to physician's duties, of direction to find for plaintiff if it found his injuries to have been proximately caused by defendant's failure to perform any of duties mentioned, where it was clear that jury had been adequately instructed with reference to liability of surgeon.

17. Trial ⚡229

It is not required that instructions which presumably favor plaintiff equal or counter-balance number of instructions which presumably favor defendant; and therefore error could not be predicated upon fact that trial court had given six instructions stating under what conditions jury might find for defendant while giving only one instruction as to when they might find for plaintiff and against defendant.

18. Physicians and Surgeons ⚡18(10)

In personal injury action against surgeon for alleged negligence, trial court's instruction on contributory negligence was correct.

19. Appeal and Error ⚡882(12)

A party cannot complain of an instruction given at his own request, or of an error in an instruction given at insistence of his adversary, when he requested a substantially similar one.

20. Appeal and Error ⚡972

Trial ⚡112

Determination of length of time for opening statement is purely a matter for discretion of trial court and in an absence of showing of abuse of such discretion, trial court's designation of limits of argument will not be disturbed on appeal.

21. Trial ⚡297

Error could not be predicated upon trial court's refusal to allow notebooks to be passed to jurors prior to opening statement of plaintiff's counsel where trial judge, while declining to take any action upon plaintiff's request to distribute notebooks at that time, further stated to jurors that they could take such notes as they desired.

22. Appeal and Error ⚡201(2)

If harmful result of misconduct of trial judge can be obviated by bringing matter to his attention, as a predicate to claiming error on appeal, an assignment of such misconduct must be made in trial court, and a request made of that court to instruct jury to disregard it.

23. Trial ⚡18

Error could not be predicated upon trial court's order requiring plaintiff's counsel to erase materials which had been placed on blackboard prior to conclusion of plaintiff's case and which counsel intended to use in his opening argument to jury, where reception of testimony had not then been completed and any juror could have been misled in believing that material constituted evidence.

24. Appeal and Error ⚡207

Appellant who had failed to request any further or additional time to argue thereby waived any right to urge on appeal that he had not had sufficient time to present his argument to jury.

25. Appeal and Error ⇨1015(5)

Trial court's decision, in passing up-on conflicting affidavits as to juror misconduct, will not be disturbed on appeal if supported by substantial evidence.

26. Appeal and Error ⇨110, 782

Order denying motion for new trial is nonappealable and must be dismissed.

Betty & Campbell, Los Angeles, and Freiburghouse & Woodard, South Gate, for appellant.

Reed & Kirtland and Henry E. Kappler, Los Angeles, for respondent.

McCOMB, Justice.

This is an action for damages for personal injuries suffered by plaintiff as a result of the alleged negligence of an osteopathic physician and surgeon in the performance of a circumcision upon plaintiff, and in his care and treatment. The case was tried before the court and jury resulting in a verdict for defendant. There is an appeal from the judgment and a purported appeal from the order denying plaintiff's motion for a new trial.

Facts: Plaintiff, a large man 37 years of age, was first married in 1940, and to his present wife in 1948. During his married life he had enjoyed normal, satisfactory and happy sexual intercourse and sexual relations with the respective wives about twice a week. Prior to May 16, 1950 (the date defendant performed a circumcision upon plaintiff), his penis when relaxed measured three to three and one half inches and during erection it was from six to six and one half inches. In erection it pointed in an upward direction or at an angle which was normal. In April, 1950, plaintiff was having trouble with his organ and consulted defendant who advised him that he should be circumcised. On May 16, 1950, defendant performed the operation. Thereafter plaintiff returned to defendant's office for treatment and on May 23, 1950, when the bandage was removed, plaintiff noticed there was no shaft visible and that only the head was showing when the organ was relaxed. Thereafter whenever plaintiff had an erection he suffered severe

pain, and his visible penis measured about one inch including the head, and it pulled the skin of the scrotum up so that it looked like a tepee or tent.

Plaintiff testified that on June 6, 1950, he visited the doctor and told him that he had cut him off short and he did not have any penis. Defendant replied, "Yes, I think I did take off a little too much. I can fix you up." He also advised plaintiff he would do a repair operation without any charge. Several operations were performed thereafter, none of which resulted in plaintiff's being returned to the condition which he considered normal.

[1-3] *Questions:* First: *Did the trial judge commit error in permitting two doctors who had examined plaintiff to express an opinion as to the position of plaintiff's penis and the effect of the abdominal apron upon his ability to have sexual intercourse?*

No. Plaintiff does not call our attention to any authority in support of his contention that the doctors' statements were inadmissible. Both doctors had examined plaintiff. No question is raised as to their competency or qualifications. It is clear that from their knowledge of anatomy they were entitled to express their opinion as to the effect of plaintiff's fatty apron on his ability to have intercourse.

A medical expert may testify as to the nature of an injury or condition, the ability or inability of a person to do certain acts. (See cases cited 32 Cal.Jur.2d (1952) Evidence section 534, page 250, note 35; cf. *Lawrence v. City of Los Angeles*, 53 Cal.App.2d 6, 8[1], 127 P.2d 931 (hearing denied by the Supreme Court).) In considering the weight to be given to the opinion of the doctors, the jury could, of course, consider the testimony of plaintiff and his wife and the fact that neither doctor had seen plaintiff's penis in erection. (*Owings v. Industrial Accident Comm.*, 31 Cal.2d 689, 692[3], 192 P.2d 1; *Gazzera v. City and County of San Francisco*, 70 Cal.App.2d 833, 838[2], 161 P.2d 806.)

[4-6] *Second: Did the trial court err in its ruling upon the evidence of Dr. Sloan?*

No. During the course of the trial the following testimony was received:

(A) "The Court: Pardon me, Doctor, you mean that there were no visible indications there that there had been such an operation?"

"The Witness: That is right, your Honor. This may have been a natural formation with this individual and the entire story a fabrication, so far as I am concerned. I could see no evidence that there had been recent surgery done, because I have seen penises in this condition that were born so.

"Mr. Campbell: Just a moment, your Honor. I am going to move that the whole answer be stricken as unresponsive and that the jury be admonished to disregard the answer in toto.

"The Court: The motion is denied."

The court's ruling was correct. The question called for an answer to a simple question. The first part of the answer was clearly responsive—"That is right, your Honor." The remainder of the answer may have been unresponsive. However, counsel moved that the whole answer be stricken as unresponsive and that the jury be admonished to disregard the answer in toto. Counsel should have moved to strike only that portion of the answer which was unresponsive. The burden is upon the party objecting to make the proper objection and motion.

Where testimony is admitted, some of which is relevant and competent and is intermingled with that which is improper, a motion should be directed to the portion attacked so that no uncertainty may remain as to the testimony challenged; otherwise a refusal to grant the motion is not error. (*Rose v. State of California*, 19 Cal.2d 713, 742 [19], 123 P.2d 505.)

(B) "Q. In other words, did you observe anything about it that would appear to be abnormal in so far as any healing was concerned, assuming that some surgery had previously been done? A. To the point you make, as to the healing?"

"Q. Yes. A. Whether anything had been done, I was unable to determine from observation only."

No objection or motion to strike this testimony was made. Therefore error in the

reception of it may not be claimed on appeal.

[7] (C) "A. * * * At that moment my belief was that he had more shaft of penis available for intercourse than before he ever had anything done to his penis, whenever he had it done, because I created more shaft than, in my humble opinion was ever present by the good Lord's making. I may be wrong."

No objection or motion to strike this testimony was made. Therefore error may not be predicated in this court upon the reception of the answer.

[8,9] (D) "Q. In other words, some do it [perform a circumcision] one way and some do it another; is that what you mean?"

"Mr. Campbell: Just a moment. May I object to that on the ground it is improper cross-examination; an attempt to secure an opinion from this witness he didn't testify to on direct.

"The Court: Overruled.

"Q. by Mr. Kirtland: Is that right, Doctor?"

"The Witness: Correct."

To this question an objection was made and overruled. Plaintiff may not urge error here in the overruling of the foregoing objection for the reason that similar evidence had been received without objection, the following question and answer having been asked of Dr. Sloan without objection being made thereto:

"Q. Now when the foreskin comes over the head, a circumcision is done to put the prepuce about right back of the head; is that right? A. That may vary with the doctor who is doing the operating."

Plaintiff urges that it was error to permit Dr. Sloan to express "an expert opinion" in answer to questions asked him. Plaintiff is not in a position to urge this proposition on appeal for the reason that in plaintiff's examination of Dr. Sloan on his direct examination he, on a number of occasions, asked the doctor for his professional opinion on various subjects, thereby considering that the doctor was qualified to express such an opinion.

[10, 11] Third: *Did the trial court err in refusing to receive in evidence as part of plaintiff's rebuttal two color slides of the plaintiff's penis in erection, which slides had been in the possession of plaintiff during plaintiff's case in chief?*

No. Plaintiff urges that such slides were admissible upon the theory that they were proper rebuttal of the testimony of Doctors Crane and Zukor, stating in his brief:

"Until this testimony (Crane and Zukor) came in on defendant's case, the plaintiff had nothing to rebut in connection with the question of the downward slant of his penis upon erection and the inability by reason thereof to have normal intercourse, and the effect of the abdominal apron, if any, on the penis in erection. The necessity to rebut such testimony came about at the close of defendant's case."

In advancing this argument plaintiff acknowledges the testimony of his own witness, Dr. Sloan, on cross examination wherein he stated that it would be impossible for plaintiff to observe his genitals when standing up due to the fatty abdominal apron. Without objection Dr. Sloan stated that he examined plaintiff and his notes revealed the following:

"Patient in the office. Examination of the penis shows complete healing and the patient has more shaft exposed than he ever had available for intercourse before surgery. Whether his personal anatomical conformation will permit his insertion of penis for intercourse is a doubtful matter to me. The size of his abdomen most likely would prevent this accomplishment."

Dr. Sloan further testified: "The Court: * * * Do you mean the position of the abdomen was such that it would rest on the penis when erect, if he were standing?"

"The Witness: There is no speculation in my mind about that. The weight of the fat apron of the abdomen would depress the erect penis in a downward direction."

The foregoing testimony was received during the presentation of plaintiff's case in chief. Therefore there was evidence prior to the testimony of the two defense witnesses, Doctors Zukor and Crane, relative to the inability of plaintiff to have intercourse due to his abdominal apron.

The law is established that one who has the affirmative of an issue may not reserve a portion of his evidence until an opposite party has exhausted his evidence to negative that offered in the first instance. If he does so the court may refuse to allow him to introduce additional evidence on the subject after defendant rests. (Lipman v. Ashburn, 106 Cal.App.2d 616, 620[4], 235 P.2d 627.)

[12, 13] There is likewise no merit in plaintiff's contention that the trial court erred in refusing plaintiff the right to demonstrate to the jury his ability to sustain an erection. Such evidence was merely cumulative of evidence previously received. It is within the discretion of the trial court whether or not to receive cumulative evidence. (Code Civ.Proc. § 2044; Kalmus v. Kalmus, 103 Cal.App.2d 405, 423[26], 230 P.2d 57 (hearing denied by the Supreme Court); Moore v. Marshall, 41 Cal. App.2d 490, 494[5], 107 P.2d 89.)

[14-16] Fourth: *Did the court err in giving the instructions hereinafter set forth?*

No. The court instructed the jury as follows:

(A) "By undertaking professional service to a patient, a physician and surgeon impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing, practicing in the same locality.

"It is further his duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality, to use reasonable diligence and his best judgment in the exercise of his skill and application of his learning in an effort to accomplish the purpose for which he is employed."

The court deleted from the proposed instruction the following language: "If you should find that the defendant failed in any of the duties I have mentioned, and that such failure was a proximate cause of injury to the plaintiff [and if you find against the defense of contributory negligence, an issue that you must consider and determine], then your verdict must be in plaintiff's favor."

The deletion of this portion of the instruction was proper. The original instruction was a formula instruction since in effect it directed a verdict in plaintiff's favor in the event certain things were found by the jurors. Formula instructions are not favored in the law. (*Tice v. Pacific Elec. Ry. Co.*, 36 Cal.App.2d 66, 71 [6], 96 P.2d 1022, 97 P.2d 844. (hearing denied by the Supreme Court).)

Every element embraced in the deleted paragraph is fully covered by other instructions read to the jury. It is settled that instructions must be read together and harmonized. (*Kraft v. Nemeth*, 115 Cal. App.2d 50, 53[3], 251 P.2d 355.) The trial judge properly instructed the jury on the definition of negligence, the definition of ordinary care and proximate cause. The criticized instruction told the jury the violation of any duty defined in the instruction was a form of negligence. Since negligence, ordinary care and proximate cause had already been defined for the jury, it is clear that the jury was adequately instructed with reference to the liability of the physician and surgeon.

[17] (B) The trial court gave six instructions in which the jury were told that under certain conditions they might find in favor of defendant, while it gave only one instruction as to when they might find for plaintiff and against defendant. No authority is cited by plaintiff in support of his proposition that this was error. He has not singled out any instruction or pointed out where there was any error in the giving of such an instruction. Apparently his theory is that the instructions, even if they correctly state the law, must be given in such a fashion that the number which presumably favor the plaintiff will equal or counter-balance the number which presumably favor the defendant. Such is not the law. The instructions given were correct.

[18, 19] (C) The trial court instructed the jury on contributory negligence thus:

"In determining whether negligence or proximate cause or contributory negligence has been proved by a preponderance of

evidence, you should consider all the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. Thus, if evidence presented by the plaintiff himself should support a finding that he was guilty of contributory negligence, that finding would be adequately supported, even if the defendant produced no additional evidence to the same effect. In like manner, a defendant's own evidence may show, and support a finding of, negligence on his part."

The foregoing instruction was correct and plaintiff has waived any right to object to the giving of such instruction since he requested several instructions upon the same issue.

The rule is accurately stated by Mr. Justice Peek in *Jansen v. Southern Pac. Co.*, 112 Cal.App.2d 833, 845, 247 P.2d 581, 588, thus: "It is well established that 'A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the insistence of his adversary when he requested a substantially similar one.' [Citing cases.]" Since plaintiff requested the court to submit the issue of contributory negligence to the jury in two separate instructions, the foregoing rule is here applicable.

(D) The court instructed the jury as to the elements of damage as follows:

"If under the court's instructions you should find that said plaintiff is entitled to a verdict, you will consider not only the elements of damage heretofore mentioned, but you will award him also such sum as will compensate reasonably for any pain, discomfort, fears, anxiety, and other mental and emotional distresses, if any, suffered by him, and approximately resulting from the injury in question, and for such like detriment, if any, as he is reasonably certain to suffer in the future from the same cause."

Plaintiff claims that it was error to give the foregoing instruction because he asked for instructions which were refused that contained as elements of damage, shame,

humiliation, wounded pride, worry, etc. Such objections are without merit. Clearly the words used in the instruction "other mental and emotional distresses" covered the elements of damages upon which plaintiff had requested instructions.

Freiburg v. Israel, 45 Cal.App. 138, 187 P. 130, cited by plaintiff, is not applicable to the facts of the present case. In that case no question of the propriety of any instruction was involved.

[20] Fifth: *Did the trial court commit prejudicial error in limiting the time for delivery of plaintiff's opening statement?*

No. The trial judge allowed defendant's and plaintiff's counsel one half hour to make their opening statement to the jury. Plaintiff now complains that he was prejudiced in not having more time to make his opening statement. This claim is without merit. Before the evidence was received the trial judge made a statement to the jury relative to the nature of the case, after which defendant's counsel suggested that he was not quite satisfied with the impression the statement might have created, after which the court stated that counsel would have many opportunities to clear up the situation in the voir dire examination. At this point plaintiff's counsel stated, "I think the court's statement was very fair, on the face of it, and I think no further explanation is needed."

It is clear that plaintiff has thus conceded that between his own statement to the jury and that of the court, the jury was fully advised of the nature of the case. In any event the determination of the length of time for the opening statement is purely a matter for the discretion of the trial court. In the absence of a showing of an abuse of such discretion, the trial court's designation of the limits of an argument will not be disturbed on appeal. (*Rosenfield v. Vosper*, 86 Cal. App.2d 687, 695[10], 195 P.2d 530 (hearing denied by the Supreme Court).) In the instant case there is no showing of an abuse of discretion of the trial court and the foregoing rule is applicable.

[21] Sixth: *Did the trial court err in refusing to allow notebooks to be passed*

to the jurors prior to the opening statement of plaintiff's counsel?

No. Immediately prior to making his opening statement counsel for plaintiff requested the trial judge for permission to give to each of the jurors a notebook and pencil to assist them in note taking. The trial judge stated that he would not take any action upon the request "at this time." He further stated to the jurors that they could take such notes as they desired. Clearly there is no merit in plaintiff's contention that this was error.

[22] Seventh: *Did the trial court commit any prejudicial misconduct in making remarks during the course of the trial?*

No. Typical examples of the remarks of which plaintiff complains are the following:

i. The trial judge stated to the prospective jurors before the voir dire examination: "This will not be a pleasant case to try. Unfortunately, neither the court nor the jurors in any way can choose the case we would like to try."

ii. "I am only suggesting that we speed up the trial as much as possible."

iii. "Let's not prove that four times."

iv. "You don't have to spend so much detail on it."

v. "This trial in my opinion has been unduly prolonged."

vi. "But we are not going to go over everything in a hypothetical question twice."

vii. "Let's not go over it again."

viii. "Let's get to something else."

ix. "And I think further offers, speaking in a light vein, will become contemptuous."

x. "Disagreement is common in the medical professions, is it not?"

It is not shown that any or all of the foregoing remarks were improper or resulted in prejudice to plaintiff. In addition the rule is established that if the harmful result of the misconduct of the trial judge can be obviated by bringing the matter to his attention, as a predicate to claiming error on appeal, (a) an assignment of such misconduct must be made in the trial court, and

(b) a request made of that court to instruct the jury to disregard it. (Church v. Payne, 36 Cal.App.2d 382, 400, 97 P.2d 819 (hearing denied by the Supreme Court); Metzenbaum v. Metzenbaum, 96 Cal.App.2d 197, 199[6], 214 P.2d 603; Rednall v. Thompson, 108 Cal.App.2d 662, 665[1], 239 P.2d 693.) In none of the instances of which plaintiff complains did he meet any of the foregoing requirements. Hence he is barred from urging error therein on this appeal.

[23] Eighth: *Did the court err in ordering plaintiff's counsel to erase certain material which he had placed on a blackboard prior to the conclusion of plaintiff's case, and which he intended to use in his opening argument to the jury?*

No. Plaintiff's counsel placed upon a blackboard prior to the completion of his case certain material which he apparently intended to use, not as evidence but as an aid in the presentation of his opening argument to the jury. There were a number of jurors present in the courtroom at the time it was placed on the blackboard. The reception of testimony had not been completed and any juror could have been misled into believing it was evidence and perhaps some sort of exhibit in the case.

Clearly the court was correct in ordering the material removed. Further, plaintiff, by failing to object in the trial court to the judge's order, has waived the right to urge the order as misconduct on appeal. (See Metzenbaum v. Metzenbaum, *supra*; Church v. Payne, *supra*.)

[24] Ninth: *Did the trial court err in limiting the time of the argument to the jurors to two hours on each side?*

No. The trial judge at the close of the evidence stated that each side would be limited to two hours in their argument to the jury. On the following morning counsel for plaintiff requested permission to put on further rebuttal testimony and made further offers of proof with reference to two of his exhibits. This argument took approximately thirty minutes in chambers. As a result of the use of this time, and the time necessary to put on the rebuttal testimony, the court cut down the time for closing oral argument to one hour and forty-

five minutes. The record fails to disclose that plaintiff requested any further or additional time. Hence he has waived any right to urge that he did not have sufficient time to present his argument to the jury.

It would obviously have been unfair to defendant for plaintiff to start with an opening argument to be followed by defendant's argument and then have only a portion of plaintiff's closing argument to be followed by a further summation by plaintiff on the succeeding day immediately before the instructions to the jury. The court exercised a sound discretion in holding that it would be better to have both arguments presented on the same day.

The time to be allowed for oral argument is a matter resting within the sound discretion of the trial court. Unless there is an obvious abuse of discretion its ruling will not be disturbed on appeal. (Rosenfield v. Vosper, 86 Cal.App.2d 687, 695[10], 195 P.2d 530.) In the instant case the foregoing rule is applicable since there is no showing of an abuse of discretion in the trial court's order.

[25] Tenth: *Were jurors Sandstrom and Smith guilty of misconduct?*

No. (a) Plaintiff in his motion for a new trial filed an affidavit of Alexander Hartman stating that juror Sandstrom had, in the presence of the jurors, stated that "Dr. Newman [defendant] had a good reputation in South Gate." Juror Sandstrom signed an affidavit categorically denying that she had made such statement. In passing upon conflicting affidavits the implied finding of the trial court supported, as in the instant case, by substantial evidence will not be disturbed on appeal. (MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 468[5], 271 P. 509.) Therefore we must assume the trial court found that the juror had not made the statement attributed to her.

(b) The rule just stated is applicable to the alleged misconduct of juror Smith. Affidavits were filed stating that she had made false statements on her voir dire examination and had stated during the deliberations of the jury that she had had an operation at one time with a bad result requiring some repair work, and that she had not sued her doctor and she saw no reason

for doing so. Juror Smith filed an affidavit denying that she had made such statements. This supports the implied finding of the trial court to the same effect.

Eleventh: *Did the trial court commit prejudicial error in admitting pictures of the operating room of defendant in evidence?*

No. Over objection of plaintiff two photographs of the interior of defendant's operating room were admitted in evidence. In view of the fact that the operative procedure was preformed in the office of defendant, it is certain that no prejudicial error could result in the admission of the pictures in question. In the light of the issues, no prejudice appears to have been suffered from their admission.

[26] The record is free from error. The order denying the motion for a new trial being nonappealable is dismissed. (See cases cited in 6 West's California Digest (1951) Appeal and Error, ¶782, page 78.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



122 Cal.App.2d 7

VON HASSELN v. VON HASSELN.

Civ. 19765.

District Court of Appeal, Second District,
Division 1, California.

Dec. 14, 1953.

Action for recovery of possession of real property, and rents, issues and profits therefrom, and for damages for the withholding thereof, brought by plaintiff, who based his claim on a purportedly lost deed granting title to him. The Superior Court, Los Angeles County, James G. Whyte, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence sus-

tained verdict and judgment for plaintiff, but that plaintiff's damages were improperly assessed.

Cause remanded for reassessment of damages; judgment otherwise affirmed.

1. Appeal and Error ¶930(1)

In reviewing evidence, on appeal from judgment for plaintiff, all conflicts must be resolved in favor of plaintiff, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

2. Appeal and Error ¶989

When a verdict is attacked as being unsupported by evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by the jury.

3. Appeal and Error ¶996

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

4. Appeal and Error ¶1010(1)

Lost Instruments ¶8(3)

To establish execution and contents of a lost instrument, evidence must be clear, satisfactory, and convincing, but whether evidence in any particular case is of that character must be left largely to trial court, whose determination thereon, if supported by substantial evidence, is conclusive.

5. Appeal and Error ¶1003

Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category, and to warrant rejection of statements given by witness who has been believed by trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

6. Appeal and Error ¶994(2, 3), 1002, 1011(1)

Conflicts in evidence and testimony which is subject to justifiable suspicion do not justify reversal of judgment, for it is exclusive province of trial judge or jury

to determine credibility of witnesses and truth of facts upon which a determination depends.

7. Appeal and Error ⇨1010(1)

Deeds ⇨66

Delivery or nondelivery of a deed is a question of fact to be determined by the surrounding circumstances of the transaction, and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery, such finding will not be interfered with on appeal.

8. Lost Instruments ⇨23(3)

In action for recovery of possession of real property, and rents, issues and profits therefrom and for damages for the withholding thereof, wherein plaintiff based his claim on a purportedly lost deed granting title to him, evidence sustained verdict and judgment for plaintiff.

9. Forcible Entry and Detainer ⇨30(1)

In action for wrongful dispossession of real property, wherein plaintiff conceded that his grantors had right to possession of such property during their lives, no dispossession of plaintiff could take place until death of last surviving grantor, and no damages for dispossession could be awarded plaintiff for period prior to death of such grantor.

Crider, Runkle & Tilson, and Garvin F. Shallenberger, Los Angeles, for appellant.

William Jerome Pollack, Los Angeles, and Matthew M. Richman, Beverly Hills, for respondent.

DRAPEAU, Justice.

The parties to this action are brothers. The plaintiff, William, alleges in his complaint that he is the owner and entitled to possession of a parcel of realty in Los Angeles; that defendant wrongfully entered and ousted him, took possession of the property and asserts an adverse interest therein which claim is without right.

By his answer, defendant alleges sole ownership of the property in him, and de-

nies that plaintiff has any right, title or interest thereto.

Upon the issues framed by the pleadings, and an affirmative answer to the following interrogatory presented to it, the jury returned a verdict in favor of plaintiff and assessed his damages at \$2,500:

"Did Theresa Patton and Otto Patton on or about February 2, 1942, sign and deliver to the plaintiff, William P. Von Hasseln, a grant deed to certain improved real property (describing it) generally known and referred to as premises 1914 Clinton Street, Los Angeles, California, in which deed said William P. Von Hasseln was named as grantee?"

From the judgment which followed, defendant appeals.

The following grounds are urged for a reversal:

(a) Proof of the contents of the alleged deed to plaintiff should not have been admitted as evidence;

(b) There is not sufficient evidence of delivery of the alleged deed or of intent to deliver it to sustain the judgment;

(c) There was insufficient evidence as to the contents of the alleged deed to sustain the judgment;

(d) Other errors which were prejudicial to defendant.

In 1942, Theresa Patton, mother of the parties hereto, and Otto Patton, their stepfather, owned two parcels of real property, one in Santa Ana and the other in Los Angeles.

The latter, known as the Clinton Street property, is the subject of this suit. On February 2, 1942, the Pattons deeded the Santa Ana property to defendant. And plaintiff asserts that they deeded the Clinton Street property to him on the same date but he did not record the deed.

Mrs. Patton died on June 3, 1950, and Otto Patton died on September 11, 1950. Before he died, to-wit: on June 19, 1950, Mr. Patton deeded the Clinton Street property to defendant. This deed was recorded on August 16, 1950.

Plaintiff testified that he had a conversation with his mother and his stepfather in

January of 1942 when they told him "that Gus wanted to go ahead and build up the business down in Santa Ana and that they were getting too old, that they couldn't afford to let him get a note on that property and in their name, that they were going to ask me if it would be all right to deed the property to him so he could get his own loan, assume his own debt, if they would leave me this place 'so we could have an even division made to be right with both of you boys.' * * * Mother Patton * * * was telling me what they had decided 'and would that be agreeable to you,' and I said, 'Well, he would be getting the benefit of the doubt.' I says, 'After all, I wouldn't be getting any of this until after you folks died. However, I am working and I don't need the money, so it would be all right with me.' * * * they had to live on the income, you know, and still live in the house, too. So they says, 'Yes, it is kind of one-sided now.' That is the reason they were asking me if it was agreeable. * * * I said it would be. * * * when they delivered the deeds to them they come up and brought one of them to me. * * *

"Q. What kind of a deed was it? A. A grant deed to the property.

"Q. Are those the words you saw on the instrument? A. That is what I thought it was.

"Q. Now, do you recall whether it bore a date? A. Well, it was right after, about a month or so after the first conversation. * * * February, I believe, of 1942.

"Q. At the beginning? A. Yes.

"Q. And do you recall anything else? Did you examine this document which they delivered to you? A. I just glanced at it.

"Q. What did you see in it when you looked at it? A. * * * Just 'Block something, Lot 5, Lot 3,' something like that.

"Q. Lot 5 and Lot 3? A. No, Lot 4, I believe, Block 3, something like that.

"Q. Lot 4 and Lot 5 in Block 3? A. Something like that.

"Q. Did you see anything else on that deed? A. Well, the seal. I know there was Mr. William Letts' name.

"Q. That was on the other side? Did you see your name on that instrument?

A. Yes, sir.

"Q. And did you see your mother and your father's name on that instrument? A. Yes, sir.

"Q. And did you see any signatures on that instrument? A. I believe there was a witness of some sort.

"Q. Did you see either your mother or your father's signature on that instrument? A. Yes, sir, both of them.

"Q. You saw them there? A. Yes. * * * It was a printed form with typing on it. * * *

"Q. Mr. Von Hessel, when they delivered this deed to you, what did you do with it? A. I put it in the safe that we all use in their house for safety and all the important papers, like insurance papers and all, we always put it in there in case of fire.

"Q. Where did you say you put it? A. In their safe. * * * Mr. Patton's old safe he had. He never locked it, but it was there in the house and always closed but not locked, you could just open it up and look in.

"Q. Did you have a cubicle or a box in that safe? A. Yes, sir.

"Q. And did you keep other documents and valuables in there? A. Yes, sir. * * * Insurance papers, and some cash, and I think I had a hundred silver dollars saved up at the time, just for the fun of it. * * *

"Q. Do I understand you to say that you took this deed and put it in that cubicle where you had your other papers? A. Yes.

"Q. Did you ever have this deed recorded? A. Never had it recorded."

Plaintiff also testified that he and his wife moved into an apartment on the Clinton Street property in 1948. They looked for a house and intended to buy one. His mother asked him "What do you want to buy a house for? * * * You have got one now, you have got two." There were two houses on the property and seven or eight tenants. Mr. Patton took him around and introduced him to the tenants.

He said, "I want you to meet the new landlord." Plaintiff lived on the property for about two years during which he had occasion to look in the safe many times. He could see what was in his box and thought the deed was still there.

In May of 1950, plaintiff's mother became ill and defendant took her to Santa Ana. Just before she died on June 3rd, defendant telephoned plaintiff and told him that he was bringing their mother back to the Clinton Street house with a nurse; that there would not be room for all of them, and told plaintiff to "get out right now." Plaintiff and his wife moved to a hotel.

Later when plaintiff tried to see his stepfather, defendant always came to the door and told him that Mr. Patton did not want to see him. Plaintiff was in the house only once after his mother died. That was when he went "to find out whether my papers were in the safe and he (defendant) said, 'No, nothing was in the safe * * * there was nothing there.'"

Neither brother told the other that he had a deed to the Clinton Street property.

On cross-examination, in reply to the question: "Now, after you said this deed was handed to you, did you regard that as your property?" plaintiff stated: "I did."

In an attempt to impeach the testimony of plaintiff, he was interrogated on cross-examination about another action filed by him and later dismissed. That was to cancel the deed from Otto Patton to defendant. It contained allegations referring to a will made by the Pattons in which plaintiff was named their sole heir.

On redirect examination, plaintiff explained that when he learned of the allegation referring to a will, he told his attorney that was a mistake; instructed him to dismiss that suit and file the instant action. Again at the behest of his counsel he testified:

"Q. Now, Mr. Von Hesseln, Mr. Tilson keeps referring to a paper of some kind that you received in February of 1942. Do you know what that paper was that you received at that time? A. Yes, sir.

"Q. What was it? A. Grant deed.

"Q. Do you know who the grantors were in that instrument? A. Yes, sir.

"Q. Who were they? A. Otto Patton and Theresa C. Patton.

"Q. Do you know who the grantee was in that deed? A. Yes.

"Q. Who was it? A. I.

"Q. Your name appeared there as grantee? A. Yes, sir.

"Q. Was it signed by your mother and stepfather? A. Yes, sir.

"Q. Was it acknowledged before a notary public? A. It was.

"Q. And that notary public's name was what? A. William Letts.

"Q. That document, that grant deed, was delivered to you, was it not? A. Yes.

"Q. At your home? A. Yes, sir.

"Q. By Otto Patton? A. And mother.

"Q. Mother Patton? A. Yes, sir.

"Q. And subsequently you took it over to the Patton house * * * And you placed it in a cubicle in a safe in that house which was reserved for you? A. That is right.

"Q. And on a number of occasions after that time you went to that safe to put things in and take things out, is that correct? A. That is right.

"Q. And on some of those occasions did you see this grant deed? A. Yes, sir.

"Q. Now, did your brother ever at any time tell you until after Otto Patton's death that Otto Patton had deeded this property to him? A. No, he did not.

"Q. In fact, when you learned for the first time of that deed you then went to see your attorney * * * And because Mr. Pollack was not there you talked to the young lady that was there, is that correct? A. That is right.

"Q. Did you at that time tell either Mr. Pollack or Vivian Feld that Otto Patton had left a will in which he left everything to you as his sole heir? A. No.

"Q. Did you ever tell Mr. Pollack or Miss Feld that you were the sole heir at law of Otto Patton? A. No."

Defendant testified that after the death of Otto Patton, in September of 1950, he told plaintiff that he had a deed to the Clinton Street property. And that plaintiff said: "Why, this place is supposed to belong to me." I told him, 'If you have any papers, Bill, that would show in any way that you are entitled to this property, you don't have to ask me to get off here, I will get off, because it belongs to you and we will be perfect friends.'"

The witnesses Bishop and Bowen both testified to conversations they had with Otto and Theresa Patton in which the latter stated they had decided to divide their property between the plaintiff and the defendant, and that they had deeded the Clinton Street property to the plaintiff.

It was stipulated at the trial that William Letts, the notary public, whose name and seal plaintiff testified appeared on the grant deed here in question, was dead, and that if his wife were called, she would testify that he died August 24, 1949, and that since his death his notarial records had been destroyed.

[1-3] As was stated by this court in the recent case of *Massow v. Gianacis*, 120 Cal.App.2d 24, 260 P.2d 655, 657: "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (*Crawford v. Southern Pac. Co.*, 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.)"

[4] Respondent bases his claim to the property in question upon a purportedly lost instrument. And, as stated in *Murray v. Guarantee Trust, etc., Bank*, 79 Cal.App.

69, 76, 248 P. 1039, 1041: "It is the rule that in order to establish the execution and contents of a lost instrument it is necessary that the evidence be clear, satisfactory, and convincing; but, as in actions to prove a trust by parol, whether the evidence in any particular case is of that character must be left largely to the trial court, and where there is substantial evidence supporting its finding its determination thereon must be accepted as conclusive on appeal. *Sherman v. Sandell*, 106 Cal. 373, 39 P. 797; *Harris v. Harris*, 136 Cal. 379, 69 P. 23; *Bollinger v. Bollinger*, 154 Cal. 695, 99 P. 196." See, also, 16 Cal. Jur. 703, Sec. 13, where it is said: "While the parol evidence should be clear and certain, it is not necessary that the witness state the contents (of a lost instrument) with verbal accuracy, the substance being all that is required."

Appellant's main contention appears to be that respondent's recollection of the facts which he testified to "after having had a glance at the instrument is not just inherently improbable but absolutely impossible * * *."

[5,6] Upon that subject the late case of *Evje v. City Title Ins. Co.*, 120 Cal.App. 2d 488, 261 P.2d 279, 280, has this to say: "'Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category (citation). To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citations.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Citations.)' *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759; *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 183, 195 P.2d 427; *Cox v. City of Los Angeles*, 100 Cal.App.2d

378, 381, 223 P.2d 868." See, also, *Postier v. Landau*, 121 Cal.App.2d 98, 262 P.2d 565.

While it is true that respondent said he "glanced" at the deed, he further testified that he *saw* the contents; that his name appeared therein as grantee; that it was signed by the Pattons and that it was acknowledged before a notary public whose name was William Letts. Although he was not completely sure of the legal description of the property, he testified that it was described in the deed as "also known as 1914 Clinton Street."

[7] Delivery or nondelivery of a deed "is a question of fact to be determined by the surrounding circumstances of the transaction and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery such finding will not be interfered with on appeal." *Chaffee v. Sorensen*, 107 Cal.App. 2d 284, 288, 236 P.2d 851, 853.

[8] The evidence as revealed by the above resume is amply sufficient to sustain the verdict of the jury and the judgment.

Appellant also urges that the following instruction was erroneously given because it would give respondent a reasonable rental value of the premises from about June 4 or 5, 1950, until time of trial:

"If under the Court's Instructions you find for the plaintiff you will assess the amount of his damages. The measure of said damages is the reasonable rental value of said property during the period possession thereof was withheld from plaintiff by the defendant. Given on Court's own motion."

It is contended that, since respondent conceded the Pattons' right to possession of the property during their lives, no dispossession could take place until the death of Otto Patton on September 11, 1950.

[9] We agree that such damage should have been assessed from September 11, 1950, instead of from June 5, 1950, until the time of trial.

The cause is remanded to the trial court for reassessment of damages in accordance with the views herein expressed. Otherwise, and in all other respects, the judgment is affirmed. Each party shall bear his respective costs of appeal.

WHITE, P. J., and DORAN, J., concur.



122 Cal.App.2d 42

In re KELLEY'S ESTATE.

HUNTINGTON v. WILSON.

Civ. 19812.

District Court of Appeal, Second District,
Division 1, California.

Dec. 15, 1953.

Proceeding in the matter of the estate of deceased testator, wherein executrix of deceased widow of deceased testator elected, on behalf of estate of deceased widow, to take under statute providing that on death of either husband or wife one-half of the community property belongs to the surviving spouse. The Superior Court of Los Angeles County, Victor R. Hansen, J., entered a decree in favor of the executrix, and one of the beneficiaries named by deceased testator in his will appealed. The District Court of Appeal, Drapeau, J., held that executrix had right to make such election.

Decree affirmed.

Doran, J., dissented.

1. Husband and Wife ⇨273(1)

On death of husband, community property, subject to administration, belongs to surviving wife and never did belong to husband. Civ.Code, § 161a; Probate Code, § 201.

2. Wills ⇨782(12)

Will of one spouse may be so framed as to put surviving spouse to an election whether to take under will or under statute

providing that on death of either husband or wife, one-half of community property belongs to surviving spouse. Civ.Code, § 161a; Probate Code, § 201.

3. Wills ⚡790

If widow of testator is put to an election whether to take under will or under statute providing that on death of either husband or wife one-half of community property belongs to surviving spouse, she need not decide until estate is to be distributed whether she wishes to claim her share in the community property or the benefits provided for her in the will. Civ.Code, § 161a; Probate Code, § 201.

4. Wills ⚡785

Where husband executed will and died, and wife, who died about 11 months later, made no election whether to take under will or under statute providing that on death of either husband or wife one-half of community property belongs to surviving spouse, wife's executrix had right to elect to take, on behalf of wife's estate, under statute providing that on death of either husband or wife one-half of community property belongs to surviving spouse, rather than under the husband's will, while husband's estate was still pending in probate. Civ.Code, § 161a; Probate Code, § 201.

5. Wills ⚡785

Rule that right to elect to take under a will is a personal right, applies to expectancies, and not to vested interests, such as right of widow of testator under statute providing that on death of either husband or wife one-half of community property belongs to surviving spouse, and therefore right to elect to take under statute survives in personal representative of testator's widow on death of widow. Civ.Code, § 161a; Probate Code, § 201.

6. Wills ⚡800

Community interest of widow of testator may be divested when widow agrees and consents to provisions of testator's will, or when widow takes benefits under the will. Civ.Code, § 161a; Probate Code, § 201.

O'Melveny & Myers, Richard C. Bergen and Richard F. Igl, Los Angeles, for appellant.

Craig, Weller & Laugharn, Frank C. Weller, Hubert F. Laugharn and Thomas S. Tobin, Los Angeles, for respondent.

DRAPEAU, Justice.

William H. Kelley and Jessie B. Kelley married in 1899. They lived together as husband and wife for more than fifty years. Mr. Kelley died March 16, 1951; Mrs. Kelley died February 9, 1952. They came to California from Indiana in 1930, and lived in Glendale for the rest of their lives.

By his will Mr. Kelley directed that all of his property, after payment of his debts, be distributed to a testamentary trust. From the trust his widow was to get the net income and so much of the corpus as might be necessary for her support and maintenance during her lifetime. After the widow died the trust property was to go to Mr. Kelley's sister and to certain of his nieces named in his will.

The will provided in the alternative however that if the widow should "elect to take under the law and not under the will" the provision for the trust would be void; "and after my wife shall receive the minimum allowed her by law" all of the residue of the estate would go to the sister and nieces.

Mrs. Kelley made no election under her husband's will before she died.

After Mrs. Kelley's will was admitted to probate, her executrix filed an election in Mr. Kelley's estate, which was still pending in probate, to take Mrs. Kelley's community half of her deceased husband's estate.

Then Mrs. Kelley's executrix filed this proceeding in Mr. Kelley's estate, praying that an order be made, determining to whom the property should go.

The Probate Court made findings of fact, and ordered, adjudged, and decreed: (a) that a substantial part of Mr. Kelley's estate was acquired by him and his wife subsequent to 1927 and was their community property; (b) that the estate of the deceased wife is entitled to one-half thereof; and (c) that the executrix of Mrs. Kelley's

estate had the right to file an election on behalf of Mrs. Kelley to take her widow's community rights under the law and to waive her rights under her husband's will.

Katherine G. Wilson, one of the nieces named in Mr. Kelley's will, appeals from the findings and decree. (The findings and decree are all in one order.)

The question in this case may then be stated: Did the election required by the husband's will have to be made during the widow's lifetime, or could the widow's executrix make such election during probate of the husband's estate?

[1] Our Civil Code Section 161a, enacted in 1927, defines community property acquired during the marriage relation as a present, existing, and equal interest in the wife. This has been defined by our courts as a "vested" interest. Subject to administration, *Estate of Kurt*, 83 Cal.App.2d 681, 189 P.2d 528, it belongs to the surviving wife and never did belong to the husband. *Estate of King*, 19 Cal.2d 354, 121 P.2d 716; *Horton v. Horton*, 115 Cal.App.2d 360, 252 P.2d 397; *Cooke v. Cooke*, 65 Cal.App.2d 260, 150 P.2d 514.

Section 201 of our Probate Code provides that upon the death of either husband or wife one-half of the community property belongs to the surviving spouse, the other half being subject to the testamentary disposition of the decedent.

[2] A will may be so framed, however, as to put the surviving spouse to an election whether to take under the will or under the statute. In *re Gray's Estate*, 159 Cal. 159, 112 P. 890; *Estate of Klingenberg*, 94 Cal. App.2d 240, 210 P.2d 514.

[3] But "If a widow is put to an election, she need not decide until the estate is to be distributed whether she wishes to claim her share in the community property or the benefits provided for her in the will." *Estate of Roberts*, 27 Cal.2d 70, at p. 75, 162 P.2d 461, at page 464, and cases cited.

[4] In consonance with the principles of law thus declared it follows that Mrs. Kelley owned a vested community interest in her husband's estate; that she did not have to make the election required by his

will until the decree of distribution in that estate; and that Mrs. Kelley's executrix not only had the right to, but was duty bound to make the election.

[5] Cases cited by appellant in support of her contention that the wife's right to make the election under the will was personal, and ceased and determined with her death, do not apply to the vested interest here under consideration. That rule applies to expectancies; not to vested interests. *Estate of Field*, 38 Cal.2d 151, 238 P.2d 578.

[6] A widow's community interest may be divested when she agrees and consents to the provisions of her husband's will, or when she takes benefits under the provisions of the will. In this respect the law follows the principles of estoppel. *Estate of Cecala*, 104 Cal.App.2d 526, 232 P.2d 48; *Estate of Klingenberg*, 94 Cal.App.2d 240, 210 P.2d 514, *supra*. "* * * before a widow can be denied her right to elect upon distribution to take her half of the community property, it must be found that, with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid those acts and disclaim her intent." *Estate of McCarthy*, 127 Cal.App. 80, 85, 15 P.2d 223, 225, quoted with approval in *Estate of Klingenberg*, *supra*.

The decree is affirmed.

WHITE, Presiding Justice.

I concur.

The facts in the instant case present a situation for application of an age old principle that law and good morals should be one and inseparable. The will of the decedent herein gave his widow only the income from the property of the estate during her lifetime, and on her death, the corpus was bequeathed to the husband's three nieces and a sister. Concededly, the time within which the widow might make an election had not expired when she died. Her death terminated all of her rights and interests under the will. Under the facts of this case the problem of an "election" was resolved by her death.

As pointed out by respondent, "There was no longer any choice which could be made. The only thing which remained was her one-half interest in the community property which vested in her on the death of her husband under the provisions of Section 201 of the Probate Code. This vested interest in turn became vested in her estate on her death. The widow, or her estate, can now get nothing under the Will and the appellant is trying to deprive her, or her estate, of her one-half interest in the community property given to her by statute. The effect of appellant's contention in this case is that when the widow has not made an election, although the time for election has not expired, that she receives nothing from an estate which she helped to accumulate and conserve for over a period of fifty years."

To permit such an injustice seems to me shocking and unconscionable, and should not have the imprimatur of the law.

DORAN, J., dissents.



122 Cal.App.2d 76

DOMINGUEZ v. GALINDO.

Civ. 8321.

District Court of Appeal, Third District,
California.

Dec. 15, 1953.

Wrongful death action brought by special administrator of deceased who was thrown to highway when truck bed in which he was riding left its fastenings and fell off. The Superior Court, Yolo County, C. C. McDonald, J., entered judgment for special administrator, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that in view of fact that statute authorizes wrongful death action to be brought by "personal representative" and makes no distinction as to whether that

representative be special or general, and fact that action is for heirs only, special administrator had authority as such officer to bring wrongful death action as trustee for heirs of deceased.

Judgment affirmed.

1. Executors and Administrators ⌘22(3)

Where petition for special letters of administration stated among other things that there was need for special administration, and court acted upon petition, and declared that it was appointing petitioner as special administrator, and ordered clerk to issue letters to him in that capacity, and clerk issued letters as general letters, letters issued were in fact special letters of administration. Probate Code, § 502.

2. Executors and Administrators ⌘22(3)

Where letters of administration issued to administrator, although containing certain defects, were in fact special letters of administration, later order of Probate Court amending letters by inserting word "special" in front of word administrator wherever it appeared in letters, was not legally necessary to give administrator capacity of special administrator. Probate Code, § 502.

3. Executors and Administrators ⌘26(2)

In view of fact that bond filed by administrator substantially complied with requirements of law concerning bond for special administrator, and specifically referred to order of court appointing administrator as special administrator, fact that bond did not refer to order specifically as appointing administrator as special administrator was immaterial and bond was sufficient as bond of special administrator.

4. Death ⌘31(3), 32, 101

Wrongful death action is solely for benefit of heirs, to compensate them for pecuniary injury suffered by reason of loss of relative, and money recovered in such action belongs to heirs only, and administrator of deceased has right to bring action only because statute authorizes him to do so, and he is statutory trustee to recover damages for heirs. Code Civ.Proc. § 377.

5. Death ⌘31(3)

In view of fact that statute authorizes wrongful death action by "personal repre-

sentative", and makes no distinction as to whether that representative be special or general, and fact that action brought is for heirs only, special administrator had authority as such officer to bring wrongful death action as trustee for heirs of deceased. Code Civ.Proc. § 377.

A. G. Bailey & John A. Young, Woodland, for appellant.

E. L. Means & James F. Roach, Woodland, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment for \$10,000 awarded to respondent (plaintiff below) as special administrator of the estate of Louis Valdez Bravo in a wrongful death action brought on behalf of the decedent's widow and children.

On July 1, 1950 Bravo was riding on the bed of a truck owned and being driven by appellant Galindo. Bravo was then a business invitee of appellant. The truck bed left its fastenings and fell off, throwing Bravo on to the highway and causing injuries from which he died. On January 5, 1951 a petition was filed for letters of administration of Bravo's estate, which petition was in due course noticed for hearing, but no further proceedings were taken. General letters not having been issued, on March 16, 1951 respondent petitioned for special letters by a petition which stated, among other things, that there had been a delay in the issuance of general letters and that there was a need for special administration. On the same day an order was made by the probate court appointing respondent as special administrator of the estate of Bravo. It was ordered that as such administrator he give bond in the sum of \$50 and that upon his giving such bond and taking the oath required by law "special letters of administration be issued to him in conformity with this order." On May 29, 1951 respondent filed a bond and letters were issued to him. The bond was executed by the Globe Indemnity Company, a corporation. The condition of the obligation was declared to be that since the probate court had appointed the principal administrator

of the estate of Bravo and had directed that "letters of administration" be issued to him, the obligation would be void if he faithfully executed the duties of his trust, otherwise to remain in full force and effect. The letters issued by the clerk were captioned in the estate of Bravo and entitled "Letters of Administration". The body of the document read: "Adolfo G. Dominguez is hereby appointed Administrator of the Estate of Louis Valdez Bravo, * * *, Deceased," and by the oath appended thereto and executed by respondent he swore to perform according to law the duties of his office. It is to be noticed that the letters were not captioned as being special letters nor did they recite in the body of the document that Dominguez was appointed special administrator. On June 22, 1951, respondent filed a complaint against appellant which recited the following: That Bravo was dead; that on the 29th of May, 1951, letters of administration upon his estate had been issued to respondent; that on that day respondent had qualified as such administrator and was the only appointed, qualified and acting administrator of the estate of Bravo; that he brought the action for the benefit of the widow and children of Bravo, naming them. It is to be noticed that the complaint does not refer to respondent as being the special administrator of the estate of Bravo. Appellant answered this complaint on September 11, 1951, more than a year after the death of Bravo, putting in issue, among other things, the capacity of respondent to maintain the suit and pleading the bar of the statute of limitations. On March 10, 1952 the probate court ordered the issued letters be amended nunc pro tunc as of the date of their issuance by adding the word "special" before the word "administrator" wherever it occurred therein. No change was made in the bond. Thereafter and at the trial, on order of court, respondent amended his complaint so as to allege his status as said special administrator. The court, sitting without a jury, gave judgment for respondent as above stated.

Appellant presents two contentions: 1. That the letters issued to respondent, considered as general letters, were void be-

cause issued without notice and without following the procedure requisite to the issuance of general letters; that they were equally void considered as special letters since they did not purport to be such, and respondent neither took the oath nor filed the bond of a special administrator. Consequently, argues appellant, he had no authority to begin any action and the action must be considered as not having been in fact begun within a year of the death of Bravo. 2. If respondent be considered as having been appointed special administrator, notwithstanding the form of his letters, oath and bond, such an officer has no authority to bring a death action such as this and the same can be brought only by one to whom general letters have been issued.

[1,2] We hold that the letters issued to respondent were in fact special letters of administration notwithstanding the defects pointed out above. These defects were defects in form only. They did not constitute matters of substance. This follows when we consider that the jurisdiction of the court to appoint a general administrator was not invoked by the petition of respondent; that he asked only that special letters be issued to him because of delay in the issuance of general letters; that the court acted on this petition and declared that it was appointing him as special administrator; and it ordered the clerk to issue letters to him in that capacity. Responding to this order and acting in an administrative capacity only, the clerk issued letters, which, though not described therein as such, must be considered as special letters issued responsive to the order of the court. The later order of the court amending the letters by inserting the word "Special", as above indicated, while proper in the interest of good housekeeping, was legally unnecessary. It would be a reproach to the administration of justice if such highly technical objections made collaterally could invalidate the actions of a special administrator purporting to act as such. The code section which prescribes the form of special letters requires no more than substantial compliance therewith. Probate Code, § 502. The attack here made is collateral. The statement of the court in

Bank of Commerce & Trust Co. v. Humphrey, 41 Cal.App. 552, 554, 183 P. 222, 223, is pertinent. We quote:

"* * * The authority of the court to appoint does not rest upon the oath or bond. That is a matter going only to the manner of qualifying after an appointment already made, and not to the validity of the appointment. If the clerk of court issues the letters in violation of the statute, without requiring the proper oath, any person interested may appear in the probate proceeding and ask to have the letters revoked. But to allow every person who may be sued to go behind the letters of administration and object to the oath as given, or to plead any other defect which does not go to the jurisdiction of the court making the appointment, would be to involve litigation in a hopeless confusion of collateral issues. Letters issued by the clerk upon the order of a court having jurisdiction should furnish ample protection to all parties dealing with an administrator as such; and no irregularity in the clerk's issuance of the letters, occurring after the order of the court directing their issue—the court having jurisdiction to make the order—should be taken advantage of in a collateral proceeding. Were the rule otherwise, no business depending on letters testamentary or of administration could be safely transacted."

Although objection is made to the oath, it is apparent that this objection depends upon the validity of the attack upon the letters and the bond. The oath taken, considered by itself, meets the requirements of the statute. Probate Code, § 462.

[3] As to the bond, it substantially complied with the requirements of the law and was binding upon the bonding company. The bond specifically referred to the order of the court appointing respondent as special administrator. By referring to that order and reciting it as the occasion for the execution of the bond the company bound itself. That it did not refer to the order specifically as appointing respondent as

special administrator is of no moment since the order referred to did appoint him in that capacity. Any doubt, therefore, which might arise upon reading the bond as to the capacity of respondent would be at once dispelled upon reading the order referred to.

[4, 5] Appellant further contends that even assuming respondent to have been a special administrator regularly appointed, qualified and acting as such, nevertheless he had no authority as such officer to bring a death action such as this. The sections of the Probate Code dealing with the powers of special administrators do not now and never have concerned themselves with the authority of the personal representative of a decedent to bring a death action as provided in Section 377 of the Code of Civil Procedure; and that section, in turn, has never sought to distinguish between administrators with general powers and those having special powers only. That section has since 1872 provided that when the death of a person is caused by the wrongful act or neglect of another "his heirs *or personal representatives* may maintain an action for damages against the person causing the death". (Italics added.) But the bringing of such an action is not a matter having to do with the probate of a decedent's estate and it has always been the law in this state that the action "authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs." Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 191-192, 128 P. 330, 332. Since the statute authorizing the action declares that the suit may be brought by the personal representative and makes no distinction as to whether that representative be special or general, and since the action brought is not in any sense business of the estate, we see

no reason to hold that the limitations upon the powers of a special administrator as set forth in the Probate Code, and as the same were set forth in the Code of Civil Procedure before the adoption of the Probate Code, should be considered as any basis for drawing a distinction between special and general administrators which the authorizing section does not itself draw. As said in the quotation from Ruiz v. Santa Barbara Gas, etc., Co., supra, the personal representative, and of course both general and special administrators are personal representatives, is simply made a statutory trustee to recover damages for the benefit of the heirs. In that action the Supreme Court held that the death action could be brought by the special administrator. It is true, as pointed out by appellant, that in part the reasoning of the opinion goes upon the proposition that the code section treating of the powers of special administrators (then section 1415 of the Code of Civil Procedure) could be construed, and was by the court there construed, as authorizing a special administrator to maintain or defend suits and other legal proceedings as "an administrator", whereas the present Probate Code section, which was in effect when Bravo was killed, that is, Section 463 of the Probate Code, specifically authorizes suits by a special administrator in order to carry out his specifically defined duties and states that he may bring such suits and other legal proceedings as "such" administrator. It may be argued, therefore, that the section of the Probate Code defining the powers and duties of special administrators no longer affords within itself authority for holding that a special representative can bring the death action authorized in Section 1415 of the Code of Civil Procedure. Nevertheless, we think that the general reasoning in Ruiz v. Santa Barbara Gas, etc., Co., and the considerations we have stated above, afford ample authority for holding in this case that a special administrator does have power to bring the action which resulted in the judgment here appealed from.

The judgment, accordingly, is affirmed.

PAULSEN, J. pro tem., and SCHOTT-KY, J., concur.

121 Cal.App.2d 833

WERNER v. SARGEANT.

Civ. 15813.

District Court of Appeal, First District,
Division 1, California.

Dec. 14, 1953.

As Modified Jan. 8, 1954.

Unlawful detainer action. The Superior Court in and for the City and County of San Francisco, Melvyn I. Cronin, J., entered summary judgment against defendant, and defendant appealed. The District Court of Appeal, Peters, P. J., held, *inter alia*, that unlawful detainer judgment granting plaintiff rent of \$300 per month was at fatal variance with demand and notice to quit which demanded rent of \$350 per month.

Reversed.

1. Appeal and Error $\S$ 110, 113(1)

Orders denying motion for new trial and motion to vacate judgment were non-appealable.

2. Judgment $\S$ 253(1)

Unlawful detainer judgment granting plaintiff rent of \$300 per month was at fatal variance with demand and notice to quit which demanded rent of \$350 per month. Code Civ.Proc. $\S$ 1161.

3. Landlord and Tenant $\S$ 291(1)

Unlawful detainer statute requiring three-day notice be given stating amount which is due landlord incorporates common-law view that in order to work forfeiture of lease for non-payment of rent, landlord must demand precise sum due, and that demand in excess of judgment will not support judgment. Code Civ.Proc. $\S$ 1161.

4. Forcible Entry and Detainer $\S$ 6(1)

Unlawful detainer is a summary proceeding, purely statutory in character. Code Civ.Proc. $\S$ 1161.

5. Judgment $\S$ 181(2, 4)

A summary judgment is purely statutory and can be employed only in cases where no material issue of fact is presented, and the remedy must be used with caution and cannot be used as a substitute for normal methods of deciding factual cases.

6. Judgment $\S$ 181(4)

Where any doubt exists as to whether summary judgment should be granted, such doubt must be resolved against applicant therefor.

Charles A. Christin, San Francisco, for appellant.

Michael L. Haun, San Francisco, for respondent.

PETERS, Presiding Justice.

This is an action for unlawful detainer based on non-payment of rent. The trial court entered a summary judgment against the defendant for restitution of the premises and for \$2,400 for unpaid rent.

[1] After the complaint was filed defendant demurred and, after the demurrer was overruled, answered, setting up several defenses. A motion to strike the major portions of this answer was granted on the ground that the stricken defenses could not be asserted in an unlawful detainer action. Thereafter, plaintiff moved to strike the remaining portions of the answer as sham and for a summary judgment, supporting the motions by an appropriate affidavit. The trial court granted the motion. The same day this motion was granted, defendant moved for leave to file and proffered for filing a supplemental answer. The next day the trial court vacated the order granting the summary judgment. Defendant's counsel one day later filed a counter-affidavit, verified by himself, which affidavit admittedly did not comply with the law. The next day the trial court, by minute order, again granted the motion for summary judgment. Later a minute order denying leave to file the supplemental answer was made, and the next day the summary judgment for recovery of the premises and \$2,400 rent damages for eight months at \$300 per month was duly entered. Defendant's motions to vacate the judgment and for a new trial were denied. Defendant

ant appeals from the judgment and from the orders denying the motion for a new trial and the motion to vacate. The orders sought to be reviewed are non-appealable, and the appeals therefrom should be dismissed. *Bank of America, etc., v. Oil Well Supply Co.*, 12 Cal.App.2d 265, 55 P.2d 885.

[2] Appellant challenges practically every ruling made by the trial court. It is not necessary to pass upon the propriety of most of these rulings for the reason that the judgment grants rent to respondent at \$300 per month, while the demand and notice to quit filed under section 1161 of the Code of Civil Procedure demands rent at \$350 per month. This is a fatal variance.

The complaint alleges that plaintiff as landlord and defendant as tenant entered into a "written lease and rental agreement" for "real and personal property known and designated as 1901 Pacific Avenue, San Francisco" for five years "at the agreed monthly rental of Three Hundred and Fifty Dollars" per month. It is then alleged that for seven designated months defendant failed to pay the agreed rent and owes \$2,450 less \$104.30, heretofore paid to plaintiff, and \$117.80 as an allowance for a heating fuel bill, leaving a net balance owing of \$2,227.90 for the seven-month period. Service of the required demand and notice to quit is averred. The prayer is for \$2,227.90 rent "now due," trebled, and for any further rent accruing during the pendency of the action. The written lease is not pleaded *in haec verba* nor attached to the complaint, all that is pleaded being its legal effect. The answer admitted the execution of the lease but denied that it provided for \$350 monthly rental, averring that it provided for but \$300 per month out of a special fund, and that defendant also agreed to pay \$50 a month in installments on the purchase price of certain furniture. The lease is attached as an exhibit to the answer. It is apparently a layman-drawn document and contains the following clauses:

"Out of the guest-room rentals the first \$300 are to be paid each month to the first party as monthly rent (to cover taxes, int.,

bank payments) \$50 to be paid as lease of furniture monthly, for 6 months.

"After 6 months, when the second party is ready to take over the furniture these \$300 (6 \$50 furniture rental) will be figured as down-payment and a payment of \$50 shall be made each following month on account furniture purchase."

The trial court struck from the answer the affirmative defense that incorporated the lease, so that, when the summary judgment was granted, the lease was not before the court.

Attached to the complaint as an exhibit is a copy of the three-day notice required by section 1161 of the Code of Civil Procedure. It contains a demand "for the payment of the rent you owe for the above specified premises, together with the personal property therein contained" for the period of seven months "at the rental of Three Hundred and Fifty Dollars (\$350.00) per month" less the allowances already mentioned "leaving a net balance of Two Thousand Two Hundred Twenty-seven and 90/100 Dollars (\$2,227.90) as rental, now due and unpaid."

The minute order upon which the summary judgment is based reads as follows:

"In this action it is by the Court ordered that the heretofore submitted motion of Plaintiff for summary judgment be granted on the basis of \$300 monthly rent." No findings were filed, but in support of the minute order the court filed a memorandum opinion, in which, after pointing out the legal insufficiency of the counter-affidavit filed by appellant's counsel, the court stated: "Accordingly it is felt that the motion for summary judgment should be granted; however, in view of the statement of counsel, it will be granted based upon the rent being \$300.00 per month, it being understood by the Court that counsel for plaintiff would press only for this amount."

The judgment entered granted restitution to respondent and "Rent damages amounting to the sum of \$2,400.00 for the detention of said premises" for a designated eight-month-period. The inclusion of the one-month additional rent accruing during

the pendency of the action, in view of the allegations of the complaint, was correct and is not challenged.

Thus, the demand for payment was for seven months' rent at \$350 per month, less several hundred dollars paid to respondent or credited on appellant's obligation, while the judgment is for eight months' rent, without deductions of any kind at \$300 per month. Why the court allowed but \$300 per month does not appear, except that the memorandum opinion states that it was based on the "statement" of respondent's counsel "it being understood" that respondent "would press only for this amount." What that "statement" may have been does not appear in the record, and we are left completely in the dark as to why respondent's counsel decided not to "press" for the amount set forth in the complaint and notice to quit. For all that appears, respondent may have concluded that damages for detention of the personal property or for failing to make payments of \$50 a month on the purchase price of the furniture could not be recovered in an unlawful detainer action. But what does appear is that the notice to quit is for rent at \$350 a month, less several hundred dollars, while the judgment is for \$300 a month, without deductions. So far as the record is concerned, appellant properly refused to comply with the notice to pay rent or quit based on the \$350 demand.

[3] So far as the record is concerned, the notice to pay rent or quit did not correctly set forth the amount of rent due. Section 1161 of the Code of Civil Procedure requires that the three-day notice must state "the amount which is due". It is settled law that this section incorporates the common law view that in order to work a forfeiture of a lease for non-payment of rent the landlord must demand the precise sum due, and that a demand in excess of the judgment will not support the judgment. The leading case is *Johnson v. Sanches*, 56 Cal.App.2d 115, 132

P.2d 853, where Justice Dooling in a well-reasoned opinion discusses the problem at some length. In that case the demand was for \$1,551.38. This demand was \$750 in excess of the amount found due. The judgment for the landlord was reversed. This case was followed in *Dertiman v. Almey*, 92 Cal.App.2d 724, 207 P.2d 615, where the demand was for rent at \$175 per month, but the judgment was based on a monthly rent of \$77. The judgment was reversed. See, also, cases collected in an annotation in 28 A.L.R.2d 803.

[4-6] The rule of these cases is sound. It must be remembered that unlawful detainer is itself a summary proceeding, purely statutory in character. See 15 Cal.Jur. p. 848, § 275. A summary judgment is, of course, purely statutory, and can be employed only in cases where no material issue of fact is presented. 7 Cal.Jur.Supp. p. 276, § 30.1. The remedy must be used with caution and cannot be used as a substitute for normal methods of deciding factual cases. *Eagle Oil & Refining Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264; *Walsh v. Walsh*, 18 Cal.2d 439, 116 P.2d 62. If any doubt exists as to whether a summary judgment should be granted, such doubt must be resolved against the applicant. *Gibson v. De La Salle Institute*, 66 Cal. App.2d 609, 152 P.2d 774; *United States Fidelity & Guaranty Co. v. Sullivan*, 93 Cal. App.2d 559, 209 P.2d 429; 7 Cal.Jur.Supp. p. 277, § 30.2, at p. 279. If the rule of the *Johnson* and *Dertiman* cases, *supra*, is sound in cases after trials on their merits, and we think that it is, such rule even more clearly is applicable in a summary judgment case.

The orders denying the motion for a new trial and the motion to vacate the judgment are non-appealable, and the appeals therefrom are dismissed. The judgment is reversed.

BRAY and FRED B. WOOD, JJ., concur.

122 Cal.App.2d 144

SHUBERG et ux. v. SCHMIDT et al.
Civ. 19544.

District Court of Appeal, Second District,
Division 3, California.

Dec. 18, 1953.

Action by husband and wife for injuries sustained by wife in intersectional collision between eastbound automobile in which she was a passenger, and defendants' southbound automobiles. The Superior Court, Los Angeles County, J. T. B. Warne, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal Vallée, J., held that whether defendants, who entered the intersection first, acted as reasonable and prudent persons would have acted under the circumstances in attempting to proceed through the intersection, was question for jury.

Affirmed.

1. Automobiles ⇨244(11)

In action for injuries sustained in intersectional collision between eastbound automobile, in which plaintiff was a passenger, and defendants' southbound automobiles, evidence warranted inference that defendants entered intersection first at time when automobile in which plaintiff was riding was at least 25 feet away. Vehicle Code, § 550(a).

2. Automobiles ⇨245(14)

In action for injuries sustained in intersectional collision between eastbound automobile, in which plaintiff was a passenger, and defendants' southbound automobiles, whether defendants, who entered the intersection first, acted as reasonable and prudent persons would have acted under the circumstances in attempting to proceed through the intersection, was question for jury.

Slane, Mantalica & Davis and Frank Barclay, Los Angeles, for appellants.

Crider, Runkle & Tilson and Donald E. Ruppe, Los Angeles, for respondent, Ella Mae Schmidt.

Parker, Stanbury, Reese & McGee and A. P. G. Steffes, Los Angeles, for respondent, Robert E. Brown.

VALLÉE, Justice.

Plaintiffs appeal from an adverse judgment entered on a verdict of a jury in an action for damages for personal injuries arising out of a collision between three automobiles.

Plaintiff's contentions are that defendants were guilty of negligence as a matter of law, and that the negligence of each was a proximate cause of the accident.

On May 11, 1951, plaintiff, Margie Shuberg, referred to as plaintiff, was a passenger in an automobile driven by Helen Billings. Plaintiff occupied the front seat next to the driver. Erna Stillmaker and Edna Murdock occupied the rear seat.

The Billings car was traveling east on Arbor Vitae Street near its intersection with Florence Avenue. Mrs. Billings intended to cross Florence. Arbor Vitae intersects Florence at a right angle. Florence was 50 feet wide; Arbor Vitae, 53 feet. There was no curb on the north side of Arbor Vitae. The intersection was not controlled by stop signs or signals, except for westbound traffic on Arbor Vitae. The streets were level. The day was dry and clear. Defendants, Schmidt and Brown, were driving their respective automobiles south on Florence. The Schmidt car was in the center lane of traffic; the Brown car in the right-hand lane.

The three cars collided in the intersection. Skid marks 10 feet 4 inches long were left by the Brown car. They ended at a point 17 feet east of the west curb line of Florence and 26 feet north of the south curb line of Arbor Vitae. There were abrasions on the pavement at this point from which the jury could have inferred that this was the point of impact between the Billings and the Brown cars. There was evidence that defendants' cars were traveling from 15 to 20 miles an hour, and that the Billings car was traveling about 40 miles an hour through the intersection. There was evidence that defendants' cars entered the intersection before the Billings car.

Mrs. Stillmaker testified that the Billings car was traveling in the curb lane on Arbor Vitae; Mrs. Billings did not change the direction of her car from the time she entered the intersection until the accident took place; she did not see Mrs. Billings turn her head to the left or feel her apply the brakes, or feel the car slow down before the accident; she did not observe Mrs. Billings swerve her car either to the right or to the left. Mrs. Murdock testified she did not feel any application of the brakes before the impact. She happened to look at Mrs. Stillmaker's face and saw an odd expression on it; at no time before that had she seen Mrs. Billings turn her head to the left. She was asked, "And you did not observe then that Mrs. Billings had applied the brakes, did you?" She answered, "Nothing except when she stopped at the tracks. That is all that I remember." She further testified: "I recall I had a cigarette in my hand and had just lit it when I looked up and saw the two approaching cars southbound on Florence Avenue. I recall Mrs. Stillmaker who was riding in the back seat with me yell, 'Look out, Helen.' I do not recall whether Mrs. Billings applied her brakes before the impact because the accident happened so fast." Mrs. Billings told an investigating officer at the scene of the accident that she did not see either of the defendants' cars before the crash.

Mr. Brown testified he first saw the Billings car after his car had entered the intersection; the Billings car was then about 25 feet back from the intersection, "somewhere around there"; he swerved to his left and applied his brakes; his car was nearly stopped when it was struck by the Billings car. When the Schmidt car was about 12 feet in the intersection, Mrs. Schmidt saw that the Billings car was not going to stop. Mrs. Schmidt testified she then went for her brakes and her horn, applied her brakes, and the Billings car hit her car.

Section 550(a) of the Vehicle Code reads: "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

[1, 2] We think it is obvious that it cannot be said as a matter of law that either defendant was negligent. The evidence warrants the inference that the defendants entered the intersection first and that at that time the Billings car was at least 25 feet away. We cannot say that defendants were negligent in then attempting to proceed through the intersection. Defendants slowed down to about 15 miles an hour on entering the intersection. Even though their failure to see the Billings car sooner, could have been found to be a negligent omission, whether they acted as reasonable and prudent persons would have acted under the circumstances was a question of fact for the jury to decide. *Peneski v. Ledford*, 112 Cal.App.2d 371, 246 P.2d 109.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



122 Cal.App.2d 113

KARLEIN v. KARLEIN et al.

Civ. 19807.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1953.

Suit to quiet title and to annul a deed. The Superior Court, Los Angeles County, James G. Whyte, J., entered judgement from which defendant grantee of quitclaim deed appealed. The District Court of Appeal, Moore, P. J., held that where status of title of property was placed in issue by complaint in divorce action, and interlocutory decree adjudged residential property to be community property and awarded it to the wife, and no appeal was taken from that decree by husband, award of property to wife was final, and attempted conveyance during pendency of action by husband to his sister who had full knowledge of the

divorce action and its effect upon its property, was ineffective.

Decree affirmed.

Divorce ⇨254

Lis Pendens ⇨3(2)

Where interlocutory decree of divorce adjudged family residence property to be community property and awarded it to the wife, and no appeal was taken therefrom by husband, the award of the property to wife was final, and husband's attempted quitclaim of his interest in the property to his sister, at time divorce action was pending, was ineffective. Code Civ.Proc. § 1908, subd. 2.

William Hicks, Hollywood, for appellant.

McIver & Snow, Montebello, for respondent, Harold S. Snow and Robert Miller Green, Montebello, of counsel.

MOORE, Presiding Justice.

On November 10, 1949, respondent, Viola R. Karlein, filed a complaint for divorce against defendant, Ludwig Karlein, in which she alleged that the family residence on lot 59 owned by them in joint tenancy was community property. A default judgment having been entered January 12, 1950, was subsequently set aside on motion of the husband. While the divorce action was still pending, the husband quitclaimed his interest in the property to appellant, Hilda Greis, his sister. The deed was recorded October 22, 1951. A second interlocutory decree of divorce based upon the finding that the residential realty was community property awarded it to the wife. No appeal having been taken within sixty days, on April 14, 1952, the wife filed her complaint in two counts to quiet title to the property awarded her by the divorce decree. By count I she sued to quiet title; by count II she sued to annul the deed from the husband to his sister. Judgment for the wife on both counts was entered January 19, 1953, from which comes this appeal by the sister. The husband had disclaimed as to count I and defaulted as to count II.

The effect of a judgment or final order in an action before a court having juris-

diction to pronounce the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action. Code Civ.Proc. § 1908, subd. 2. This statute is applicable to the case at bar and is conclusive of the questions on appeal.

The status of the title of the property was placed in issue by the complaint in the divorce action. The interlocutory decree adjudged the home place to be community property and awarded it to the wife. Since no appeal was taken from the decree, the award of the property to Viola is final. *Leupe v. Leupe*, 21 Cal.2d 145, 149, 130 P.2d 697. The authorities relied on by appellant which hold that the disposition of property by interlocutory decree is not final, *Slavich v. Slavich*, 108 Cal.App.2d 451, 460, 239 P.2d 100, and *Wilson v. Wilson*, 76 Cal.App.2d 119, 129, 172 P.2d 568, are actions in which an appeal *was taken* from the interlocutory decree. That factual situation is expressly distinguished from the cause at bar by the *Leupe* opinion.

After the first interlocutory decree was entered, but before the property was conveyed to the sister, the wife wrote a letter to Hilda in which she set out the events leading to the divorce action and said, "In the divorce court I was awarded the home, furniture and the children * * *. As you know Ludwig had everything mortgaged, I am going to try and save the home * * * the taxes \$239 were not paid and they will have to be taken care of * * *. I am going to work very hard * * *." From this letter, appellant had such notice of the divorce action and its effect upon the title of lot 59 as was sufficient to advise her of the current status of such title or to put her on inquiry into the rights of her brother with respect to the ownership or possession thereof.

The property is located in Los Angeles county. Since both parties appeared in

the action, the jurisdiction of the court is not in question.

Appellant raises other assignments of error, but in view of the conclusion above announced the asserted errors could not have prejudiced her cause, as indeed they must in order to justify a reversal. Const. art. VI, sec. 4½. Hence, they will not be considered here.

The decree is affirmed.

McCOMB and FOX, JJ., concur.



122 Cal.App.2d 185

PEOPLE v. MENDOZA et al.

Cr. 15053.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1953.

Hearing Denied Jan. 20, 1954.

Defendants were convicted of robbery, kidnapping and grand theft. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., rendered judgment, and defendants appealed. The District Court of Appeals, Doran, J., held that the evidence sustained convictions.

Affirmed.

Kidnapping ⚡5

1. Larceny ⚡65

Robbery ⚡24(1)

Convictions for robbery, kidnapping and grand theft were sustained by evidence.

2. Criminal Law ⚡519(1)

Under evidence, in prosecution for robbery, kidnapping and grand theft, including showing that two of defendants had been suffering from withdrawal symptoms connected with narcotics addiction and that each had been given morphine 17 hours prior to confessing, trial court did not err in admitting confessions in evidence, notwithstanding defendants' contention

that confessions had not been freely and voluntarily given.

Eugene V. McPherson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James D. Loeb, Dep. Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

Defendants were charged by information with robbery, kidnapping and grand theft. Prior conviction of a felony as to each was also alleged. A jury was waived. Defendants were adjudged guilty on all three counts. The allegations of prior conviction were found to be true. A motion for a new trial was denied. Probation was denied.

The facts as recited in respondent's brief and supported by the record are as follows:

"On August 5, 1952, Emmet Glasgow was a truck driver for the Pasadena Candy and Tobacco Company. On that date he made a delivery at Valley and Fremont Streets in Alhambra and upon returning to the truck a man jumped into it armed with a gun, and said, 'This is a holdup.' He ordered Glasgow to follow a car that was ahead of the truck. Mr. Glasgow followed that car for quite some distance, over many different streets, and finally was led to a dirt road, and up the dirt road to a fence. At the fence, the man in the truck ordered it stopped, and ordered Mr. Glasgow out. Then the man with the gun who had climbed into the truck tied Mr. Glasgow to the fence with some adhesive tape.

"There were two men in the car which Mr. Glasgow was ordered to follow. However, he could not identify either of them because only one came close to him, and that one wore a bandana over his face. After Mr. Glasgow had been tied to the fence one of the men came up behind him and took his wallet, but after taking the money which amounted to \$15.99 and his

identification, he discarded the wallet. Mr. Glasgow testified that from the time the man got into the truck, he was in fear, and the taking of the truck, tying him up, etc., was entirely without his consent.

"The next time Mr. Glasgow saw the truck, after the men drove it away, was approximately 7 o'clock p. m. that same evening in an alley in East Los Angeles. Part of the merchandise was still in the truck, but the remainder of the cargo worth \$2500 was missing. The next time Mr. Glasgow saw the man who had held the gun on him in the truck was about two weeks later in the Alhambra Police Station, at which time Mr. Glasgow approached him to within a distance of about 10 feet and made positive identification of him. The man who got into the truck was also represented by the picture which was introduced as People's Exhibit 1.

"Mr. Glasgow, when shown a picture of a blue, 1937 Chevrolet, testified that it was similar to the car which he was ordered to follow, but he could not state definitely that it was the same car. He was unable to identify either defendant as being in the car, or as tying him to the post, or otherwise being involved in the crime.

"Two young boys testified that they saw two men unload the truck into a shack near where it was found in East Los Angeles. Neither boy could testify that the defendants were the two men whom they saw unloading the truck.

"Officer William Carl Wiggins identified the man pictured in People's Exhibit 1 as Edward Lastra, who committed suicide while in custody after having been accused of being one of the perpetrators of the crime which is the subject matter of this suit. He did so on August 15, 1952, at approximately 4:00 or 4:30 p. m.

"On Saturday, August 16, 1952, at approximately 12:05 p. m., the defendants made and signed a statement. It was taken by a stenographer in the presence of three officers. Mr. Wiggins testified that no force or violence was used on either of the defendants, no offers or promises of reward or immunity were extended, and the statement was given freely and voluntarily.

The statement was read in full by the defense counsel at page 148 of the Reporter's Transcript. It was a confession of Mendoza, also signed by defendant Garcia, to committing the crimes involved in this information, along with the deceased, Edward Lastra. The statement told how he, Mendoza, and Garcia were the two men in the car described by the victim, Mr. Glasgow, and how they had been present when Lastra tied the victim to the post. It also described how each of the defendants helped to unload the contents of the truck, and received money from Lastra, when some of the merchandise was sold.

"On August 15, 1952, Sergeant Wiggins sent for a doctor to treat the two defendants, who were suffering from the withdrawal symptoms occasioned by drug addiction. The doctor gave each of the defendants a shot of morphine at approximately 7:00 p. m. that night. The defendant Garcia admitted that the cause of his sickness was the withdrawal symptoms induced by the lack of narcotics. As the statement made by each of the defendants was given the next day shortly after noon, 17 hours elapsed between the time of the shots of morphine and the time the statement was given."

It is contended on appeal that "the evidence was insufficient" and that "the confession was not admissible".

[1] A review of the record reveals the evidence to be sufficient.

[2] As to the confession, the defendants testified, in effect, that force and violence was used and it is argued that the confessions were not free and voluntary. The evidence was conflicting on this issue for the officers testified to the contrary. As to the effect of the morphine, that was a question of fact for the trial court to determine. It does not appear that the trial court's rulings on the admission in evidence of the confessions was error.

There are no prejudicial errors in the record. The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

121 Cal.App.2d 816

PEOPLE v. HENDERSON et al.

Cr. 5061.

District Court of Appeal, Second District,
Division 2, California.

Dec. 11, 1953.

Prosecution for unlawful possession of heroin. Defendant and codefendant were tried before court without jury. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, McComb, J., held that where defendant drove codefendant to meeting with seller of heroin, although defendant did not have heroin in his personal possession when arrested, he was properly prosecuted for illegal possession of heroin since, under statute which makes participants in crimes principals thereto, person aiding and abetting commission of a crime is a principal.

Judgment affirmed.

1. Poisons ☞9

In prosecution for unlawful possession of heroin, defendant's admission that he had taken codefendant to buy heroin was sufficient to sustain implied finding that defendant knew that package, which was found in codefendant's possession, contained heroin. Health and Safety Code, § 11500.

2. Poisons ☞4

Where defendant drove codefendant to meeting with seller of heroin, although defendant did not have heroin in his personal possession when arrested, he was properly found guilty as principal for illegal possession of heroin. Health and Safety Code, § 11500; Pen.Code, § 31.

Minsky & Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 11500 of the Health and Safety Code (unlawfully possessing a preparation of heroin) after trial before the court without a jury, defendant appeals.

Facts: Officer Arrendondo of the Los Angeles City Police Department, assigned to the narcotic division, observed defendant and his co-defendant Henderson sitting in an automobile talking to an unknown individual at the corner of Temple and Figueroa Streets. Defendant was in the driver's seat. The unknown person stuck his head in the window of the passenger's side, left, then came back to the car and after a brief period walked away, whereupon defendant drove his automobile west on Temple Street to the 1000 block on North Hoover, where they were stopped by the officer and placed under arrest. At such time defendant was driving the car. Officer Arrendondo in approaching defendant's car observed a package drop from Mr. Henderson's hands to his lap where it was picked up by the officer. It was sealed and booked with the police property clerk. Thereafter the package was examined by a chemist who testified that the contents consisted of a narcotic known as heroin.

After defendant's arrest, in the presence of his co-defendant, two investigators from the District Attorney's office and Officer Walker, Officer Arrendondo asked him what he was doing around Temple and Figueroa streets. Defendant replied that he had taken his friend down there to "score for a cap."¹ When asked what he meant by that, he stated he took his friend down there to "score for a capsule of H." He was then asked if he was going to split the capsule with Mr. Henderson, and he said he did not know. The statements of defendant were freely and voluntarily made.

Defendant contends that there was no substantial evidence to sustain the conviction because (a) there is no evidence that defendant knew that his co-defendant had

1. In the vernacular of the underworld, the term "score" means to purchase or

buy, while "cap" refers to a capsule of heroin.

heroin in the package which Mr. Henderson held in his lap, and (b) defendant never had the capsule of heroin in his possession.

[1] (a) This proposition is devoid of merit. Defendant's admission to the police officers that he had taken his friend down to Temple and Figueroa streets for the purpose of obtaining heroin, and that he did not know whether or not he was going to split the capsule with Mr. Henderson, was substantial evidence to sustain the trial court's implied finding that defendant knew the package which Mr. Henderson had contained heroin.

[2] (b) This argument is devoid of merit for the reason that defendant was found guilty on the theory he was aiding and abetting his co-defendant in the commission of a crime. Therefore pursuant to the provisions of section 31 of the Penal Code² defendant, as an aider and abettor, was a principal in the crime which was committed. (People v. Bigelow, 104 Cal. App.2d 380, 389 [11] et seq., 231 P.2d 881). In the present case under defendant's admission he clearly aided and abetted his co-defendant in obtaining and possessing the capsule of heroin. Therefore he was properly found guilty as a principal. (Cf. People v. Borrego, 211 Cal. 759, 764, 297 P. 17.)

People v. Sinclair, 129 Cal.App. 320, at page 322, 19 P.2d 23, 24, relied on by defendant, does not support his thesis, for the court said, "* * * [Defendant] argues that it is necessary to show that the person accused has the unlawful article on his person, but he has called our attention to no case so holding; and manifestly such is not the law, because, if it were, it would exclude entirely from the operation of the statute cases of joint possession or possession by carrying the illegal article in an automobile or other conveyance, or keep-

ing it in some place under the immediate and exclusive control of the accused."

It is thus apparent that the court held diametrically opposite to plaintiff's contention.

Willsman v. United States, 8 Cir., 286 F. 852, is likewise inapplicable to the facts of the present case. Such case does not stand for the proposition that one may not aid and abet in the possession of narcotics, but merely that defendant in such case was only a go-between in effecting an illegal sale, and there was a total absence of any evidence that he aided or abetted in the commission of the crime. (Cf. United States v. Cohen, 2 Cir., 124 F.2d 164, 165.)

The record being free from error the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



121 Cal.App.2d 735

CALLAN et al.

v.

CITY OF SAN BRUNO.

Civ. 15545.

District Court of Appeal, First District,
Division 2, California.

Dec. 8, 1953.

Action to quiet title to lots which plaintiffs had purchased at a delinquent tax sale from county. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment giving clear title to plaintiffs, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that where

2. Section 31, Penal Code reads: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging chil-

dren under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

plaintiffs purchased from county at delinquent general tax sale and defendants purchased at private sale from city following a declaration of delinquent municipal taxes, the so-called parity rule regarding interests of the claimants in the property did not apply.

Judgment affirmed.

Taxation ☞786

Where plaintiffs purchased at a delinquent general tax sale from county in year 1929 and defendants purchased from a city in 1945 at a private sale made pursuant to a declaration of delinquent municipal taxes, the so-called parity rule putting holders of deeds from political divisions on equal footing did not apply.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for appellants.

Michael Aaronson, Melvin E. Cohn, San Carlos, for respondents Thomas J. Callan and Bridgie E. Callan.

NOURSE, Presiding Justice.

The case presented on this appeal is without legal precedent. Counsel for both parties have searched diligently for authorities in point, but without success. On our review of the record we are inclined to the view that, on general principles, the trial court reached a reasonable and sound conclusion of the case on the merits.

The Callans brought this action to quiet title to two lots in the city of San Bruno, which they had purchased at a delinquent tax sale from the county of San Mateo. This was in the year 1929 and the sale was for delinquent general taxes of 1923 and subsequent delinquencies. No question is made of the propriety of the sale or of the validity of the tax deed.

The Chapmans rely on the purchase at a private sale from the city of San Bruno, in its proprietary capacity, of the same lots, the sale having been made pursuant to a

declaration of delinquent municipal taxes. The sale to the Chapmans followed an option agreement between them and the city providing that "if and when" the city should acquire clear title it would make the sale. Such a sale was made by deed dated January 24, 1945. This was more than fifteen years after the sale by the county of San Mateo to the Callans.

On the evidence the trial court found that the sale by the county of San Mateo to the Callans was valid; that the sale by the city of San Bruno to the Chapmans was invalid; and that there were delinquent taxes due the city of San Bruno. Judgment was entered giving clear title to the property to the Callans; denying any interest therein to the Chapmans, but awarding them a money judgment against the city of San Bruno in the sum of \$1,000 paid by them to the city on the illegal sale and \$281.64 paid by them to the city by way of taxes. The city of San Bruno was then awarded judgment against the Callans in the sum of \$763.05 covering unpaid municipal taxes on the property to and including the year 1951-1952.

The so-called "parity" rule relied on in *Monheit v. Cigna*, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, and *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 197 P.2d 537 is not applicable here because the rights of the parties do not stem from deeds of two separate taxing agencies made pursuant to foreclosure of two separate taxing liens. Here the respondents rely upon a tax sale made in 1929, approximately fifteen years prior to a private sale made by the city of San Bruno at a time when it had no legal title to convey. As said in the *Elbert* case, *supra*, 32 Cal.2d at page 615, 197 P.2d at page 540, the "disparity" is clear "where the controversy involves the status of an *unforeclosed lien* as against the 'subsequent transaction' of a *title claim* pursuant to a *tax deed*."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

121 Cal.App.2d 813

PERRY v. CHATTERS et al.

Civ. 19768.

District Court of Appeal, Second District,
Division 2, California.

Dec. 11, 1953.

Petition for writ of mandate. The Superior Court, Los Angeles County, Frank G. Swain, J., entered order denying petition, and plaintiff appealed. The District Court of Appeal, McComb, J., held that petition merely alleging that decision of personnel board sustaining action of department director in discharging state civil service employee was not supported by evidence but failing to contain an essential allegation upon which to predicate claim of insufficiency of evidence, did not state cause of action.

Affirmed.

1. Mandamus ☞ 154(4)

In order for petition for a writ of mandate to state a cause of action, the petition must set forth facts showing that plaintiff is entitled to the relief he seeks.

2. Mandamus ☞ 154(5)

Petition for writ of mandate by state civil service employee who had been discharged by department director, which petition merely alleged that decision of personnel board sustaining action of department director was not supported by evidence but which failed to contain an essential allegation upon which to predicate claim of insufficiency of evidence, did not state cause of action. Government Code, §§ 19572(h, i, k, p, q, s), 19574.

1. Section 19574, Government Code reads: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than fifteen calendar

Shirley M. Hufstedler, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondents.

McCOMB, Justice.

Plaintiff was an employee of the State of California, holding the position of Inspector of Economic Poisons and Fertilizers, Bureau of Chemistry, Department of Agriculture, with permanent civil service status from December 14, 1941 to February 25, 1952. On December 13, 1951, plaintiff received a notice of punitive action by the appointing authority under Government Code, section 19574¹ and on February 23, 1952, plaintiff was served with a second notice of punitive action signed by defendant A. A. Brock, of the Department of Agriculture of the State of California, discharging plaintiff as of February 25, 1952.

The notice charged plaintiff with certain acts and conduct which were alleged to constitute drunkenness on duty, intemperance, inexcusable absence without leave, willful disobedience, misuse of state property and failure of good behavior, and acts which are incompatible with and inimical to the public service within the meaning of section 19572, subdivisions (h), (i), (k), (p), (q) and (s).

Plaintiff filed his answer to the notice in which he denied a substantial number of the allegations and made certain affirmative allegations.

A hearing was held by the State of California Personnel Board before duly appointed hearing officers of the board. After receiving oral and documentary evidence

days after the date of such action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; and (d) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

on behalf of plaintiff and defendants, and after making findings of fact, the board rendered its decision on July 18, 1952, sustaining without modification the action taken by defendant Brock dismissing plaintiff from his position.

Plaintiff filed a request for rehearing with the board which was denied on September 5, 1952. On October 14, 1952, plaintiff filed his petition for an alternative writ of mandate in the superior court of Los Angeles. The matter was submitted on the transcript of the record of the hearing and the written briefs of counsel. The trial court entered an order January 7, 1953, denying plaintiff's petition for an alternative writ of mandate. From this order he appeals.

Question: *Did the petition for a writ of mandate fail to state a cause of action?*

[1] Yes. In order to state a cause of action the petition for a writ of mandate must set forth facts showing that plaintiff is entitled to the relief he seeks. (*Dierssen v. Civil Service Commission*, 43 Cal.App.2d 53, 64, 110 P.2d 513; *Kelley v. Kingsbury*, 210 Cal. 37, 39[3], 290 P. 885.)

[2] In the present case plaintiff has failed to meet the requirements of this rule. He merely stated that the defendant board's decision was not supported by the evidence. Such a statement is merely a conclusion of law and not a statement of fact. (*Kelley v. Kingsbury*, supra, 210 Cal. 39[3], 290 P. 886.) The petition fails to indicate in any manner whatever wherein the evidence produced was insufficient. Thus the petition fails to contain an essential allegation upon which to predicate a claim of the insufficiency of the evidence to sustain the defendant board's findings. (*Dierssen v. Civil Service Commission*, supra, 43 Cal.App.2d 64, 110 P.2d 519.)

In view of our conclusions it is unnecessary to consider other questions argued by counsel in their briefs. The trial court did not abuse its discretion in denying plaintiff's petition for a writ of mandate.

Affirmed.

MOORE, P. J., and FOX, J., concur.

121 Cal.App.2d Supp. 870

UNITED STATES CREDIT BUREAU, Inc.

v.

POWELL.

Civ. A. No. 10.

Appellate Department, Superior Court,
Kern County, California.

Nov. 27, 1953.

Action on contract for purchase of piano, brought by seller's assignee. The Municipal Court, Bakersfield Judicial District, Doyle Miller, J., entered judgment for assignee and buyer appealed. The Superior Court, Appellate Department, Lambert, P. J., held that written contract of sale, which stated that it contained the entire contract, would exclude parol evidence to change contract or of express warranty, but did not exclude proof of implied warranty.

Reversed and remanded with directions.

1. Courts ⚖️189(8)

In action on contract for purchase of piano brought by seller's assignee, municipal court's refusal to strike oral evidence of written assignment was not error, since the written assignment could have been filed in Superior Court on appeal.

2. Evidence ⚖️442(6)

Written contract of sale, which stated that it contained the entire contract, would exclude parol evidence to change contract or of express warranty, but did not exclude proof of implied warranty. Civ.Code, § 1735.

3. Sales ⚖️273(1)

Statute which provides that where buyer informs seller of his purpose, and relies on seller's skill to satisfy his wants, there is an implied warranty that the goods sold are reasonably fit for buyer's purpose, is a part of every contract, unless specifically excluded. Civ.Code, § 1735.

4. Sales ⚖️435(1)

In view of statute providing that pleadings are to be liberally construed, affirmative defense to action on contract to buy

piano, alleging that buyer told seller that he wanted a piano for use in home, that he relied on seller's judgment in selecting piano, and that the piano was unfit for use, was sufficient to raise defense of implied warranty. Civ.Code, § 1735; Code Civ. Proc. § 452.

5. Courts ◀190(3½)

Where seller's assignee failed to object in municipal court that buyer's pleading was insufficient to show implied warranty, he waived objection to such insufficiency. Civ.Code, § 1735.

6. Sales ◀273(5)

Fact that piano was sold by trade name did not overcome affirmative defense of implied warranty raised by defendant who alleged that piano was unfit for use. Civ. Code, § 1735.

Deadrich, Gill & Bates, Bakersfield, for appellant.

Hayes, Bletz & Lawson, Los Angeles, for respondent.

LAMBERT, Presiding Judge.

[1] The plaintiff-respondent here brought suit on a written contract for the purchase price of a piano. The Complaint alleged the execution of the contract by defendant and Jayne's Piano and Accordion Company, the assignment of the contract to the Bank of America and the reassignment by the Bank of America to Jayne's Piano and Accordion Company and the assignment from Jayne's Piano and Accordion Company to the plaintiff. No demurrer to the Answer was filed and no objection raised as to the pleadings by the plaintiff. The evidence presented to the trial court established without conflict that the written contract was signed by the defendant and that no payments had been made and that the contract was repurchased by Jayne's Piano and Accordion Company from the Bank of America and then assigned to plaintiff. Also the record shows that the piano was still in the possession of the defendant when the suit was filed although he had offered to return it promptly to the plaintiff's assignor. Over the objection of

the defendant, oral testimony was received that the contract had been assigned by written assignment to plaintiff, and the defendant's motion to strike said testimony was denied. After plaintiff had rested its case the defendant sought to introduce evidence to show a breach of implied warranty in support of the affirmative defense set forth in defendant's Answer. The plaintiff objected to admission of this evidence and the Court sustained the objection. Appellant relies on two grounds for reversal: First, that the assignment to the plaintiff-respondent here having been in writing, a written assignment should have been produced. The second contention is that it was prejudicial error for the Court to exclude all the evidence relating to the proof of an implied warranty.

[2,3] So far as the first assignment of error here is concerned, we do not consider it of any importance for there appears to be a written assignment, and it could be filed in this Court, and that would dispose of the case. However, we have concluded that the refusal to hear any evidence in an attempt to prove a breach of an implied warranty was prejudicial error. The contract upon which suit was brought provided, among other things, "This contract constitutes the entire agreement, no waivers or modifications shall be valid unless written upon or attached hereto." While this provision would exclude any parol evidence to change the contract in this case or prove an express warranty we are of an opinion that it would not exclude an implied warranty, assuming that the plaintiff could prove facts sufficient to show an implied warranty, because Section 1735 of the Civil Code provides for an implied warranty under certain conditions, and the statutory provision is a part of every contract, and unless there is something in the contract specifically excluding the provisions of the statute it remains a part of the contract. While there is not too much case law on the subject the weight of authority seems to be that in a case like this an implied warranty may be shown. And in *Kuitens v. Covell*, 104 Cal.App.2d 482, 231 P.2d 552, 554, the Court in that case made this observation, "Obviously, the

statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use.'" While the facts in this case are of course not identical with the facts in that case, the principle is exactly the same.

The rule admitting evidence to show an implied warranty should not be confused with the rule excluding parol evidence to vary or add to or take from a contract as set forth in the sections in the Civil Code. The affirmative answer in this case was in the words and figures following, to wit:

"For a Counter Claim and Off Set to Plaintiff's Complaint, Defendant Alleges:

"1. That at all times mentioned in said complaint, and for sometime prior thereto, plaintiff's assignor was engaged in the business of selling pianos and musical instruments to the general public in the City of Bakersfield, County of Kern, State of California.

"2. That at the time of the execution of the said contract, plaintiff's said assignor, being then engaged in the business of selling pianos, and knowing that defendant desired to purchase a piano reasonably fit for use as a piano in defendant's home and of merchantable quality, then and there warranted to defendant that the said piano described in the written sale contract was in all respects reasonably fit for such purpose, and that the same was of merchantable quality.

"3. That defendant relied upon such warranties and in reliance thereon, executed the said written contract of sale set forth in plaintiff's Complaint; that defendant attempted to use said piano for the purpose aforesaid, but said piano was wholly unfit for such purpose and was not of merchantable quality, in that the foot pedals thereof were unworkable, the piano keys would not operate and the piano mechanism was generally worn, depreciated and unusable.

"4. That as soon as said unfitness and unmerchantable quality were ascertained,

defendant notified plaintiff's assignor thereof, and offered to return the said piano, but that plaintiff's said assignor refused and still refuses to accept the same.

"5. That said piano is of the reasonable value of \$10.00; that defendant has been at all times and now is ready and willing to return the said piano to plaintiff's assignor."

The offer of proof made by the defendant was as follows:

"a. In purchasing the piano, defendant advised Jayne's of the particular purpose for which the piano was required.

"b. The purpose for which the piano was required was the use of the piano by defendant's children in taking piano lessons.

"c. Defendant relied upon the skill and judgment of Jayne's in the selection of the piano and in entering into the sales contract.

"d. Within three days after delivery of the piano, defendants discovered that the piano was not in playable condition, the foot pedals were disconnected, several hammers were broken and the notes would not play, and the piano was not fit nor suitable for use in his home for the purpose desired.

"e. Prompt notice of the defects and breach of warranty was given to Jayne's.

"f. The piano was not of a value in excess of \$10.00."

[4] The provisions in part of Section 1735 of the Civil Code provide that "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Therefore, we think that the pleading together with the offer of proof were sufficient. Pleadings are to be liberally construed. Section 452, Code Civ.Proc.

[5,6] The respondent seeks to uphold the judgment on the ground that the pleading was not sufficient to show that the defendant was relying on an implied war-

ranty, and while this argument was not advanced in the trial court, we think that even if there was anything to the point, it is waived. See *French v. Smith Booth Usher Co.*, 56 Cal.App.2d 23, 131 P.2d 863. The respondent also raises a point that the piano was sold by a trade name. This likewise was raised for the first time on appeal, and there does not seem to be any merit to the contention. The case of *Drumar Mining Company, Ltd., v. Morris Ravine Mining Company*, 33 Cal.App.2d 492, 92 P.2d 424, cited by appellant, holds otherwise. This case discusses various propositions and holds among other things that where the selection of the article is made by the

seller and the buyer relies on the skill and judgment of the seller, there is an implied warranty of fitness and that the trade name rule does not apply, and, of course, that is a matter for the trial court to determine, not this court, as the evidence relating to the implied warranty was excluded.

There are no other points that we deem necessary to discuss. The judgment is reversed, and the case is remanded to the Municipal Court of the City of Bakersfield for a retrial of the issues in accordance with the views expressed in this opinion.

BRADSHAW and MAIN, JJ., concur.

41 Cal.2d 756

Ex parte DIXON.**Cr. 5171.**

Supreme Court of California.

In Bank.

Dec. 15, 1953.

Proceedings on application for writ of habeas corpus by one convicted and sentenced for counterfeiting. The Supreme Court, Gibson, C. J., held that when petitioner's contentions that his confession had been coerced and that evidence used against him had been obtained by unlawful search and seizure, had been presented to the trial court, and there was evidence which would have supported findings that there was no violation of its constitutional rights in connection with his confession or the search and seizure, petitioner was not entitled to have considered in habeas corpus proceeding his claims based upon his version of conflicting evidence and which could have been, but were not, raised on appeal.

Writ denied.

Carter and Schauer, JJ., dissented.

1. Habeas Corpus ☞4

As a general rule, habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

2. Habeas Corpus ☞4

Failure of petitioner for habeas corpus to appeal from his conviction in a criminal case could not be excused on basis of explanation that he lost the right because of his ignorance of the law and because of a lack of funds necessary to order a transcript of the record, when it appeared that he had been represented by counsel during all stages of his trial and no showing was made that he could not obtain the aid of counsel during time within which he could have taken an appeal, and in view of fact that petitioner would have been entitled to a transcript of evidence at expense of the state.

3. Habeas Corpus ☞85(1)

A petitioner for habeas corpus has the burden of alleging and proving all facts upon which he relies to overturn the judgment and of giving a satisfactory reason for not resorting to his remedy of appeal.

4. Habeas Corpus ☞4

Habeas corpus may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial, nor is the writ available to correct errors or irregularities relating to ascertainment of the facts, when such errors could and should have been raised by appeal, even though the alleged errors may involve factual issues relative to an asserted denial of constitutional rights.

5. Arrest ☞63(4), 71

Where entry of defendant's premises by officers is lawful, and officers thereafter have reasonable cause for believing that defendant has committed a felony, they can arrest him without a warrant, and it is thereafter proper to, as an incident to a lawful arrest, search the premises and seize articles which officers believe were used in commission of crime for which arrest was made. Pen.Code, § 836.

6. Habeas Corpus ☞85(1)

In habeas corpus proceeding, wherein petitioner contended that his confession had been coerced, evidence was sufficient to warrant finding that confession had been voluntary.

7. Habeas Corpus ☞4

Where contentions of petitioner that his confession of criminal charge had been coerced, and that evidence used in prosecution had been obtained by illegal search and seizure, were before trial court in the criminal case, and record disclosed evidence which would have supported findings that there was no violation of constitutional rights in connection with the petitioner's confession or the search and seizure, petitioner was not entitled in habeas corpus proceeding to consideration of his claims with regard to such questions, which could have been raised on appeal.

8. Habeas Corpus ⇨4

Questions of alleged admission of irrelevant evidence and misconduct of prosecutor are not reviewable in a habeas corpus proceeding, but are matters for consideration upon a timely appeal.

9. Habeas Corpus ⇨32

The courts will ordinarily, in a habeas corpus proceeding, pass upon the constitutionality of the statute under which petitioner was convicted. Pen.Code, § 480.

10. Criminal Law ⇨16**States** ⇨4.10

A state is not precluded from acting with respect to a particular subject merely because power over that subject has been expressly granted to Congress by the Constitution, but the same act may be made a crime by both the state and federal governments. Pen.Code, § 480.

11. Criminal Law ⇨16

Generally, in the absence of federal legislation which pre-empts the field, state Legislatures have authority to prohibit the counterfeiting of federal money. Pen. Code, § 480.

12. Criminal Law ⇨16

Enactment by federal government of statute providing for punishment of counterfeiting did not, in view of express provision of same title that nothing therein should be held to take away or impair jurisdiction of courts of the several states under the laws thereof, exclude state legislation prohibiting counterfeiting, and thus state statute was not invalid on theory that field was pre-empted by federal regulation, and that federal government had sole power with respect thereto. Pen.Code, § 480; U.S.C.A.Const. art. 1, § 8; 18 U.S.C. A. §§ 471 et seq., 3231.

Franklin C. Stark, Oakland, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

GIBSON, Chief Justice.

After a trial before a jury in the superior court petitioner was convicted of a violation of section 480 of the Penal Code, which prohibits the making or possessing of dies, plates or other apparatus used in counterfeiting.¹ He was sentenced to San Quentin, where he is now imprisoned. No appeal was taken from the judgment of conviction.

Petitioner seeks a writ of habeas corpus and contends, in part, that real evidence used to convict him was obtained by unlawful search and seizure and that his confession, which was received in evidence, was obtained by coercion. In support of his contentions petitioner makes allegations to the effect that police officers and federal secret service agents illegally searched his home and seized evidence used against him, that he was beaten and threatened, and that his confession was not made voluntarily. These allegations are controverted by the return, which alleges that all the matters complained of by petitioner were urged and considered at his trial in the superior court.

[1] In view of the fact that petitioner did not appeal we must determine whether any of the matters urged by him may nevertheless be appropriately considered in this proceeding. The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction. In re McInturff, 37 Cal.2d 876, 880, 236 P.2d 574; In re Connor, 16 Cal.2d 701, 705, 108 P.2d 10; see In re James, 38 Cal.2d 302, 309, 240 P.2d 596; In re Manchester, 33

1. Section 480 of the Penal Code provides: "Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold-dust, gold or silver bars, bullion, lumps, pieces, or

nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed."

Cal.2d 740, 742, 204 P.2d 881; In re Byrnes, 26 Cal.2d 824, 827, 161 P.2d 376; cf. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 420-422. The only explanation given by petitioner for his failure to appeal is that he lost the right because of his ignorance of the law and because of a lack of funds necessary to order a transcript of the record.

[2,3] Petitioner's failure to appeal cannot be excused upon the basis of his explanation. He was represented by counsel during all stages of his trial from arraignment through pronouncement of judgment and sentence, and there is no showing that he did not have, or could not obtain, the aid of counsel during the time within which he could have taken an appeal. Although the application for habeas corpus was apparently prepared by petitioner without the aid of an attorney, he is now represented by counsel, who argued on his behalf at the hearing before this court. No claim has been made, however, that his failure to appeal was due to lack of opportunity to consult an attorney or that he was in any manner deprived of the right to the assistance of an attorney during the time within which he could have appealed from the conviction. Petitioner has the burden in this proceeding of alleging and proving all facts upon which he relies to overturn the judgment and of giving a satisfactory reason for not resorting to his remedy of appeal. See In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793; In re Manchester, 33 Cal.2d 740, 742, 204 P.2d 881; In re Connor, 16 Cal.2d 701, 711, 108 P.2d 10. For all that appears petitioner may have refused the services of counsel, and, in the absence of allegations to the contrary, he is in no position to assert that he was ignorant of the law. His allegation as to lack of funds for a transcript raises a false issue and is entirely immaterial, since he would have been entitled to a transcript of the evidence at the expense of the state. People v. Smith, 34 Cal.2d 449, 211 P.2d 561; see 4 Cal.Jur.2d 262.

[4] We must next consider whether, regardless of the lack of a satisfactory excuse for the failure to appeal, we may properly pass upon petitioner's claims re-

lating to forced confession and unlawful search and seizure. Petitioner argues that a failure to appeal will not prevent a resort to habeas corpus when, as here, fundamental constitutional rights are involved. His contentions, however, depend entirely on his version of what occurred, and, as we shall see, there was ample evidence from which the trial court could have found that there was no violation of his rights. It is, of course, an established rule that habeas corpus may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial. In re Horowitz, 33 Cal.2d 534, 546, 203 P.2d 513; In re Lindley, 29 Cal.2d 709, 723, 177 P.2d 918. Likewise, the writ is not available to correct errors or irregularities relating to ascertainment of the facts when such errors could and should have been raised by appeal. Cf. In re Lindley, 29 Cal.2d 709, 722, 177 P.2d 918; In re Porterfield, 28 Cal.2d 91, 99, 168 P.2d 706, 167 A.L.R. 675. The same principles should apply even though the alleged errors involving factual issues relate to an asserted denial of constitutional rights. Cf. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 421-422. It would obviously be improper to permit a collateral attack because of claimed errors in the determination of the facts after expiration of the time for appeal when evidence may have disappeared and witnesses may have become unavailable.

The clerk's and reporter's transcripts of the proceedings in the trial court have been made a part of the record herein, and we have examined them to ascertain whether the facts relating to petitioner's contentions were before that court and whether any error in connection therewith could have been raised on appeal. The record shows that the issues relating to the confession and the claimed unlawful search and seizure were argued during the trial, that the testimony on these matters was conflicting, and that the evidence would have supported a finding that there was no violation of petitioner's constitutional rights. According to the testimony and the inferences to be drawn therefrom, two police officers, who were looking for a Mr. Levitt, went to

petitioner's apartment and rang the bell. They identified themselves as police officers when petitioner came to the door, and he invited them to enter. While one of them was talking to him, the other, standing in an inner doorway and looking into another room, observed some of the equipment assertedly used by petitioner for counterfeiting, including a ten dollar bill taped to a printing frame before a camera. The officers then arrested and handcuffed petitioner, the premises were searched and certain articles were seized. The police officers telephoned United States secret service agents, and additional evidence was discovered after the federal agents arrived, but the record shows that such evidence was voluntarily disclosed to the agents by petitioner in response to their questions. The officers and agents denied that petitioner was beaten or threatened, and there was testimony that his confession was given freely and voluntarily and that no force was used upon him except for a slight scuffle when he was handcuffed.

[5,6] It could be concluded from the evidence that the police officers lawfully entered the apartment and that they thereafter had reasonable cause for believing that petitioner had committed a felony. Hence they could arrest him without a warrant. Pen.Code, § 836. Thereafter it was proper for them, as an incident to a lawful arrest, to search the premises and seize articles which they believed were being used by petitioner in the commission of the crime for which he was arrested. *Harris v. United States*, 331 U.S. 145, 151 et seq., 67 S.Ct. 1098, 91 L.Ed. 1399; see 79 C.J.S., Searches and Seizures, § 26, pages 795-796. Similarly, the action of the federal agents in taking possession of the additional evidence discovered after their arrival was proper in view of the showing that such evidence was willingly disclosed to them by petitioner. With regard to his confession, the testimony as to its voluntary character is clearly sufficient.

[7,8] It is thus apparent from the record as a whole that the matters of which petitioner complains were before the trial court and that there was evidence which would have supported findings that there

was no violation of his constitutional rights in connection with his confession or the search and seizure. Although difficult questions of law might be presented if the facts alleged by petitioner with respect to these matters were accepted, he is not entitled in this proceeding to a consideration of claims which are based upon his version of the conflicting evidence and which could have been, but were not, raised on appeal. Likewise, petitioner's contentions that irrelevant evidence was erroneously admitted at his trial and that the prosecution was guilty of misconduct clearly could have been dealt with upon a timely appeal from the judgment of conviction, and such matters are not reviewable in this proceeding. *In re Manchester*, 33 Cal.2d 740, 743-744, 204 P.2d 881; *In re Lindley*, 29 Cal.2d 709, 723-724, 177 P.2d 918.

[9] Finally, petitioner contends that section 480 of the Penal Code, under which he was convicted, is unconstitutional. This contention comes within a recognized exception to the general rule requiring resort to appeal as a prerequisite to the remedy of habeas corpus. The decisions involving this writ have uniformly passed upon the constitutionality of legislation and, in most instances, have done so as a matter of course without discussion of the propriety of the writ or the availability of an appeal. See *In re Wells*, 35 Cal.2d 889, 892-895, 221 P.2d 947 (considering merits of contentions although noting that they could have been, but were not, presented on appeal); *In re Porterfield*, 28 Cal.2d 91, 99, 168 P.2d 706, 167 A.L.R. 675; *In re Herrera*, 23 Cal.2d 206, 208, 214, 143 P.2d 345 (no discussion); *In re Bell*, 19 Cal.2d 488, 492-495, 122 P.2d 22; *In re Sidebotham*, 12 Cal.2d 434, 85 P.2d 453 (no discussion); 13 Cal.Jur. 225-226; cf. *In re Leach*, 215 Cal. 536, 543-545, 547, 12 P.2d 3 (stating that it is well settled that constitutionality of a law may be raised on habeas corpus).

[10,11] Petitioner asserts that section 480 is void because, he argues, the United States Constitution gives Congress the sole power to punish the counterfeiting of federal currency. Section 8 of article I of the United States Constitution provides that "the Congress shall have Power * *

To coin Money, regulate the Value thereof, and of foreign Coin * * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States". A state, of course, is not precluded from acting with respect to a particular subject merely because power over that subject has been expressly granted to Congress by the Constitution, and it has been recognized that the same act may be made a crime by both state and federal governments. *People of State of California v. Zook*, 336 U.S. 725, 731, 69 S.Ct. 841 (regulation of interstate commerce); *United States v. Lanza*, 260 U.S. 377, 381-384, 43 S.Ct. 141, 67 L.Ed. 314 (sale of intoxicating liquor); *People v. Grososky*, 73 Cal.App.2d 15, 17, 165 P.2d 757; see 15 Am. Jur. 68. Although the cases are not entirely clear, the United States Supreme Court has indicated that, in the absence of federal legislation which occupies the field, state legislatures have authority to prohibit counterfeiting of federal money. See *Sexton v. People of State of California*, 189 U.S. 319, 322-323, 23 S.Ct. 543, 47 L.Ed. 833; *United States v. Arjona*, 120 U.S. 479, 487, 7 S.Ct. 628, 30 L.Ed. 728; cf. *Fox v. State of Ohio*, 5 How. 410, 46 U.S. 410, 432 et seq., 12 L.Ed. 213.

In California the case of *People v. White*, 34 Cal. 183, 186, sustained a conviction under a statute similar to section 480 of the Penal Code for knowingly procuring and possessing instruments used in counterfeiting United States gold coin. The court rejected an argument that the statute was contrary to the federal Constitution, stating that the United States Supreme Court had decided the matter adversely to the views advanced by the defendant's counsel. See also *People v. McDonnell*, 80 Cal. 285, 22 P. 190. Other jurisdictions have reached the same conclusion on the ground that the states have concurrent power with the federal government unless Congress provides for exclusive federal control. *Commonwealth v. Fuller*, 8 Metc., Mass., 313, 314 et seq.; *Harlan v. People*, 1 Doug. Mich., 207, 209-212; *Stroube v. State*, 40 Tex.Cr.App. 581, 51 S.W. 357, 358; *Martin v. State*, 18 Tex. App. 224, 225.

[12] There is no merit to petitioner's contention that the field was occupied by the enactment of chapter 25 of Title 18 of the United States Code which provides for the punishment of counterfeiting and related crimes. Whether Congress has occupied a particular field depends upon whether it intended to exclude state legislation. *People of State of California v. Zook*, 336 U.S. 725, 728-733, 69 S.Ct. 841. Title 18, which relates to other federal crimes in addition to counterfeiting, expressly provides that "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." U.S.C.A. § 3231. Substantially identical provisions in former federal statutes have been held to expressly reserve the jurisdiction of the states to punish counterfeiting. *Ex parte Geisler*, 5 Cir., 50 F. 411; *People v. White*, 34 Cal. 183, 186; *State of Iowa v. McPherson*, 9 Iowa 53, 55; *People v. Fury*, 279 N.Y. 433, 18 N.E.2d 650, 651; *Stroube v. State*, 40 Tex.Cr.App. 581, 51 S.W. 357, 358; see *Sexton v. People of State of California*, 189 U.S. 319, 322, 23 S.Ct. 543, 47 L.Ed. 833; *Nastasi v. Aderhold*, 201 Ga. 237, 39 S.E.2d 403, 405.

The order to show cause is discharged, and the writ is denied.

SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

There can be no question but that the record discloses a flagrant violation of petitioner's constitutional rights. The majority opinion conveys the false impression that the officers went to petitioner's home looking for a Mr. Levitt and accidentally saw the counterfeiting material and equipment. It is there stated that petitioner *invited* the officers in and that the entry of the police officers was peaceful. This is refuted by the statement in respondent's brief that "In the instant case the officers had reason to believe that one Levitt had committed a felony and was in the premises. *They had a right to break and enter*

in an endeavor to apprehend Levitt." (Emphasis added.)

The majority opinion fails to give the complete factual background of this case. It fails to mention that at the instigation of the federal officers who made the search, petitioner was charged by a federal Grand Jury with the same crime as is here involved. Upon the trial, in the federal district court, he moved to suppress the evidence which had been seized in violation of his constitutional rights; that motion was granted by Judge Dal M. Lemmon and it was ordered that "The evidence other than the written statement, the photographs taken by the officers and the written consent" be delivered to the defendant. The evidence so ordered to be delivered to petitioner was not delivered to him but to police officers of the City and County of San Francisco who used it to institute the criminal action in which he was convicted. This petition for a writ of habeas corpus stems from the judgment of conviction entered in the Superior Court of the City and County of San Francisco. The charge against petitioner in the Federal Court was dismissed.

As Judge Lemmon pointed out in his opinion, that any invitation by defendant to the officers was in submission to authority rather than an intelligent and voluntary waiver of his right of protection from illegal arrest or unreasonable search and seizure. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. It is admitted by the prosecution that there was a scuffle when petitioner was handcuffed after asking if the officers had a search warrant. Petitioner's so-called voluntary oral consent to a search was given while he was handcuffed; his written consent to such a search was also given while he was handcuffed. For all practical purposes, aside from any force used by the officers, the entry by the officers and their search of petitioner's home was illegal and in violation of his constitutional rights. As Judge Lemmon stated, there was present coercion, both physical and psychological. Petitioner knew that incriminating evidence had been found; he was handcuffed when his consent to a thorough search was re-

fused and later gave his consent. A consent given under such circumstances is not the consent which the law requires before a lawful search may be made. A forced consent is no consent at all. *United States v. Baldocci*, 9 Cir., 42 F.2d 567.

In California, due to an unfortunate line of decisions, evidence illegally obtained is admissible in the courts. With these holdings I have always been in disagreement. See dissenting opinion in *People v. Rochin*, 101 Cal.App.2d 140, 143, 225 P.2d 1, 913; reversed by United States Supreme Court, *Rochin v. People of California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. I have always taken the position that the decisions of this Court have given aid and comfort to so-called officers of the law who are so lacking in respect for the constitutional provisions here involved that they ruthlessly violate them with impunity. To them the constitutional right of privacy does not exist, and they make an empty, hollow mockery out of the oath which they took to support the Constitution.

The Fourth Amendment to the Constitution of the United States provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." (Emphasis added.) The same provision is found in the California Constitution, article I, section 19. The federal courts have refused to allow this right to be violated. I wish I could say the same thing for the courts of California. We are told by a majority of this Court that the action of the federal agents in taking possession of additional evidence discovered after their arrival was proper *in view of the showing that such evidence was willingly disclosed to them by petitioner*. This is in conflict with the decision of Judge Lemmon who held that the evidence was illegally obtained and ordered it returned to defendant. His decision on this issue is final and should be res adjudicata. It is ignored by the majority. The evidence is uncontradicted—in fact it is admitted—that at the time the search was made petitioner was handcuffed. It would appear to me that one who is handcuffed is not in a position to do any-

thing *willingly*. We are also told that evidence was *voluntarily* disclosed by petitioner. This so-called *voluntary* disclosure was also made *after* he was handcuffed. In view of the foregoing it is perfectly obvious that the search and seizure were unlawful.

As Mr. Justice Douglas said in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 193, 93 L.Ed. 153: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. *We cannot be true to that constitutional requirement* and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." (Emphasis added.)

In this record I find no evidence that such an emergency existed as to excuse the procurement of a search warrant and Judge Lemmon so held. It is also my opinion that, under the facts presented here, to hold, that petitioner "*willingly*" and "*voluntarily*" permitted the officers to search and seize evidence found in his home is a travesty upon the accepted meaning of those words.

The majority here disregards the mandates of both the federal and state Constitutions that the right of the people to be secure in their persons, houses, papers and effects shall not be violated, and sanctions the violation of these mandates on the ground of expediency.

It is indeed regrettable that the majority of this Court has again seen fit to perpetuate a rule which permits peace officers to flout these constitutional mandates. This rule was first pronounced by this Court in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, which was followed by the cases of *People v. Gonzales*, 20 Cal.2d 165, 124 P.2d 44, and *People v. Kelley*, 22 Cal.2d 169, 137 P.2d 1. Abuses which have been practiced under this rule have been declared by the Supreme Court of the United States to be of such gravity and so inhuman as to shock the conscience of mankind and that "this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities." See *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183. While the reversal of this Court by the Supreme Court of the United States in the *Rochin* case was not based upon the Fourth Amendment to the Constitution of the United States but upon the due process clauses of the Fifth and Fourteenth Amendments to that Constitution, it cannot be denied that had the courts of California followed the federal rule with respect to excluding evidence obtained as the result of an unlawful search and seizure, the *Rochin* case would never have occurred and this Court would have escaped the censure implicit in the following statement in the *Rochin* case, 342 U.S. at page 174, 72 S.Ct. at page 210, 96 L.Ed. 183: "In deciding this case we do not heedlessly bring in to question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a review of the conviction. All the California judges who have expressed themselves in this case have

condemned the conduct in the strongest language." It should be noted that the statement in the above excerpt that "the California Supreme Court has not sanctioned this mode of securing a conviction", is not a correct statement, as the Rochin case was before this Court on a petition for hearing after decision by the District Court of Appeal, Second Appellate District, and that petition was denied by the vote of every member of this Court except Justice Schauer and myself who wrote dissenting opinions to the order of denial. See *People v. Rochin*, 101 Cal.App.2d 140, 143, 149, 225 P.2d 1, 913.

It cannot be denied that it lies within the power of a majority of this Court to change the rule which permitted and encouraged the shocking and inhuman conduct of peace officers depicted in the Rochin case and in the case at bar. The courts of last resort of many other states have seen fit to adopt and follow the federal rule relating to the admissibility of evidence obtained as the result of an unlawful search and seizure.

On December 6, 1950, the Supreme Court of Delaware, in the case of *Rickards v. State*, 6 Terry. 573, 77 A.2d 199, overruled two prior decisions of that court and adopted the federal rule with respect to the inadmissibility of evidence obtained as a result of an unlawful search and seizure; that is, search without a search warrant. The decision of the Supreme Court of Delaware is reported in 6 Terry. at page 573, 77 A.2d at page 199, 204. In the course of its opinion in this case, the Supreme Court of Delaware stated:

"It would serve little purpose to catalog numerous decisions of State and Federal Courts discussing the rule. There is a direct conflict between the respective points of view; they are irreconcilable.

"Courts admitting such evidence, while recognizing the existence of the constitutional guarantees against unreasonable search and seizure and compulsory self-incrimination, nevertheless, hold that the protection of those guarantees does not require evidence obtained in violation of them to be excluded. In answer to the ar-

gument that the guarantees have been violated by state officials, it is said that the state, itself, has committed no violation because it adopts as its acts only the legal acts of its officials, and that officials who illegally violate constitutional guarantees do so on their own initiative and not under the sponsorship of or for the benefit of the state. The remedy of the individual whose rights have been violated is stated to be a civil action against the official who has invaded his constitutional rights.

"Courts following the Federal rule adopt the view that the efficient prosecution of criminals cannot justify a deliberate invasion of the right of the citizen to be made secure against the violation of specific constitutional guarantees, and that the suggested remedy of a civil action is as a practical matter no remedy at all. The Federal rule is a practical attempt to help preserve the constitutional guarantees.

"We prefer the rule followed in the Federal courts. We conceive it the duty of the courts to protect constitutional guarantees. The most effective way to protect the guarantees against unreasonable search and seizure and compulsory self-incrimination is to exclude from evidence any matter obtained by a violation of them.

"We believe that as long as the Constitution of this state contains the guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees. Since it is obvious that the exclusion of such matters from evidence is the most practical protection, we adopt that means. It is no answer to say that the rule hampers the task of the prosecuting officer. If forced to choose between convenience to the prosecutor and a deprivation of constitutional guarantees to the citizen, we in fact have no choice. Moreover, within constitutional limits, the Legislature may change the rules defining the limits of legal police action. It may well be that the Legislature will desire to reconsider Section 5173 and Section 5683 in the light of modern needs.

"We, accordingly, are of the opinion that *State v. Chuchola* [2 W.W.Harr. 133, 120 A. 212], *supra*, and *State v. Episcopo* [7

W.W.Harr, 439, 184 A. 872], supra, were erroneously decided and overrule them. The proper rule to be applied in the criminal courts of this state is that evidence obtained by a violation of constitutional guarantees is inadmissible at the trial of the person whose guarantees have been violated, if timely objection is made thereto. We suggest the adoption of an appropriate rule by the Court of General Sessions to cover the subject. Cf. Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

"The conviction of the plaintiff in error is reversed." (Emphasis added.)

In view of the foregoing I would grant the writ here prayed for and discharge the petitioner from custody.

SCHAUER, Justice.

I concur in the reasoning and in the conclusion stated by Justice CARTER.



41 Cal.2d 794

PEOPLE v. BRADDOCK.

Cr. 5513.

Supreme Court of California.

In Bank.

Dec. 18, 1953.

Rehearing Denied Jan. 14, 1954.

Defendant was convicted of unlawfully prescribing narcotics to a person not under his treatment. The Superior Court, Los Angeles County, Kenneth C. Newell, J., rendered judgment, and defendant appealed. The Supreme Court, Edmonds, J., held that there was no fatal variance between the information and the proof and that the evidence sustained the trial court's finding, adverse to defendant, on entrapment defense.

Affirmed.

Carter, J., dissented.

Prior opinion 258 P.2d 1043.

264 P.2d—33 1/2

1. Indictment and Information ◊71

An information is formally sufficient if, in substance, it charges defendant with commission of public offense in words "sufficient to give the accused notice of the offense of which he is accused". Pen. Code, § 952.

2. Indictment and Information ◊171

To be material, variance between information and proof must be of such a substantive character as to mislead accused in preparing his defense, or likely to place him in second jeopardy for same offense. Pen.Code, § 952.

3. Indictment and Information ◊180

There was no fatal variance between information charging wrongful prescription of narcotics to named narcotic officer and evidence which showed that prescriptions had been made out to a fictitious person, where true identity of narcotic officer, who had posed as husband of fictitious person for whom narcotics were prescribed, was made known to defendant and testimony, including, in detail, circumstances surrounding writing of prescriptions, with dates and places of those events and names used, was given at preliminary hearing, at which defendant was present. Health and Safety Code, § 11163.

4. Criminal Law ◊295

On plea of double jeopardy, extrinsic evidence is admissible on trial to identify crime of which defendant has been convicted.

5. Poisons ◊2

Statute forbidding certain narcotics prescriptions was not enacted to protect persons not under physician's treatment for pathology from faulty diagnosis or improvident administration of narcotics, but rather to prevent one having access to narcotics from making them available, other than for legitimate purpose, to one under treatment for a pathology. Health and Safety Code, §§ 11162.5, 11163, 11330.

6. Criminal Law ◊29

It does not follow from fact that offense is punishable under statute prohibiting fictitious prescriptions that such act

may not also amount to a violation of statute prohibiting prescription of narcotics for persons not under treatment. Health and Safety Code, §§ 11163, 11165.

7. Criminal Law ⚖330

Entrapment is a positive defense imposing upon accused burden of showing that he was induced to commit act for which he is on trial.

8. Criminal Law ⚖1159(3)

Where record shows conflict in evidence, judgment will not be reversed.

9. Poisons ⚖4

A person who violates law by selling narcotics to evasive purchaser is as guilty as one who supplies an addict more forthright in his demands. Health and Safety Code, § 11163.

10. Criminal Law ⚖569

In prosecution for wrongful issuance of narcotics to one not under treatment, evidence sustained finding adverse to defendant on defense of entrapment. Health and Safety Code, §§ 11001, 11163.

Isaac Pacht, Arthur F. Larrabee and Rudolph Pacht, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Raymond M. Braddock was tried by the court without a jury upon an information charging him with four violations of section 11163 of the Health and Safety Code.¹ He has appealed from a judgment of conviction upon each count and from an order denying his motion for a new trial. Braddock asserts that a material variance exists between the information and the proof. Another point relied upon by him is that the evidence, as a matter of law, shows the commission of the offenses as a result of entrapment.

The four counts are in substantially the same language, except for the date of the alleged offense. Each of them charges that Braddock, a licensed doctor of osteopathy, "did willfully, unlawfully and feloniously prescribe a narcotic, to wit, methadon, to E. J. Mantler, a person not under his treatment for a pathology". Mantler, an inspector for the Bureau of Narcotic Enforcement, was the principal witness for the People. The defendant did not testify and presented no evidence.

The record shows the following facts:

In the company of one Grimes, a person addicted to the use of narcotics, Mantler went to Braddock's residence and was introduced to the doctor as "Roy Bates". Mantler said to him, "I was hoping you could help me out with my wife." Braddock asked, "What kind of medicine does your wife use?" Mantler replied, "Well, she has used lots of different kinds in the last couple of years." Asked if he could bring her to the doctor, Mantler stated that it would not be convenient or practical. They discussed other subjects for a few minutes, and then the doctor said, "Oh, well, let's go inside and I'll write her one."

The three men entered the house, where Braddock seated himself at a table and produced a prescription book. At that moment, one Thomas, known by Mantler to be a narcotic addict, appeared at the front door. Grimes left the room and engaged Thomas in conversation, and they disappeared from Mantler's view. Braddock asked Mantler for his wife's name and was given the fictitious one of "Julia M. Bates". "You say she used methadon?" Braddock asked. Mantler answered, "Yes, and demerol." Braddock said, "I think Methadon is better."

Told by Mantler that "shots" were preferable to tablets, the doctor wrote a prescription for 120 cubic centimeters of methadon to Julia M. Bates at a fictitious address supplied by Mantler. "She has

1. Section 11163 provides: "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person

who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division."

T. B.?" he asked. Receiving an affirmative reply, he wrote those initials upon the prescription form. "How much do you want for the favor?" asked Mantler. Braddock replied, "How much have you got?" Mantler told him that he had \$30. Braddock said, "I will take half of it. That will give you enough to get along on." Mantler gave him the money and departed.

Mantler had the prescription filled, although with difficulty because of the quantity of the drug indicated. When he received the substance, he gave it to a chemist for analysis. Testifying as an expert, the chemist stated that methadon is a manufacturer's name for amidone, a narcotic enumerated in section 11001 of the Health and Safety Code, and included within the provisions of section 11163.

About 10 days later, Mantler again visited Braddock's home. After some preliminary conversation, he remarked, "My wife is not too good." Braddock said, "What was it she is using, delaudid?" Mantler stated that it was methadon. The doctor said, "That is not as bad as some stuff." He left the room and returned with a prescription book. "Give me a run down on her again. I can't seem to remember it." Mantler answered, "Well, she has been using it a couple of years now." "Is she bad when she doesn't have it?" asked the doctor. "She sure is", Mantler replied. "She nearly runs me up the chimney."

Braddock made the notation, "T. B." on the prescription form and asked Mantler what else was wrong with his wife. Mantler told him that she had an "old hysterectomy." The doctor said, "Oh yes. How much of these are you using?" Mantler looked at Braddock and said, "Not me, Doc. I am not using any. I have got enough trouble." Braddock remarked, "I never use anything but alcohol. Morphine makes me very odd." He then stated, "We won't have any trouble as long as you keep this far apart." Mantler assured him that he would try to do so. In payment, the doctor accepted \$10, and said, "I ought to see this patient some time." After further conversation, he continued, "Give me a call some time when you are sure your wife

will be home and I will drop in. I should see the patient."

About a week later, Mantler visited the doctor's home for the third time. He entered the house and was invited to sit down. After writing a prescription to Julia M. Bates for a quantity of methadon, he said, "You are kind of shortening up the time." Mantler replied, "Well, Doc, it is not holding. It doesn't last." The doctor said, "I don't want you to come here before ten days." He again advised Mantler to wait ten days, and accepted \$10 for the prescription.

On his fourth visit, Mantler was accompanied by inspectors from the Bureau of Narcotic Enforcement and from the Board of Osteopathic Examiners. The other men waited outside while Mantler went in. Producing a prescription book, the doctor asked him the date and how he was getting along. Mantler answered that things were "pretty tough" and that he was having trouble "getting along with it". He paid the doctor \$10 after receiving the assurance that if the prescriptions were kept at least ten days apart, they would have no trouble.

As he left the house, Mantler handed the prescription to Blanchard, one of the other officers. Blanchard entered, identified himself, and asked to see Braddock's records. When he questioned Braddock as to the identity of Julia Bates he was told that she was an old patient, who had a post-pregnancy condition and a hysterectomy. Braddock added that he had first contacted her when called to her home. Blanchard said, "Now, as a matter of fact, Doctor, have you ever seen Julia Bates?" The doctor admitted that he had not.

Blanchard told Braddock that the person who had been obtaining prescriptions from him under the name of Julia Bates in fact was an inspector from the Bureau of Narcotic Enforcement. He asked the doctor why he had been writing false and fictitious prescriptions and was told, "Well, I am in financial straits and I need the money." "Do you admit then that you have been violating the State and Federal Narcotic Laws in the sale of these narcotics?" he asked. Braddock replied, "Certainly, you have

got the evidence on me; what is the use of denying it?" Thereafter, Mantler returned to the house, identified himself to the doctor, and showed him his credentials.

Braddock's claim of a material variance is based upon an alleged conflict between the information, which charges that he prescribed narcotics to E. J. Mantler in violation of section 11163 of the Health and Safety Code, and the evidence, which shows that the prescriptions were made out to Julia M. Bates, a fictitious person.

[1, 2] An information is formally sufficient if, in substance, it charges the defendant with the commission of a public offense in words "sufficient to give the accused notice of the offense of which he is accused." Pen.Code, § 952. To be material, a variance between the information and proof must be "of such a substantive character as to mislead the accused in preparing his defense, or * * * likely to place him in second jeopardy for the same offense." *People v. Williams*, 27 Cal.2d 220, 226, 163 P.2d 692, 695; *People v. Amy*, 100 Cal.App. 2d 126, 127, 223 P.2d 69; *People v. Moranda*, 87 Cal.App.2d 703, 705, 197 P.2d 394.

[3] In substance, the charges against Braddock are based upon transactions by which he sold narcotic prescriptions to Mantler, ostensibly for the use of another person, neither of them being under his treatment for a pathology. The true identity of the man supposed to be the husband of Julia M. Bates was made known to Braddock both by Inspector Blanchard and by Mantler himself, and Braddock was present when Mantler testified at the preliminary hearing. That testimony included in detail the circumstances surrounding the writing of the prescriptions, with the dates and places of those events and the names used, and it was sufficient to notify him of the particular circumstances of the offense charged in the information. *People v. Roberts*, 40 Cal.2d 483, 486, 254 P.2d 501. Furthermore, by stipulation the evidence against Braddock was presented by a transcript of the proceedings upon the preliminary hearing with only a slight amount

of additional testimony. Braddock could not have been misled.

[4] If Braddock should be tried again on a charge of violating section 11163 for any of the acts which form the bases for the present prosecution, he may show former jeopardy by evidence produced in that proceeding. "It is well settled that on a plea of double jeopardy, extrinsic evidence is admissible on the trial to identify the crime of which a defendant has been convicted." *People v. Williams*, *supra*, 27 Cal.2d at page 226, 163 P.2d at page 695.

[5, 6] Braddock contends, however, that the evidence does not support the charge that he violated section 11163 of the Health and Safety Code in that the narcotics were prescribed for a fictitious person. Although the evidence shows a violation of section 11165 of that code,² a misdemeanor, the argument continues, a violation of section 11163, which is a felony, requires that he "prescribe, administer, or furnish" the narcotic to an existing person.

It is questionable whether an accused properly may be convicted of a violation of section 11165 when the evidence does not show that he knew, or should have known, that the person for whom a prescription is written is nonexistent. But even if punishable under that section, it does not follow that such act may not also amount to a violation of section 11163. To hold otherwise would be to permit a physician freely supplying narcotics for illegitimate purposes to prevent being convicted of a felony by the simple device of writing a prescription for a fictitious person. No such result could have been intended by the Legislature.

The decision in *People v. Whitlow*, 113 Cal.App.2d 804, 249 P.2d 35, is not contrary to this conclusion. In that case, the defendant was accused of violating section 11163, but upon motion the offenses charged were reduced to misdemeanors under section 11165 as lesser included offenses. Upon appeal, the judgment of conviction was reversed upon the ground that a violation of section 1163 does not necessarily include a

2. Section 11165 states: "No person shall issue a prescription that is false or fictitious in any respect."

violation of section 11165. However, the court did not hold that conduct proscribed by the former section may never be included within the prohibitions of the latter one.

The apparent purpose of section 11163 is to regulate the conduct of those persons who, in the practice of their professions, have access to legitimate sources of narcotics. The responsibility of such a practitioner is to prescribe narcotics for legitimate medical purposes. Health and Safety Code § 11162.5. "A physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction.

"The physician shall prescribe, furnish, or administer narcotics only when in good faith he believes the disease, ailment, injury, or infirmity, requires such treatment." Health and Safety Code § 11330.

If the object of section 11163 were to protect persons not under a physician's treatment for a pathology from faulty diagnosis or improvident administration of narcotics, it might be material in a prosecution under that section to show whether the person named in the prescription exists. But that is not the purpose of the statute. It seeks instead to prevent one having access to narcotics from making them available, other than for a legitimate purpose, to one under treatment for a pathology.

From the evidence it might reasonably be inferred that Braddock intended that the narcotics go to the person identified to him as Julia M. Bates. Also tenable is the inference that he intended that the narcotics go to the person before him, Mantler. Despite Mantler's assurances that he was not using the drugs, Braddock might have believed that he was the addict, as shown by his references to Mantler's "shortening up the time" between prescriptions and his advice to avoid more dangerous drugs. In either event, however, the conviction must be affirmed, since the gist of the offense was Braddock's action in writing a prescription for a narcotic for a person not under treatment for a pathology.

Finally, Braddock contends that the evidence, as a matter of law, shows unlawful entrapment. From the testimony of Mantler, he argues, it appears that the sales of prescriptions were made by him as the result of Mantler's inducements. The crime originated in the mind of Mantler, says Braddock, and except for the officer's persuasion, fraud and trickery, the offenses would not have been committed.

The many decisions in this state which define the defense of entrapment were reviewed in *People v. Lindsey*, 91 Cal.App. 2d 914, 205 P.2d 1114, and the law stated as follows: "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. [Citation.] If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment." 91 Cal.App.2d at page 917, 205 P.2d at page 1115. More recently it was held: "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." *People v. Schwartz*, 109 Cal.App.2d 450, 455, 240 P.2d 1024, 1027; quoted with approval in *People v. Roberts*, supra, 40 Cal.2d at page 489, 254 P.2d 501; accord *People v. Makovsky*, 3 Cal.2d 366, 369, 44 P.2d 536; *People v. Branch*, 119 Cal.App.2d 490, 260 P.2d 27; *People v. Alamillo*, 113 Cal.App.2d 617, 620-621, 248 P.2d 421; *People v. Crawford*, 105 Cal.App.2d 530, 537, 234 P.2d 181.

In the present case, although Mantler had stated that his fictitious wife used "lots of different kinds" of medicines, it was Braddock who suggested a prescription, and it was he who first mentioned a narcotic. Braddock's suggestion of "T.B." came after

the initial prescription had been written and without any previous description by Mantler of the nature of his wife's illnesses. Despite the complete lack of any suggestion by Mantler that the drugs were to be used for an improper purpose, Braddock advised him to wait a sufficient time between prescriptions to avoid detection. Moreover, when placed under arrest, Braddock stated that he had been selling prescriptions because he was in financial straits and needed the money.

[7,8] Entrapment "is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial." *People v. Schwartz*, supra, 109 Cal.App.2d at page 455, 240 P.2d at page 1027; *People v. Grijalva*, 48 Cal.App.2d 690, 694, 121 P.2d 32; *People v. Lee*, 9 Cal.App.2d 99, 109, 48 P.2d 1003. Where the record shows a conflict in the evidence, the judgment will not be reversed. *People v. Crawford*, 105 Cal. App.2d 530, 537, 234 P.2d 181.

[9] Braddock concedes that if the officer had asked to purchase a narcotic prescription for an unlawful purpose, there would be no basis for a defense of entrapment. He argues, however, that because Mantler made the purchases for a person supposedly ill, it must be concluded that the seller was persuaded to violate the law only because of sympathy. However, a person who violates the law by selling narcotics to an evasive purchaser is as guilty as one who supplies an addict more forthright in his demands. That Braddock was not misled is demonstrated by his studied efforts, entirely voluntary, to give a cloak of legality to the transaction.

[10] The testimony, read as a whole, shows Braddock to have been a willing seller to whom Mantler presented an opportunity to sell narcotics. By the judgment of conviction and the order denying the motion for a new trial, the trial judge determined that Braddock had not been en-

trapped into making the sales. For an appellate court to hold otherwise would require it to draw different inferences from the evidence which amply supports that determination.

The judgment and the order denying defendant's motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I adopt as my dissent in this case the able and well reasoned opinion prepared by Mr. Presiding Justice SHINN which was concurred in by Justices WOOD and VALLEE when this case was before the District Court of Appeal, Second Appellate District, Division Three.

"Dr. Raymond M. Braddock was convicted in a nonjury trial of four violations of § 11163, Health & Safety Code,¹ consisting of the issuance of four narcotic prescriptions on separate days for one who was not under his treatment. He was granted probation upon condition that he spend nine months in the county jail, his motion for a new trial was denied, and he appeals.

"The case was tried upon the transcript of evidence at the preliminary and some additional testimony at the time of trial. The case of the People rested upon the testimony of one Mantler, an inspector for the Bureau of Narcotic Enforcement, State of California. Defendant offered no evidence. Therefore, the evidence is unconflicting.

"Defendant urges the defense of entrapment and also claims there was a material variance in that the information charged that the medicine was prescribed to E. J. Mantler, whereas the proof showed that it was prescribed for a fictitious person, 'Julia Bates.'

1. "§ 11163. Narcotic not to be prescribed etc., for person not under treatment. Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic

to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division."

"Simply stated, the rule as to entrapment is that the defense is valid when the intent to bring about the commission of the unlawful act originates in the mind of the entrapping person and the accused is lured into commission of an offense he would not otherwise have committed in order that he can be apprehended and prosecuted. *People v. Hall*, 133 Cal.App. 40, 23 P.2d 783.

"Mantler had himself introduced to Dr. Braddock by one Donald Grimes who, he testified, was a narcotic addict whom he had known for about a year. (There was no evidence that Grimes was known to the doctor to be a narcotic addict.) Grimes took Mantler to Dr. Braddock's residence and introduced him to the doctor as 'Roy Bates.' Mantler said he hoped the doctor would take care of his wife, to whom he gave the fictitious name of 'Julia M. Bates,' and he gave a false address for her. The doctor said he was supposed to see the patient and asked if she could be brought to him. The doctor asked what kind of medicine she used and Mantler said she had used all different kinds in the past two years. After a conversation about the doctor's dog and his cat, they entered the doctor's house and the doctor asked what it was Mantler wanted, whether his wife used Methadon and Mantler replied mostly Methadon or Demerol. A prescription was written and Mantler paid the doctor \$15. During this time a man named Thomas came to the front door and Grimes went outside and spoke with him. Mantler testified Thomas was a narcotic addict in Los Angeles, but there was no evidence that the doctor was aware of that fact or even knew of the appearance of Thomas. Ten days later Mantler returned. He and the doctor visited in a friendly manner and in the conversation Mantler said he had been lucky in an unlawful poker game. He said his wife was not 'doing so good,' that she had run out of medicine but he had something for an emergency. The doctor asked if his wife gave trouble when she was short of medicine and Mantler said: 'She very nearly ran me up the chimney of the house on occasions.' The doctor wrote on his prescription book, 'T.B.'

and said: 'What else is wrong with her, I have forgotten what you said the last time' and Mantler said: 'Well, she had an old hysterectomy a couple of years ago.' Mantler paid the doctor \$10. About ten days later he went to the doctor again, and on another visit ten days later, when the doctor asked how he was getting along, Mantler told him that things were 'pretty tough.' Although Mantler testified that on the first occasion he did not tell the doctor what was wrong with his wife, it appeared from his cross-examination that he had stated that she had 'T.B.' During the several visits the conversations were on a friendly basis and the doctor addressed Mantler as 'Roy.' Upon the second visit he asked Mantler to let him know when he could call upon 'Julia Bates' at her home, and upon different occasions inquired how she was getting on. On one occasion they watched a world series ball game on television, and upon the occasion of the second visit Mantler offered the doctor \$20, but he refused to take more than \$10. After Mantler obtained the first prescription it was known to other inspectors in the enforcement office that he had obtained it by false representations to the doctor that 'Julia Bates' was his wife and was in need of drugs. Upon Mantler's fourth visit defendant was arrested by Mantler and three other inspectors who seized all his prescription books and records.

"The only question which requires an answer may be stated as follows: When a narcotic officer conceives a plan to entrap a physician into a violation of the law, has himself introduced to the physician under an assumed name, represents that he has a sick wife who is using Methadon or Demerol (trade names), makes excuses for not bringing her to the doctor's office when told he should do so, ignores a request by the doctor that he call upon her, and obtains prescriptions in a fictitious name given as that of his wife, may the doctor be lawfully convicted of violation of the law which forbids prescribing a narcotic for one not under his treatment? The question describes the case of Dr. Braddock and our answer is a negative.

"It is scarcely necessary to remark that the agent won the confidence of the doctor, who was soon calling him 'Roy' and making friendly inquiries concerning the supposed wife. He appeared as a man who was burdened with a sick wife, for whom he generously provided the drugs for the relief of her distress, when she was unable to visit the doctor. So the doctor issued the prescriptions for one not under his treatment, and as a consequence stands convicted of four counts of felony. But let us see what the agent did: He conceived the plan of inducing the doctor to commit a crime; he persuaded the doctor to issue false and fraudulent prescriptions and became accessory to four misdemeanors, § 11165²; he made false and fraudulent representations, a felony under § 11170³; he gave a false name and a false address for the pretended wife, a felony under § 11170.5⁴.

This was entrapment. In all our searching we have not found a case in which a physician was made the victim of such deception. We cannot say that this is the first time a presumably law abiding physician has been induced by false representations of a law enforcement officer to issue a prescription unlawfully, although we have been unable to discover another one. This satisfies us not only that such methods have not been found necessary in policing the medical profession in prescribing narcotics, but also that the employment of fraud and deception in the entrapment of physicians has been very generally and properly scorned.

"There is, of course, much more involved here than the simple question whether Dr.

Braddock violated the law. He stood mute, as was his right, and thus admitted the truth of Mantler's testimony. It is not because of a claim of innocence that he relies upon the defense of entrapment, but because it is the policy of the law not to punish violations initiated and induced by others for the purpose of bringing about a prosecution.

"If we were to uphold the conviction of Dr. Braddock it would mean that we were approving the unlawful enforcement of the law and giving a free hand to law enforcement officers to use not only deceitful means, but unlawful means, to entice physicians, and others as well, to violate the law. The courts have consistently refused to temporize with such fraud, deceit and direct violation of statutory law as the record here discloses. The agent provocateur, so despised that he has been given no name in our language and can claim no place in our society, had best have the door shut against him whenever he appears. Our courts have given no encouragement to his hateful practices, no foothold in our field of law enforcement from which to extend his contaminating influence.

"It was said in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 213, 77 L.Ed. 413, 418: 'The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts v. United States*, 8 Cir., 273 F. 35, 38, 18 A.L.R. 143, supra, as follows: "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing

2. "§ 11165. False or fictitious prescription. No person shall issue a prescription that is false or fictitious in any respect."

3. "§ 11170. Acts and statements prohibited. (1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact.

"(2) No person shall make a false statement in any prescription, order, report, or record, required by this division.

"(3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian, or other authorized person.

"(4) No person shall affix any false or forged label to a package or receptacle containing narcotics."

4. "§ 11170.5. False name and address. No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it,"' and in the concurring opinion of Justices Roberts, Brandeis and Stone: 'There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require. * * *

"The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court

to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury.'

"It has been the settled policy of the courts to condemn and repudiate unlawful enforcement of the law. We shall refer to only a few of the many cases. One in which the accused was entrapped into procuring and selling a narcotic is *Cline v. United States*, 8 Cir., 20 F.2d 494. A government narcotic agent arrested an addict but promised to release him if he 'made a case' for the agent. The addict, pretending to be greatly in need of the drug, persuaded a friend to induce a chauffeur to obtain morphine for him. The friend received the morphine from the chauffeur, paid him \$5 and when he delivered the morphine to the addict in exchange for \$5, was arrested and convicted in a jury trial. It was held on appeal that the evidence sustained only one conclusion, namely, that the agent used the addict to trap the defendant.

"In *United States v. Healy*, D.C.Mont., 202 F. 349, 350, the accused unlawfully sold liquor to an Indian who was not known by him to be such, but who was used by government officers as a decoy. After conviction the judgment was set aside, the court saying: 'Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. * * * The practice cannot be tolerated, and a conviction for an offense so procured cannot stand.'

"In *United States v. Eman Mfg. Co.*, D. C.Colo., 271 F. 353, 356, a government agent wrote the defendant enclosing \$3 and requesting a case of a preparation claimed to be mislabeled. His purpose was to initiate a prosecution for an unlawful shipment in interstate commerce. Defendant, having made the shipment, was prosecuted and it was held, on the stipulated facts, 'that in the interests of a sound public policy the defendant should be found not guilty and discharged.'

"In *United States v. Lynch*, D.C.N.Y., 256 F. 983, the Military Intelligence Department caused one Fancher to demand money for his influence in the award of a government contract and when money was offered to him by the defendant Lynch the latter was arrested and prosecuted for offering a bribe. The court said that under such circumstances the government was estopped from prosecuting on the ground that it caused and created that of which complaint was made. A verdict of acquittal was directed.

"In *United States v. Echols*, D.C.Tex., 253 F. 862, a military police officer persuaded the accused to procure him a drink in order that he might arrest him therefor. The prosecution was dismissed although the defendant had offered to plead guilty. The court upheld the defense of entrapment and stated as follows, 253 F. at page 863: 'In what is here stated there is no intention to excuse persons who yield to temptation, or to hamper or limit the acts of officers of the law in detecting crime by any means or device; but the zeal to detect crime ought not to be so vigorous as to induce officers to originate and procure the commission of the very offenses which they are enjoined to prevent. No faithful officer of the law will be hampered, nor will any criminal be aided, by the observance of this rule. Its disregard, however, may, and likely will, subject to persecution and conviction weak and spineless persons, who find it hard to resist temptation; and the government, through the zeal for conviction on the part of the arresting officer, may become the means of the ruin of its citizens, instead of their safeguard and protection. Such a possible result at once establishes the unimpeachable wisdom of the rule of public policy here enunciated, and requires that the plea of guilty, which the defendant offered to make, be by the court refused, and the case dismissed, which is accordingly now done.'

"*United States ex rel. Hassel v. Mathues*, D.C.Pa., 22 F.2d 979, was a similar case which stated and applied the rule of entrapment.

"The People contend that the case is the ordinary one of an officer appearing as a

willing buyer of narcotics from one who is willing to sell to anyone offering himself as a customer. Cases of this sort are legion, convictions are the rule and reversals the rare exception. *People v. Makovsky*, 3 Cal.2d 366, 369, 44 P.2d 536; *People v. Lindsey*, 91 Cal.App.2d 914, 916, 205 P.2d 1114; cf. *People v. Gallagher*, 107 Cal.App. 425, 290 P. 504; *Cline v. United States*, supra, 8 Cir., 20 F.2d 494. But this is because one who is willing to peddle narcotics is necessarily a criminal at heart, looking for no inducement to break the law other than the money he expects to receive. It is an inescapable inference in such cases that a willingness to violate the law existed and that the act of violation was self-induced. Persuasion to make a sale does not taint the transaction with the vice of entrapment unless it induces the commission of an act that would otherwise not have been committed. *People v. Makovsky*, supra, 3 Cal. 2d 366, 370, 44 P.2d 536; cf. *Butts v. United States*, 8 Cir., 1921, 273 F. 35; *People v. Gallagher*, supra, 107 Cal.App. 425, 290 P. 504. If this were such a case it would occupy but little of our time, for we would applaud and encourage every energetic and legitimate effort to stamp out the fearful and detestable traffic in narcotics.

"In *Sam Yick v. United States*, 9 Cir., 240 F. 60, at page 65, the court stated: 'While it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have incited the party to commit the crime charged and lured him on to its consummation, the law will not authorize a verdict of guilty.' It is, of course, conceded that officer Mantler conceived the plan to induce Dr. Braddock to commit a crime. The remaining question is whether, in the language of the *Sam Yick* case, the officer 'lured him on to its consummation,' and we shall see from a discussion of the undisputed evidence that Dr. Braddock was 'lured on' from start to finish.

"The question here is whether it could reasonably have been inferred from the facts in evidence that Dr. Braddock was willing to write prescriptions for anyone

willing to pay a price, and that he was not induced and persuaded to write them by the representations of the officer. Such conclusions, in our opinion, would have been based on nothing more than suspicion. Mantler kept up his deception to the last. Nothing occurred to cast doubt upon his representations. The doctor asked to see 'Julia Bates' at his office and offered to call upon her at her home, but Mantler succeeded in persuading him that she could not be brought to the office and avoided the suggestion that the doctor call upon her. It was not shown that Dr. Braddock had ever before issued a prescription for a person who was not under treatment by him, or had otherwise violated the narcotic laws. Mantler made no effort to obtain a prescription for himself. He evidently believed deception would be necessary and he played his role straight through. He was the agent of the state through whom the state acted. It should not be permitted the state to escape responsibility for the acts of its agent by merely saying that although he spoke falsely he was not believed, and that the doctor was not deceived by his falsehoods into doing something he would not otherwise have done. Every reasonable inference is to the contrary. That the doctor believed the representations was evidenced by the fact that he acted upon them. That they were understood by Mantler to be the effective means of accomplishing his purpose was evidenced by the fact that he persisted in them and improved upon them to the point of arousing the doctor's compassion. If there was an intermixture of cupidity, this would not alter the legal aspects of the case. There is no pretense that the defendant was moved by purely charitable motives, or that he did not know he was violating the law, but this does not militate against the defense of entrapment. Defendant admitted to the officers, immediately after his arrest, that he had written the prescriptions because he needed the money, but this means only that he was the more easily persuaded. The defense of entrapment is not to be denied to the weak and needy. They are the very ones who become the victims of persuasion and deceit, and who deserve protection.

"Defendant claims only that he was persuaded to violate the law and that the evidence supports his claim to the exclusion of any other reasonable conclusion. In answering this contention the People call attention to the testimony of Mantler that he had previously questioned defendant over the telephone and accused him of prescribing for addicts, which accusation defendant resented. Also, mention is made of the fact that Mantler testified that Grimes and Thomas were addicts, although it was not shown that defendant had knowledge of that fact or that he even knew the man Thomas. To give serious consideration to such self-serving testimony and vaguely suspicious circumstances as incriminating evidence would only magnify the error of the conviction. The mere presence of Grimes and Thomas was not any sort of evidence that defendant was a law violator. If they were 'planted' there by Mantler, as they no doubt were, they could have been called as witnesses if they would have testified that defendant had prescribed for them unlawfully. It is therefore to be presumed that had they been called to testify as to their relations with defendant, if any, their testimony would have been adverse to the People. We therefore utterly reject the argument that as against this presumption the court could regard the presence of these men as an incriminating or even a suspicious circumstance. Moreover, the officers had seized and had possession of defendant's narcotic records. None was offered in evidence. The assertion of Mantler in the telephone conversation that defendant had been prescribing for addicts was not evidence. Defendant made no admission. His prescription books, which were required to contain copies of all prescriptions issued within two years, Health and Safety Code, § 11166.10, were in the hands of the officers. It was to be presumed that if they had been produced in court they would not have disclosed anything favorable to the prosecution.

"This case takes on added significance from the fact that in the present day courts and juries must place great reliance upon the testimony of officers who are charged with the duty of enforcing the narcotic

laws. It is of common occurrence that convictions are had, and are affirmed on appeal, upon the uncorroborated testimony of such officers, even in the face of strong denials by the accused. We do not doubt that confidence in the veracity and motives of the officers is generally well deserved, and deem it somewhat more than unfortunate that any officer should stoop to falsehood and deceit in order to bring about the commission of a crime for the purpose of obtaining a conviction. It is shocking to learn that an officer of the law whose worth depends so much upon a high regard for the truth and a just regard for the rights of citizens should conceive and carry out a plan involving so much duplicity, and even more so that he should be assisted by other officers who were aware of the deception. That the narcotic laws are vigorously and systematically enforced we know from the multitudes of arrests that are made and the convictions that are had, but it is better that some offenders should go unpunished than that over zealous officers should be permitted to indulge in practices which would tend to demoralize the law enforcement agencies and impair the confidence and trust of the people and the courts which it is necessary for such agencies to possess in order to be most effective.

"This is clearly a case in which there was an entire absence of evidence and reasonable inference that the accused would have violated the law had he not been induced to do so by false representations and persuasion of a law enforcement officer. We do not believe that any conviction has been sustained on appeal upon such a record.

"In conclusion, we quote from *Woo Wai v. United States*, 9 Cir., 223 F. 412, 415: 'Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in *People v. Mills*, 178 N.Y. 274, 70 N.E. 786, 67 L.R.A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant.'

"If the conviction of Dr. Braddock should be affirmed it would be the only case to be

found in the books in which a conviction was allowed to stand upon undisputed evidence that an officer of the law conceived the commission of a crime, used misrepresentation, deceit and unlawful methods to induce its commission, and when all the evidence and the reasonable inferences were that but for the machinations of the officer the unlawful act would not have been committed.

"It is unnecessary to consider the question of variance between the information and the proof.

"The judgment and order denying a new trial are reversed."

For the reasons stated in the foregoing opinion I would reverse the judgment.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



41 Cal.2d 832

PEOPLE v. DELONEY.

Cr. 5485.

Supreme Court of California.

In Bank.

Dec. 22, 1953.

Defendant was convicted of murder in the first degree. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered judgment and denied defendant's motion for new trial and defendant was sentenced to death. Appeal to the Supreme Court was automatic under Pen.Code, § 1238b. The Supreme Court, Traynor, J., held that instruction that an individual could premeditate, that is think before doing the act, the moment he conceived the purpose as well as if the act was the result of a long preconcert or preparation and therefore could be guilty of first degree murder was erroneous and giving another instruction correctly defining deliberation and premeditation required to establish such offense merely created an irreconcilable conflict in the instructions and did not cure the error, where there was ample

evidence that would justify jury's concluding that homicide was not deliberate and premeditated.

Judgment and order denying motion for new trial reversed.

1. Homicide $\S$ 271

In prosecution for murder, question as to whether defendant killed victim on sudden impulse and heat of passion when defendant's inhibitions were removed or killed victim as result of deliberation and premeditation was for jury. Pen.Code $\S$ 189.

2. Criminal Law $\S$ 810, 823(4)

Homicide $\S$ 286(3)

Instruction that defendant could have premeditated, that is, thought before doing the act, the moment he conceived the purpose, as well as if he acted with long preconcert or with preparation and, therefore could be guilty of first-degree murder was erroneous and giving of another instruction correctly defining deliberation and premeditation required to establish first-degree murder merely created an irreconcilable conflict in the instructions and did not cure the error, where evidence would have justified jury's concluding that homicide was not deliberate and premeditated. Pen.Code $\S$ 189.

3. Criminal Law $\S$ 781(1)

In prosecution for murder, failure to instruct jury that admissions of defendant were to be viewed with caution was error. Code Civ.Proc. $\S$ 2061, subd. 4; Pen.Code, $\S$ 189.

4. Criminal Law $\S$ 808½

Instructing jury in language of statute concerning defendant's burden of proving mitigating circumstances when commission of homicide by defendant has been shown and instructing that defendant's proof of mitigating circumstances need not be by preponderance of evidence and that defendant could take advantage of evidence produced by prosecution without instructing that prosecution had burden throughout the trial to prove every element of the crime beyond a reasonable doubt and that burden of persuasion never shifts to defendant was error. Pen.Code, $\S$ 189, 1105.

Cal.Rep. 263-264 P.2d-41

5. Homicide $\S$ 151(1)

Statute concerning defendant's burden of proving mitigating circumstances when commission of homicide by defendant is shown does not place on defendant the burden of persuasion, but merely declares a rule of procedure that imposes on defendant a duty of going forward with evidence of mitigating circumstances. Pen.Code, $\S$ 189, 1105.

6. Criminal Law $\S$ 813

Giving instruction on principles of law that have no application to facts of case is error.

7. Homicide $\S$ 300(8)

In murder prosecution, giving instructions on right of self-defense was justified by the evidence.

Rodin, Nelson & Coffin and Robert R. Coffin, Turlock, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant Willie Deloney was charged by information with the murder of Ollie Stillwell. He pleaded not guilty. The jury returned a verdict of murder in the first degree without recommendation. Defendant's motion for a new trial was denied, and he was sentenced to death. The appeal to this court is automatic. Penal Code, $\S$ 1239b.

The killing occurred at about 8:20 P.M. on February 15, 1953, at Bob's Barbecue, a cafe and bar located in the Monte Vista Tract on Crow's Landing Road, Stanislaus County. Defendant had been in the bar most of the day drinking beer. Stillwell and his wife, Willie Stillwell, had spent the afternoon in Stockton with Golie Turner and Willie Crawford and had had several drinks. They returned in Turner's car, after stopping for a short time at Modesto. Turner left the Stillwells at their home, a block or two from the bar. Turner and Crawford continued on to the bar. Defendant was dancing by himself on the dance

floor and playing the juke box and piano. About 8 P.M. Stillwell and his wife came to the bar. Bill Allen, known as Cowboy, asked Stillwell to buy him a drink. Stillwell's refusal led to an argument. Willie Stillwell took her husband by the collar and dragged him outside. Crawford tried to persuade Stillwell to go home. Cowboy and defendant came out, and Cowboy and Stillwell resumed their argument. Cowboy had a .22 caliber pistol in his belt, but made no attempt to use it. Cowboy and Stillwell scuffled for a few minutes and then Cowboy entered the bar.

As he passed through the doorway defendant said to him, "If I had your gun, if I was you, I would have killed him." Stillwell overheard this remark. A fist fight followed between the two, and Stillwell knocked defendant down two or three times. Calvin Belford, known as Roger, joined the fight and seized Stillwell from behind and threw him to the ground. Roger was forced to let go his grip when Willie Stillwell bit him in the back. Defendant got to his feet and returned with Cowboy to the bar. Stillwell and his wife remained outside. Defendant and Cowboy went to the back part of the bar. Defendant asked for the gun, and Cowboy gave it to him. Defendant started for the door, waving the gun, when one of the other patrons seized him and threw him to the floor, saying, "Willie, you're not to get in no trouble like that." Defendant tried to get up, shouting, "Turn me loose, I'll kill him." The bartender, not realizing that defendant had the gun, told the men to let him go, and they released him.

One of the men shouted, "Stillwell, De-loney got a pistol. You better start running if you're going to run. If you stay, you're going to fight him." Stillwell went to his car, took off his overcoat, folded it, placed it in his car, took a tire pump from the turtle back, and then rolled up his sleeves. He returned to the side of the building near the door and by a window where he could see inside the bar. Defendant paused at the door with the gun in his hand by his side and was pushed by a man behind him that two of the witnesses identified as Cowboy. As defendant passed through the doorway,

Stillwell struck him on the side of the head with the tire pump. Defendant dropped the gun and fell to the ground near a parked car. Stillwell attempted to strike him a second time, but the tire pump hit the side of the car and was knocked from his hands. Stillwell leaped upon defendant and struck him repeatedly in the face with his hands. Stillwell made no attempt to pick up the gun.

As the two men rolled on the ground, defendant managed to regain the gun with his right hand. Stillwell seized defendant's right hand with his own left hand and continued to strike defendant in the face with his right hand. Defendant was still on the ground with Stillwell crouching over him, when defendant fired one shot into the ground and then twisted the gun around and fired two shots into Stillwell's body. Stillwell fell to the ground. Defendant got to his feet and walked to the door of the bar. He said to the spectators, "I told you guys I was going to kill him." He turned back, stood over Stillwell, who had not moved since the first shots, and said, "I told you I was going to kill you." He then fired the gun into Stillwell's body until the gun clicked several times on empty chambers. Stillwell's wife, who had been holding Roger from the fight, came running to the scene and asked defendant if he had killed Stillwell. Defendant said, "Yes I killed him. I told you I was going to kill him, so I killed him." Defendant returned to the bar and waited for the officers. Defendant and Stillwell had known each other before the shooting, but there is no evidence of any previous animosity between them.

The foregoing evidence was presented by the People. The defense rested at the close of the People's case.

[1] Defendant contends that the evidence is insufficient to sustain a conviction of first degree murder. On the record the killing could come within the statutory definition of first degree murder only on the ground that it was willful, deliberate, and premeditated. Penal Code, § 189. Defendant urges that the killing was done in anger without deliberation and premeditation. He points to the evidence that he had been drinking, that there was no pre-

vious animosity between him and Stillwell, that he did not arm himself until after a fist fight with Stillwell, and that he did not fire the fatal shots until after he had been repeatedly struck on the head and face by his victim. He contends that there is no evidence of any motive that might indicate deliberation or premeditation, that the killing was committed in a brawl on sudden impulse when his emotions were aroused and his inhibitions removed by alcohol and the blows he had received, that considering the character of the affray, either of the principals might have been killed, and that it was a fortuitous circumstance that it was Stillwell and not the defendant.

The jury could certainly have drawn the foregoing conclusions from the evidence and returned a verdict of a lower degree of homicide than first degree murder. *People v. Tubby*, 34 Cal.2d 72, 77-78, 207 P.2d 51; *People v. Bender*, 27 Cal.2d 164, 178-180, 163 P.2d 8; *People v. Holt*, 25 Cal.2d 59, 92-93, 153 P.2d 21; *People v. Fields*, 99 Cal.App.2d 10, 13-14, 221 P.2d 190; *People v. Daniel*, 65 Cal.App.2d 622, 635, 151 P.2d 275. We cannot reduce the offense to a lesser degree of homicide, however, if the jury could also conclude from the evidence that the killing was not on sudden impulse in the heat of passion when defendant's inhibitions were removed, but was the result of deliberation and premeditation. There was ample time in the interval between defendant's intervention in the quarrel between Cowboy and Stillwell and the firing of the fatal shots for defendant to contemplate the killing of Stillwell and to weigh and consider the consequences. The crucial question is whether the jury could find that he did so or was bound to conclude that during that time defendant's emotions were so aroused and his acts and statements so rash and impetuous that there was no reflection or weighing of considerations either before or after the intent to kill was formed. Defendant's intervention in the quarrel between Cowboy and Stillwell and his statement to Cowboy at that time, "If I had your gun, if I was you, I would have killed him" indicates that there was then animosity

between defendant and Stillwell and that defendant was not only not averse to killing Stillwell but thought that Cowboy should have done so. After withdrawing from his fist fight with Stillwell, defendant entered the bar to get the gun. His friends attempted to persuade him to remain in the bar and not to "get in no trouble like that." Thus, regardless of consequences and despite the warnings and efforts of his friends, defendant was determined to kill Stillwell. In the ensuing fight outside, after both defendant and Stillwell were disarmed, defendant seized the gun at the first opportunity and twice shot his victim. When his opponent was helpless on the ground, either unconscious or dead, and all danger to defendant was past, he emptied the gun into his body. He told the spectators and Stillwell's wife that he had intended to kill Stillwell and had carried out that intention. In the light of this evidence, we cannot say that the jury could not reasonably conclude that the killing was the result of deliberation and premeditation. *People v. Gilliam*, 39 Cal.2d 235, 239, 246 P.2d 31; *People v. Hooper*, 35 Cal.2d 165, 168, 216 P.2d 876; *People v. Isby*, 30 Cal.2d 879, 888-890, 186 P.2d 405.

[2] Defendant contends that the instruction on deliberation and premeditation was prejudiciously erroneous. The court gave the following instruction: "You are instructed that a man may do a thing wilfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or years. He can premeditate, that is think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation. There is nothing in the sections of the Penal Code which relate to this subject, which indicate that the Legislature meant to assign any particular period to this process of deliberation or premeditation, in order to bring the act within the first degree."

This court has repeatedly condemned similar instructions on the ground that they lead the jury to believe that neither deliberation nor premeditation, in the commonly understood meaning of those terms, need be

proved by the People. *People v. Carmen*, 36 Cal.2d 768, 777-778, 228 P.2d 281; *People v. Cornett*, 33 Cal.2d 33, 40-42, 198 P.2d 877; *People v. Honeycutt*, 29 Cal.2d 52, 60-61, 172 P.2d 698; *People v. Valentine*, 28 Cal.2d 121, 134, 169 P.2d 1; *People v. Bender*, 27 Cal.2d 164, 182-183, 163 P.2d 8; *People v. Thomas*, 25 Cal.2d 880, 900-901, 156 P.2d 7.

The instruction has the same vices as the one given in *People v. Bender*, supra. The statements that, "a man may do a thing willfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or a year", and "He can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation", are word-for-word the same as the instruction condemned in the *Bender* case. 27 Cal.2d at page 182, 163 P.2d at page 19. The instruction unduly emphasized that there need be little time to form the intent to kill or little time between the formation of the intent to kill and the execution thereof, and may have misled the jury "into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated." *People v. Bender*, supra, 27 Cal.2d at page 185, 163 P.2d at page 20.

Another instruction stated: "[B]efore you can bring back a verdict of murder in the first degree, you must find that the killing was accompanied and was preceded by a clear, deliberate intent to take life; an intent on the part of the defendant to kill, which must be the result of deliberation and premeditation, so that it must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other condition such as precludes the idea of deliberation. To be murder in the first degree you must find that at the moment Willie Deloney fired the shot which was fatal to Ollie Stillwell that he had a clear deliberate intention to take the life of Ollie Stillwell, and you must further find that this deliberate and clear intention to take the life of Ollie Stillwell had been formed upon a pre-existing reflection and that at the time that the defendant fired the fatal

shot that he was not acting under the sudden heat of passion, or as to any other condition which precludes the idea of deliberation."

Since the foregoing instruction is a correct statement of the law, *People v. Daugherty*, 40 Cal.2d 876, 901-902, 256 P.2d 911, the People contend that any error in the first instruction was cured. It is obvious, however, that there is an irreconcilable conflict in the instructions, and we are not at liberty to speculate as to which of them the jury followed. *People v. Carmen*, supra, 36 Cal.2d 768, 778, 228 P.2d 281; *People v. Cornett*, supra, 33 Cal.2d 33, 41, 198 P.2d 877; *People v. Honeycutt*, supra, 29 Cal.2d 52, 62, 172 P.2d 698; *People v. Dail*, 22 Cal.2d 642, 653, 140 P.2d 828.

As we have observed above, there is ample evidence that would justify the jury's concluding that the homicide was not deliberate and premeditated and was therefore not murder of the first degree. Under the first instruction, however, the jury may have concluded that even though the killing was hasty and hurried, impulsive and unstudied, it would nevertheless be first degree murder. If the jury followed this instruction, it may have found the existence of facts showing no more than second degree murder and yet returned a verdict of first degree murder.

[3] The trial court did not instruct the jury that admissions of defendant were to be viewed with caution. Section 2061, subd. 4, of the Code of Civil Procedure provides that the jury is "to be instructed by the court on all proper occasions * * * that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution". The court should have given such an instruction on its own motion. *People v. Bemis*, 33 Cal.2d 395, 398-399, 202 P.2d 82; *People v. Hamilton*, 33 Cal.2d 45, 51, 198 P.2d 873; *People v. Cornett*, 33 Cal.2d 33, 40, 198 P.2d 877; *People v. Koenig*, 29 Cal.2d 87, 94, 173 P.2d 1.

Defendant's alleged statement to Mrs. Stillwell after the shooting, "I told you I was going to kill him, so I killed him," and his statement to the spectators, "I told you

guys I was going to kill him," were key parts of the People's proof of premeditation and deliberation. The burden was on the People to prove defendant guilty of first degree murder beyond a reasonable doubt. In determining whether that burden had been met, a difficult question on the facts of the present case, the jury should have been given the instruction required by section 2061, subd. 4. Defendant's admissions were vitally important evidence in this case; it was likewise vitally important that the jury be guided as to the manner in which it was to view that evidence.

[4,5] The jury was instructed that, "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. But such proof need not be by a preponderance of the evidence, but only to an extent sufficient to raise a reasonable doubt in the minds of the jurors as to his guilt or the mitigating circumstances. You are further instructed that where, as in this case, the defendant has produced no evidence in his own behalf, he may have the benefit, in determining the matters expressed in this instruction, of the evidence produced by the prosecution if and when it is to his advantage to do so." The first part of this instruction was in the language of section 1105 of the Penal Code.

This court has held repeatedly that a jury should not be instructed in the language of section 1105. *People v. Letourneau*, 34 Cal.2d 478, 490-491, 211 P.2d 865; *People v. Cornett*, 33 Cal.2d 33, 42-44, 198 P.2d 877; *People v. Valentine*, 28 Cal.2d 121, 132-134, 169 P.2d 1; *People v. Thomas*, 25 Cal.2d 880, 895-896, 156 P.2d 7. The jury was not advised that such an instruction would have no application in determining the degree of murder and that it could apply only in determining whether the homicide was murder or manslaughter, or was excusable or justifiable. *People v. Thomas*, supra, 25 Cal.2d 880, 897, 156 P.2d

7. The words "circumstances of mitigation" may have been interpreted by the jury to include circumstances that reduce the homicide from murder in the first degree to murder in the second degree. The error was particularly serious in the present case, since one of the most difficult questions before the jury was whether the homicide was first degree murder, second degree murder, or voluntary manslaughter. As we recently pointed out, such an instruction "may have the effect of foreclosing any consideration by the jury that mitigating circumstances, although not sufficient in law to justify or excuse the homicide, may be enough to reduce the crime to second degree murder by counteracting the element of premeditation or deliberation." *People v. Cornett*, supra, 33 Cal.2d 33, 43, 198 P.2d 877, 884.

Section 1105 does not place on a defendant the burden of persuasion, but merely declares a rule of procedure that imposes on him a duty of going forward with evidence of mitigating circumstances. *People v. Cornett*, supra, 33 Cal.2d 33, 42, 198 P.2d 877; see, 9 So. Cal. L. Rev. 405. If the jury is instructed in the words of the statute alone, it may be misled into construing the "burden of proving circumstances of mitigation" as imposing upon the defendant the burden of persuasion and into believing that mitigating circumstances do not exist unless the defendant proves the existence of such circumstances by a preponderance of the evidence. See, *People v. Cornett*, supra, 33 Cal.2d at pages 42-43, 198 P.2d at page 883. The trial court in the present case attempted to meet this objection by adding, "But such proof need not be by a preponderance of the evidence, but only to an extent sufficient to raise a reasonable doubt in the minds of the jurors as to his guilt or the mitigating circumstances" and by explaining that defendant could take advantage of evidence produced by the prosecution. These additional statements may have avoided some of the confusion that would result from a reading of section 1105 alone, *People v. Leddy*, 95 Cal.App. 659, 672, 273 P. 110; see, *People v. Cornett*, supra, 33 Cal.2d at page 44, 198 P.2d at page 884, although the jury should have been ex-

pressly told, in connection with the instruction on section 1105, that the prosecution has the burden throughout the trial to prove every element of the crime beyond a reasonable doubt and that the burden of persuasion never shifts to the defendant. In any event, an instruction in the language of section 1105, even with an adequate explanation of its meaning, has no proper place in a charge to a jury. As we stated in *People v. Thomas*, supra, 25 Cal.2d 880, 156 P.2d 7, "logic suggests that since such section in reality merely declares a rule of procedure and does not relieve the state of the burden of proving each and every essential element of guilt beyond a reasonable doubt the propriety of reading it to the jury, even with a proper explanation, is doubtful." 25 Cal.2d at page 896, 156 P.2d at page 16; see, also, discussion in *California Jury Instructions Criminal* [1946], p. 283.

[6,7] Defendant contends that three instructions* on the right of self-defense should not have been given. He does not contend that the instructions were incorrectly worded, but invokes the rule that it is error to give instructions on principles of law that have no application to the facts of a case. *People v. Sanchez*, 30 Cal.2d 560, 572, 184 P.2d 673; *People v. Silver*, 16 Cal.2d 714, 722, 108 P.2d 4; *People v. Roe*, 189 Cal. 548, 558, 209 P. 560; *People v. Geibel*, 93 Cal.App.2d 147, 178, 208 P.2d 743.

From a review of the record it appears that each instruction was properly given. Instruction No. 23 was justified by the evidence. In view of defendant's statement to Cowboy, in the presence of Stillwell, that had he been Cowboy he would have

killed Stillwell, and his statement in the bar, "Turn me loose, I'll kill him," it could be inferred that defendant came out of the bar to kill Stillwell, that Stillwell knew it, and that he acted lawfully when he seized the tire pump and struck defendant. Instruction No. 25 was also justified by the evidence. At the time defendant fired the fatal shots, Stillwell had dropped the tire pump and had made no attempt either to retrieve it or pick up the gun. Instruction No. 26 was likewise proper; the jury could infer from the evidence that defendant was the aggressor throughout.

Conclusion

Three serious errors were committed at the trial of this case: (1) The instruction on premeditation and deliberation was erroneous; (2) The instruction in the language of section 1105 of the Penal Code failed to advise the jury that it had no application in its determination of the degree of murder; and (3) The jury was not instructed as required by section 2061, subd. 4, of the Code of Civil Procedure.

A number of cases have held that such errors required reversal, *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281, error (1), supra, combined with other errors; *People v. Bemis*, 33 Cal.2d 395, 202 P.2d 82, error (3); *People v. Cornett*, 33 Cal.2d 33, 198 P.2d 877 errors (1), (2), and (3); *People v. Valentine*, 28 Cal.2d 121, 169 P.2d 1 errors (1) and (2); *People v. Thomas*, 25 Cal.2d 880, 156 P.2d 7 errors (1) and (2); in other cases, relied upon by the People, this court has concluded that the evidence of guilt was so overwhelming that reversal was not indicated. *People v. Letourneau*, 34 Cal.2d 478, 211 P.2d 865 errors (2) and (3); *People v. Hilton*, 29 Cal.2d 217, 174

* "The right of self-defense exists only as against an unlawful attack. The right does not exist, even though bodily injury appears probable, as against a person who, in threatening or appearing to threaten injury, is acting lawfully." (People's Instruction No. 23.)

"If an assault with the fists is being made on a person, but without intent to kill or to do great bodily harm, and if the assault is not likely to produce great bodily injury, and if the one thus attacked is not deceived as to the character of

such an assault, he is not justified in using a deadly weapon in self-defense." (People's Instruction No. 25.)

"The law does not permit or justify one who intends to commit an assault upon another to design in advance his own defense by instigating a quarrel or a combat with a view thereby to create a situation wherein the infliction of the intended injury will appear to have been done in self-defense." (People's Instruction No. 26.)

P.2d 5 error (1); *People v. Koenig*, 29 Cal. 2d 87, 173 P.2d 1 error (3); *People v. Honeycutt*, 29 Cal.2d 52, 172 P.2d 698 error (1); *People v. Bernard*, 28 Cal.2d 207, 169 P.2d 636 error (1). Each case necessarily turns on its own facts. A careful examination of the entire record in this case leads to the conclusion that it is not improbable that a correctly instructed jury would have reached a different verdict. The evidence, although sufficient to sustain a conviction of first degree murder, would readily justify a conviction of a lesser degree of homicide. Each error in this case tended to lead the jury to a verdict of first degree murder even though it may have drawn inferences from the evidence showing no more than second degree murder or voluntary manslaughter. As in *People v. Cornett*, supra, 33 Cal.2d 33, 198 P.2d 877, where the errors were identical with those in the present case, reversal is necessary to avoid a miscarriage of justice.

The judgment and the order denying the motion for a new trial are reversed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.



41 Cal.2d 844

PACIFIC HOME
v.
LOS ANGELES COUNTY et al.
L. A. 22495-22497.

Supreme Court of California.
In Bank.
Dec. 23, 1953.

Actions brought by corporation maintaining home for aged and infirmed persons to recover taxes paid under protest. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Spence, J., held that since properties in question were, by limitation of plaintiff's articles at time of the acquisi-

tion, impressed with trust for charitable purposes, which trust could be enforced against either plaintiff or its successor, plaintiff met requirements of Revenue and Taxation Code section enumerating conditions of entitlement for welfare exemption.

Reversed with directions.

Prior opinion, 256 P.2d 44.

1. Taxation ☞241(2)

The Revenue and Taxation Code section enumerating conditions of entitlement for welfare exemption is to be given a strict but reasonable construction. Revenue and Taxation Code, § 214(6).

2. Taxation ☞251

Party claiming exemption under Revenue and Taxation Code section enumerating conditions of entitlement for welfare exemption has burden of showing that it clearly comes within statutory terms, with any doubt resolved against its right to exemption. Revenue and Taxation Code, § 214(6).

3. Taxation ☞241(2)

Under Revenue and Taxation Code section exempting from taxation property used exclusively for hospital purposes if property is "irrevocably dedicated" to religious, charitable, scientific or hospital purposes, requirement of irrevocable dedication is concerned with ultimate purposes rather than with present uses, and thus claimant's manner of operation and its use, past or present, of its properties are wholly and material, critical factor being its powers with respect to its properties; and those powers, in case of corporate claimant, must ordinarily be ascertained from its articles of incorporation. Revenue and Taxation Code, § 214(6).

4. Charities ☞40

Statement, in articles of charitable corporation, that enumeration of specific powers should not be held to limit or restrict in any manner powers of corporation, was not a general grant of power but merely meant that incidental powers reasonably necessary to effectuate corporation's main purpose should not be limited by specific enumeration of them.

5. Charities ⇨40

All assets of corporation organized solely for charitable purposes must be deemed to be impressed with charitable trust by virtue of express declaration of corporation's purposes, notwithstanding absence of any express declaration by those who contribute such assets as to purpose for which contributions are made; and amendment of articles of such corporation to include nonexempt purposes will only permit diversion of property acquired after such amendment.

6. Taxation ⇨241(2)

Where properties of organization maintaining home for worthy aged and infirm persons were, by limitation of its articles at the time of their acquisition, impressed with trust for charitable purposes, which trust could be enforced against either the organization or its successor, in event of liquidation, dissolution, or abandonment, such organization met requirements of Revenue and Taxation Code section enumerating conditions of entitlement for welfare exemption. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

7. Appeal and Error ⇨1176(1)

Where facts were undisputed, parties had stipulated as to amounts in controversy, and only question of law was involved, it would be appropriate for Supreme Court to reverse judgments with directions.

Newby, Holder & Newby and Charles R. Newby, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Arvo Van Alstyne and Gordon Boller, Deputy County Counsel, Ray L. Chesebro and Roger Arnebergh, City Attys., and Louis A. Baber, Deputy City Atty., Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff brought these three actions to recover taxes paid under protest, for the respective tax years 1946-1947, 1947-1948, and 1948-1949 on certain properties which it claims to be exempt under the welfare exemption law. Cal.Const. art. XIII, § 1c; Revenue & Taxation Code, § 214. The

trial court determined that plaintiff did not meet the statutory requirement of irrevocable dedication of its properties to exempt purposes. Revenue & Taxation Code, § 214, subd. (6). From judgments accordingly entered in defendants' favor in each action, plaintiff appeals. Upon consideration of the undisputed facts, we have concluded that the trial court improperly denied the tax relief sought.

Plaintiff is a nonprofit California corporation, having no capital stock and with a membership consisting exclusively of the members of the Southern California-Arizona Annual Conference of the Methodist Church. It is organized to "establish, maintain, support, and operate a home or homes for worthy aged and infirm persons * * * and carry on such other charitable work in connection therewith as may be consistent" with its history and purposes. During the tax years in question and under authority granted by the Discipline of the Methodist Church, plaintiff operated and maintained such a home in Los Angeles, with the number of inmates ranging from 350 in 1946 to 375 in 1948. Admission to the home is on a single-fee life care contract with the entry charge determined by the life expectancy of the applicant and the accommodations selected. The rate is fixed with the intent that plaintiff will "break even" on the operation. Preference for admission to the home is given to active members of some church and, if possible, to members of the Methodist Church who are selected primarily because of their record of service as missionaries, ministers, teachers, and social workers. A substantial portion of plaintiff's reserve and endowment funds is invested in income-producing properties. An annual contribution of \$2,000 was made in these tax years to the retired ministers' fund of the above-mentioned Conference, a "charitable fund" under stipulation of the parties. Throughout these years plaintiff operated at a loss.

The parties stipulated and the court found that plaintiff is not organized for profit; that no part of its net earnings inures to the benefit of any private shareholder or individual; and that the properties were used exclusively in the mainte-

nance and operation of a home for the aged, and to house members and necessary employees of the home. The court also found that the properties were not used or operated by plaintiff or by any other person for profit regardless of the purposes to which the profit is devoted; and that the properties on liquidation, dissolution, or abandonment of plaintiff would have inured to the benefit of a fund, foundation, or corporation organized and operated for religious, hospital or charitable purposes within the meaning of subdivision 6 of section 214 of the Revenue and Taxation Code. However, the court further found that on the first Mondays of March 1946, 1947, and 1948, the properties were "not irrevocably dedicated to religious, charitable, or hospital purposes." The sole question presented on this appeal concerns the propriety of this latter determination.

[1,2] Section 214, subdivision (6), of the Revenue and Taxation Code provides that property used exclusively for religious, hospital, scientific or charitable purposes and owned and operated by a corporation organized and operated for any of such purposes is exempt from taxation if the property is "irrevocably dedicated" to any of these purposes and "upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person" but only to "a fund, foundation or corporation organized and operated for" any of such purposes. A "strict but reasonable construction" must be given to this language to the end that the tax concession will be neither enlarged nor extended beyond the plain meaning of the words used. *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 736, 221 P.2d 31, 35, 15 A.L.R.2d 1045; *Pasadena Hospital Ass'n v. County of Los Angeles*, 35 Cal.2d 779, 785, 221 P.2d 62. Plaintiff has the burden of showing that it clearly comes within the terms of the exemption, *Cedars of Lebanon Hospital v. County of Los Angeles*, supra, 35 Cal.2d at page 734, 221 P.2d at page 34, and any doubt must be resolved against the right thereto. *Sutter Hospital of Sacramento v. City of Sacramento*, 39 Cal.2d 33, 39, 244 P.2d 390.

[3] The requirement of irrevocable dedication is concerned with ultimate purposes rather than with present uses. Thus, the claimant's manner of operation and its use, past or present, of its properties are wholly immaterial. The critical factor is its powers with respect to its properties; and these powers, in the case of a corporate claimant, must ordinarily be ascertained from its articles of incorporation. If such powers permit the ultimate and permanent diversion of all corporate assets to nonexempt purposes, there cannot be said to be an irrevocable dedication of such assets to exempt purposes and the exemption must be denied. *Pasadena Hospital Ass'n v. County of Los Angeles*, supra, 35 Cal.2d 779, 785-787, 221 P.2d 62.

According to its articles of incorporation, plaintiff was formed for the purpose of maintaining and operating "a home or homes for worthy aged and infirm persons," and providing and carrying on such other "necessary and convenient" activities and "such other charitable work in connection therewith as may be consistent with [its] history and purposes." It is empowered to provide from its funds and pay over an annual amount to the Southern California-Arizona Annual Conference of the Methodist Church for the benefit of the retired ministers' fund as mutually agreed (stipulated as a charitable contribution). It is permitted to buy, sell, receive, or otherwise deal with real and personal property as "is necessary, auxiliary, incidental or convenient to [its] needs and purposes"; to borrow and lend money; to enter into such contracts as "convenient or necessary to carry out [its] purposes and objects"; to receive bequests and devise for its own use and upon trust; to "do all and everything necessary, suitable and proper for the accomplishment of [its] purposes and anything which [its] Board of Directors * * * may deem conducive or expedient for the proper conduct of [the] Home and for the carrying out of [its] purposes." It is further recited that the "foregoing clauses shall be construed both as objects and powers and * * * that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner

"the powers of this corporation." The laws of the State of California are declared to govern the conduct of the corporation and so far as thereby permitted, it is subject to the "uses and Discipline of the Methodist Church." In the event of dissolution, all of the corporation's assets remaining after payment of its obligations are declared "subject to the disposition and control of the Southern California-Arizona Annual conference of the Methodist Church or its successors."

[4] Reasonably construed as a whole, plaintiff's articles indicate its purpose to be the maintenance and operation of a charitable home for worthy aged and infirm persons, and that the conduct of a noncharitable home would be contrary to its authority. Moreover, the parties stipulated, as shown by the evidence, that plaintiff's home satisfied the requirement of a charitable purpose under the welfare exemption law. See *Fredericka Home for the Aged v. County of San Diego*, 35 Cal.2d 789, 792-795, 221 P.2d 68. Likewise, as stipulated by the parties and found by the court, plaintiff's authority to make annual contributions to the retired ministers' fund was charitable within the meaning of the welfare exemption law. The further enumerated powers of plaintiff to buy and sell property, to make contracts, to receive devises and bequests, to borrow money, to contract debts and to do "all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation" are all powers which a nonprofit corporation has by statute, Corporations Code, § 9501, and which plaintiff would possess without their recital in its articles. *Davis v. Pacific Studios Corp.*, 84 Cal.App. 611, 615, 258 P. 440. The statement in the articles that the "enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation" does not purport to be a general grant of power. Rather it appears to be a precautionary clause to signify that the incidental powers reasonably necessary to effectuate plaintiff's main purposes shall not be limited by their specific enumeration. See 7 Fletcher Cy-

clopedia Corporations, Perm.Ed., ch. 42, § 3648, p. 780. It does not give plaintiff any powers except such as are specifically conferred by the articles and those given by statute. Such powers are not unlimited powers, but are subordinate to plaintiff's main objects and purposes, which are wholly charitable.

Defendants claim, however, that the properties in question were not "irrevocably dedicated" to exempt purposes for the reason that plaintiff's articles of incorporation provide that in the event of dissolution, all its corporate assets shall pass to the Southern California-Arizona Annual Conference of the Methodist Church; and that the articles of incorporation of the Conference provide that it is "organized for religious, charitable, *social* and *educational* purposes." (Emphasis added.) Defendants argue that all of plaintiff's assets may therefore be ultimately and permanently diverted by the successor corporation to social and educational purposes, which purposes are not exempt purposes under the so-called welfare exemption. *Pasadena Hospital Ass'n v. County of Los Angeles*, supra, 35 Cal.2d 779, 786, 221 P.2d 62; *Moody Institute of Science v. County of Los Angeles*, 105 Cal. App.2d 107, 109, 233 P.2d 51; *Goodwill Industries of Southern California v. County of Los Angeles*, 117 Cal.App.2d 19, 23-24, 254 P.2d 877. This argument, however, ignores the trust status of the properties acquired by plaintiff whose purposes, as above indicated, were solely charitable in nature.

In the recent case of *In re Los Angeles County Pioneer Society*, 40 Cal.2d 852, 257 P.2d 1, this court had occasion to consider the question of the status of property acquired by a corporation organized for charitable purposes. In *re Estate of Clippinger*, 75 Cal.App.2d 426, 433, 171 P.2d 567, was there quoted with approval as follows (40 Cal.2d 860, 257 P.2d 6): "(A) devise to a society organized for a charitable purpose without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created." It was therefore concluded that such property was held upon a charitable trust, and that the duty to protect such

trust was placed upon the Attorney General. 40 Cal.2d 861, 257 P.2d 6; Corporations Code, § 10207.

[5] Similarly, all the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes. It follows that neither plaintiff nor its successor could legally divert its assets to any purpose other than charitable purposes, and said property was therefore "irrevocably dedicated" to exempt purposes within the meaning of the welfare exemption.

There remains for consideration the related requirement that upon dissolution the property must "not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes". Rev. & Tax.Code, § 214, subd. (6). It is sufficient here to point out that the successor corporation was organized for charitable purposes as well as for religious, social and educational purposes, and it is significant that the statute does not require that the corporation to whose benefit the assets will inure shall be organized exclusively for any of the four alternate exempt purposes. As the successor corporation was organized for charitable purposes, and as it would be required to continue to devote plaintiff's assets to charitable purposes under the trust theretofore impressed upon such assets, all the requirements of subdivision 6 of section 214 of the Revenue and Taxation Code have been met.

Defendants insist that the statutory condition of irrevocable dedication of property presupposes an express declaration to that effect, appearing either in the articles of incorporation or some other writing affecting the powers of the recipient organization with respect to its property. But the statute does not so provide. If such had been the intention of the Legislature, undoubtedly it would have so stated. Rather, as noted in *Pasadena Hospital Ass'n. v. County of Los Angeles*, supra, 35 Cal.2d 779, at page 786, 221 P.2d 62, at page 66, the "requirement of irrevocable dedication is ordinarily to be determined by ascertaining the powers of the owner with respect to its assets, including its properties and the proceeds thereof", and to that end the articles of the claimant corporation were carefully examined without regard for the absence of an irrevocable dedication clause such as was later included as an amendment. See, also, *Moody Institute of Science v. County of Los Angeles*, supra, 105 Cal.App.2d 107, 108-109, 233 P.2d 51; *Goodwill Industries of Southern California v. County of Los Angeles*, supra, 117 Cal.App.2d 19, 23-24, 254 P.2d 877. Here, as above stated, plaintiff's articles of incorporation limited its purposes to one of those declared exempt, the operation of a charitable home. When plaintiff accepted property under such articles of incorporation, the property became impressed with a charitable trust and was therefore irrevocably dedicated to the trust purpose. It would serve no useful purpose, and the Legislature did not require, that the recipient corporation must also expressly declare in its articles of incorporation or some other writing that its assets are "irrevocably dedicated" to exempt purposes.

The above-cited *Pasadena Hospital*, *Moody Institute*, and *Goodwill Industries* cases are clearly distinguishable. In each of those instances the recipient corporation was organized and operated for both exempt and nonexempt purposes, and the property in question was acquired without any dedication to any one of its several purposes, exempt or nonexempt. Conse-

quently, though the property in fact may have been used for exempt purposes at the time that the welfare exemption was sought, it could not be said that it had been irrevocably dedicated to exempt purposes when the corporate powers and purposes of the claimant corporation permitted it to divert the property or its proceeds to nonexempt purposes. The various broadly stated purposes, exempt and non-exempt, of the respective recipient corporations at the time of acquisition of the property prevented the imposition of a trust on the property for hospital (Pasadena Hospital Ass'n), religious (Moody Institute), or charitable (Goodwill Industries) purposes. But here when plaintiff acquired the properties in question, its purposes as declared in its articles of incorporation were limited solely to exempt charitable purposes.

Defendants further argue that plaintiff may amend its articles to include non-exempt as well as exempt purposes. It is true that the welfare exemption law does not require that the corporate claimant renounce the right to amend its articles in this regard. However, if plaintiff were to so amend its articles, such action would not affect the trust status of property theretofore acquired. Such property, which was acquired when plaintiff's articles were limited to charitable purposes, was thereby impressed with a trust for such purposes, and if such property subsequently should be diverted to newly-declared nonexempt purposes, the Attorney General would have the duty to bring appropriate proceedings to enforce the trust. In *re Los Angeles County Pioneer Society*, supra, 40 Cal.2d 852, 861, 257 P.2d 1. Only property acquired by plaintiff after the amendment of its articles so as to include nonexempt purposes would be subject to diversion to nonexempt purposes.

[6,7] As the record has been here reviewed, the properties in question were, by the limitation of plaintiff's articles at the time of their acquisition, impressed with a trust for charitable purposes, which trust may be enforced against either plaintiff or the Conference as its successor.

We therefore conclude that plaintiff has met the requirements of subdivision 6 of section 214 of the Revenue and Taxation Code for the tax years in question and is entitled to the tax relief sought. Since the facts are undisputed and the parties agree that a question of law only is presented, it is appropriate to reverse the judgments with directions. The parties stipulated as to the amounts in controversy.

The judgment in each action is reversed, with directions to the trial court to amend its findings of fact and conclusions of law in accord with the views expressed herein, and to enter judgment for plaintiff pursuant to the stipulation of the parties as to the amounts in controversy.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



41 Cal.2d 855

PACIFIC HOME

v.

LOS ANGELES COUNTY et al.

L. A. 22498.

Supreme Court of California.

In Bank.

Dec. 23, 1953.

Action brought by corporation maintaining home for aged and infirm persons to recover taxes paid under protest. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Spence, J., held that where articles of incorporation of organization maintaining home for the aged and infirm persons did not permit present use of its assets for non-exempt purposes, and where property of such organization would, upon liquidation, dissolution or abandonment, inure to benefit of fund, foundation or corporation organized and operated exclusively for religious, hos-

pital, or charitable purposes within meaning of welfare exemption statute, organization's property was irrevocably dedicated to exempt purposes.

Reversed with directions.

Prior opinion, 256 P.2d 36.

See, also, 264 P.2d 539.

1. New Trial ⇨163(1)

An order ruling on motion for new trial is ineffective unless filed with clerk or entered in minutes; and effective date of order denying motion for new trial is date of minute entry. Code Civ.Proc. §§ 662, 1003.

2. New Trial ⇨164

Notwithstanding fact that trial judge had, at conclusion of hearing on motion for new trial, stated that he "would" deny the motion, court nevertheless had jurisdiction thereafter to deny motion and to vacate findings, conclusions, and prior judgment, and to enter a new and different judgment. Code Civ.Proc. §§ 662, 1003.

3. Taxation ⇨241(2)

Where articles of incorporation of organization maintaining home for the aged and infirm persons did not permit present use of its assets for nonexempt purposes, and where property of such organization would, upon liquidation, dissolution, or abandonment, inure to benefit of fund, foundation, or corporation organized and operated exclusively for religious, hospital, or charitable purposes, within meaning of welfare, exemption statute, organization's property was irrevocably dedicated to exempt purposes. Revenue and Taxation Code, § 214(6).

4. Appeal and Error ⇨1176(1)

Where facts were undisputed and only a question of law was involved and parties had stipulated as to amount in controversy, reversal with directions would be appropriate.

Harold W. Kennedy, County Counsel, Arvo Van Alstyne and Gordon Boller, Deputy County Counsel, Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., Los Angeles, for defendants and appellants.

SPENCER, Justice.

This is a companion case to *Pacific Home v. County of Los Angeles*, 264 P.2d 539. Plaintiff sought here to recover taxes paid under protest for the tax year 1949-1950. The record presents the added consideration of an amendment of plaintiff's articles of incorporation as related to the requirement of irrevocable dedication. Revenue & Taxation Code, § 214, subd. (6). The trial court ultimately ruled against plaintiff and entered judgment for defendants; and from such judgment, plaintiff appeals.

In 1948 and prior to the first Monday of March, 1949 (the tax-lien date) plaintiff's articles of incorporation were amended. The amendments consisted of eliminating the provision for the annual payment to the retired ministers' fund and engrafting a limitation upon the disposition of plaintiff's corporate assets coming under the control of the Southern California-Arizona Annual Conference of the Methodist Church as the result of plaintiff's dissolution. In such event it is provided that plaintiff's properties should be "used for the benefit of worthy aged and infirm persons and for such other charitable work as may be consistent with the history and purposes of the [plaintiff] corporation."

The court first found that on the first Monday of March, 1949, plaintiff and its properties met the requirements of the welfare exemption law. It specifically then concluded that the properties were irrevocably dedicated to religious, hospital or charitable purposes, and upon liquidation, dissolution, or abandonment by plaintiff would not have inured to the benefit of any private person except a fund, foundation or corporation organized and operated for such purposes. Accordingly, judgment for plaintiff was entered on February 18, 1952. Defendants made a

Newby, Holder & Newby and Charles R. Newby, Los Angeles, for plaintiff and appellant.

motion for a new trial. On April 1, 1952, at the conclusion of the hearing of the motion, the court said: "I will deny all motions." (Motions for a new trial in the three companion cases were heard at the same time.) The clerk made a memorandum to that effect but did not make an entry in the minutes. On April 2, 1952, the trial court instructed the clerk that the motion would stand submitted. Thereupon the clerk made a minute entry dated April 1, 1952, stating that the motion was submitted. On April 15, 1952, the court signed and filed a written order vacating the findings of fact, conclusions of law and judgment; ordering judgment for defendants; directing the preparation of new findings, conclusions, and judgment in accord with those in the three companion cases; and denying the motion for a new trial. In the new findings the only significant change is the court's finding against plaintiff on the issue of irrevocable dedication of its properties. Revenue & Taxation Code, § 214, subd. (6). Judgment was then entered for defendants on April 17, 1952, and plaintiff appeals therefrom.

[1, 2] A procedural question first arises as the result of defendants' precautionary appeal taken from the judgment of February 18, 1952. Plaintiff takes the position that the trial court's oral statement at the conclusion of the hearing of the motion for a new trial, "I will deny all motions," was effective immediately to deny the motion, and that the court did not have jurisdiction thereafter to vacate the findings, conclusions and first judgment, and enter a new and different judgment. There is no merit to this contention. The court's oral pronouncement was in the future tense and was never entered in the minutes. The formal written order which the court later signed was the only order entered in the minutes. An order ruling on a motion for a new trial is ineffective unless filed with the clerk or entered in the minutes. Code Civ.Proc. § 1003, *Jablon v. Henneberger*, 33 Cal.2d 773, 775, 205 P.2d 1; *Jackson v. Thompson*, 43 Cal.App.2d 150, 152, 110 P.2d 470. The effective date of an order denying a motion for an new trial is the

date of the minute entry. *Millsap v. Hooper*, 34 Cal.2d 192, 193, 208 P.2d 982. The minute entry here was made while the court still retained jurisdiction. Upon denying the motion for a new trial, the court was authorized to vacate the prior findings, conclusions and judgment, and to make new findings and conclusions, and to render a new judgment. Code Civ. Proc. § 662; *Spier v. Lang*, 4 Cal.2d 711, 713-714, 53 P.2d 138; see, also, *In re Estate of Busteed*, 105 Cal.App.2d 14, 16-18, 232 P.2d 881. Accordingly, the new judgment entered April 17, 1952, superseded the judgment entered February 18, 1952. Defendants' appeal from the superseded judgment is therefore a nullity and will be dismissed.

[3, 4] Turning now to the merits of plaintiff's exemption claim, plaintiff's articles of incorporation were the same for the tax year here involved as they were quoted in the companion cases for the preceding years, except for the elimination of the provision for contribution to the retired ministers' fund of the Conference and change of the dissolution clause. Manifestly, as defendants concede, the amendment of the dissolution clause expressly imposed a restriction for charitable purposes on plaintiff's property coming into the hands of the Conference by reason of plaintiff's liquidation, dissolution or abandonment. But irrespective of this express declaration and upon authority of *Pacific Home v. County of Los Angeles*, supra, plaintiff's properties were irrevocably dedicated to exempt purposes within the meaning of the welfare exemption law, and plaintiff is entitled to the tax relief here sought. With the record presenting only a question of law to be determined upon undisputed facts, and the parties having stipulated as to the amount in controversy, a reversal of the judgment with directions is appropriate.

Defendants' appeal from the judgment entered February 18, 1952, is dismissed. The judgment entered April 17, 1952, is reversed with directions to the trial court to amend its findings of fact and conclusions of law in conformity with the views

expressed herein, and to enter judgment for plaintiff in accord with the stipulation of the parties as to the amount in controversy.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



41 Cal.2d 814

PEOPLE v. WAYNE.
Cr. 5461.

Supreme Court of California.
Dec. 22, 1953.

Defendant was convicted of soliciting another to offer and join in offer of bribe to police officials, and of making book and keeping a room with books and paraphernalia for recording bets. The Superior Court, Alameda County, Charles Wade Snook, J., rendered judgment, and defendant appealed. The Supreme Court, Schauer, J., held, inter alia, that testimony of defendant's accomplices had been sufficiently corroborated.

Affirmed.

Prior opinion, 117 Cal.App.2d 268, 256 P.2d 62.

1. Criminal Law ⇨511(1)

Corroborative evidence may be slight and entitled to little consideration when standing alone. Pen.Code, §§ 31, 1111.

2. Criminal Law ⇨511(1)

Evidence of inculpatory participation need not be direct nor extend to every fact and detail in order to constitute sufficient corroborating evidence. Pen.Code, §§ 31, 1111.

3. Criminal Law ⇨511(2)

Circumstantial evidence is sufficient corroborating evidence, even though slight, if it tends to connect defendant with commission of crime. Pen.Code, §§ 31, 1111.

4. Criminal Law ⇨511(1)

Testimony of accomplices was sufficiently corroborated to sustain conviction for making book and keeping room with books and paraphernalia for recording bets. Pen.Code, §§ 31, 1111, 337a.

5. Evidence ⇨219(1)

Witnesses ⇨317(1)

Where material fact is established by evidence, and it is shown that defendant's testimony regarding that fact was willfully untrue, such circumstances not only furnishes ground for disbelieving other testimony of defendant, but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on issue of guilt or liability.

6. Evidence ⇨219(1)

Defendant's false testimony as to material fact is in nature of an admission from which, with other evidence, guilt or liability may be inferred, but only where false statement or testimony is intentional, rather than mistaken, and where such statement or testimony suggests that defendant has no true exculpatory explanation, can it be considered as admission of guilt.

7. Criminal Law ⇨511(7)

Mere fact that jury disbelieved defendant's testimony will not render such testimony an admission of guilt corroborative of accomplice testimony.

8. Criminal Law ⇨507(1)

Absent anything further, person solicited to offer bribe to public officials is not an accomplice of solicitor. Pen.Code, §§ 653f, 1111.

9. Criminal Law ⇨507(1), 510

Where prosecuting witness had first solicited defendant in general terms and thereafter defendant had solicited prosecution witness to join in offer of bribe on specific terms, and prosecution witness had, by his original solicitation of defendant, together with his ensuing conduct, encouraged and abetted defendant's subsequent more specific solicitation, prosecution witness was an accomplice whose

testimony, unless corroborated, would not support conviction of defendant for soliciting prosecution witness to offer and join in offer of bribe to police official. Pen.Code, §§ 653f, 1111.

10. Criminal Law — 511(1)

Accomplice's testimony was sufficiently corroborated to sustain conviction for soliciting another to offer and join in offer of bribe to police officers. Pen.Code, §§ 31, 653f, 1111.

11. Criminal Law — 31

Asserted fact that other persons involved had been given short jail sentences or not prosecuted could not effect propriety of defendant's conviction.

12. Criminal Law — 719(1), 1171(1)

Prosecuting attorney's comment as to what grand jury believed was improper; but under circumstances of prosecution, for soliciting another to bribe and for gaming offenses, such comment did not result in miscarriage of justice. Pen.Code, §§ 337a, 653f.

13. Criminal Law — 721(1)

Where defendant had testified that he had appeared before grand jury, and, although desiring to testify there, had upon advice of his counsel refused to do so on ground that he might incriminate himself, it was not error for prosecuting attorney to refer in argument to such invocation of privilege against self-incrimination.

14. Witnesses — 374(1)

Rebuttal evidence that witness had lived together as man and wife with defendant's mother-in-law was admissible as tending to show bias on part of such witness.

SCHAUER, Justice.

Defendant and Thomas Redden were charged by indictment with (count one) violation of section 653f of the Penal Code by soliciting Joseph May "to offer and to join in the offer of a bribe" to police officers, and (counts two and three) two violations of section 337a of the Penal Code by making book and by keeping a room with books and paraphernalia for recording bets. Redden pleaded guilty to all three counts and May was separately charged with and pleaded guilty to bookmaking. A jury found defendant guilty on all three counts. Defendant appeals from the ensuing judgment and from an order denying his motion for new trial.

The principal prosecution witnesses were May and Redden. According to their own testimonies they were closely connected with the criminal activities of which defendant was convicted. Defendant's main contentions relate to the necessity for and sufficiency of the corroboration of their testimonies. We have concluded that these and other contentions of defendant, hereinafter stated and answered, are without merit.

The testimony of May and Redden is to the following effect:

May, a bookmaker, had been charged with bookmaking in Oakland in July, 1950, pleaded guilty, and was granted probation. May had become acquainted with Redden through Redden's having placed bets with him. In August, 1950, May told Redden that he wished to establish bookmaking operations in Alameda and "would have to have 100 percent protection" from police interference because he was on probation; he asked Redden to aid him in arranging for such protection. Redden recalled that on social occasions he had seen defendant in the company of Alameda police officers and told defendant of May's proposal. Defendant said that he would attempt to arrange for protection. A few days later defendant reported to Redden that he had arranged with a lieutenant of the Alameda police force that May would receive protection in exchange for a "pay-off." De-

Harrison W. Call, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Dep. Atty. Gen., J. F. Coakley, Dist. Atty. (Alameda), Richard H. Chamberlain, Asst. Dist. Atty., and Ray Mellana, Dep. Dist. Atty., Oakland, for respondent.

fendant, May and Redden then met by appointment and defendant told May that he had arranged for him to operate safely on certain conditions as to location and manner of operation. Thereafter arrangements for weekly payments for protection were completed and May commenced bookmaking operations. He made periodical payments for protection to Redden who in turn delivered the payments to defendant. Defendant told Redden that out of the payments he purchased cases of whiskey and a slot machine which he gave to police officers. The balance of the payments was divided between defendant and Redden.

May discontinued bookmaking operations for a time after defendant warned him that the police planned to raid the establishment; operations were resumed when defendant advised that he had arranged with the lieutenant that May could operate with protection at a new address.

On January 12, 1951, police officers went to the bookmaking establishment and arrested May. At the police station May complained that he should not have been arrested because he was paying for protection through Redden and defendant to the above mentioned lieutenant. The arresting officers called in the lieutenant; May repeated his account of paying for protection; and the lieutenant said that May was lying. The lieutenant then went to Redden's place of business and told him of May's arrest and disclosures as to protection and asked Redden what story he planned to tell at the police station. Redden replied that he would say that May had borrowed \$1,000 from him (actually Redden had invested \$1,000 in the bookmaking business) and that the periodical payments were on the loan; the lieutenant replied, "I guess that story is as good as any." After Redden and the lieutenant had visited the police station, and Redden had told the above mentioned story, the lieutenant asked Redden to get in touch with defendant as soon as possible and to let him (the lieutenant) know what Redden learned. Redden telephoned defendant's home and defendant's wife told Redden that defendant would be at a hotel in Sac-

ramento after eight o'clock that night. Redden gave the lieutenant the number of defendant's hotel and thereafter reached defendant on the telephone and told him "that they had picked May up and * * * he was screaming his head off" because he had not received protection.

After defendant returned to Oakland Redden told him of his story of a loan to May. When he was questioned by a deputy district attorney defendant told a similar story of a \$1,000 loan from him to May which May was to repay in weekly installments of \$100 with two additional \$100 payments as interest. He said that he suspected that May was engaged in bookmaking, but "didn't delve into the thing," and that thereafter he told Redden and May that he thought the bookmaking was a "bad thing." In his statement to the deputy district attorney defendant denied that he had told May that the police intended to arrest him or that he had advised moving the bookmaking enterprise to a new location or that he had ever discussed police protection with Redden or May.

At the trial defendant testified on his own behalf. The substance of his testimony is similar to that of his statement to the deputy district attorney. He denied any connection with bookmaking or bribery.

The following evidence corroborates the testimony of May and Redden: Although defendant denied the testimony that he "tipped off" Redden and May that May should suspend operations because the police planned to raid the bookmaking establishment, defendant testified that at about the time of the asserted "tip-off" he had read in the paper that May was on probation for a previous conviction of bookmaking and that there were numerous investigations and raids of bookmakers in progress; he telephoned Redden and thereafter met with Redden and May and told them that "the man should certainly get out of the [bookmaking] business * * * because he certainly would get caught, probably without any lapse of time at all." A sheriff's officer testified that at the time of the asserted "tip-off" he did give the

Oakland police a report on May's activities. An Oakland police captain testified that he received the report and gave it to the lieutenant who, according to May and Redden, had been named by defendant as the person with whom he arranged for protection. Defendant was acquainted with several ranking members of the Alameda police department, including the above mentioned lieutenant.

Defendant admitted that he was receiving payments from May and his explanation thereof was rather peculiar; i. e., although defendant's cash resources were very modest he had made an unsecured loan of cash to May, whom he had not previously known, merely upon Redden's assurance that May was "all right"; the loan was not evidenced by any writing; defendant stated on one occasion that he made no record of the amounts repaid on the loan and testified that on a few occasions he noted a payment on a calendar but kept no "methodical record" of payments.

On the afternoon of January 12, 1951, after May's arrest, Redden made three telephone calls to defendant's wife in an effort to reach defendant; she told Redden that defendant would be at a hotel in Sacramento that evening; Redden left a message at the hotel and shortly after defendant arrived there he returned the call and Redden told him that May had been arrested and had made statements implicating defendant and Redden. At 1:39 a. m. on January 13 defendant, at the Sacramento hotel, received a telephone call from "Mr. Smith" at a pay station in Oakland. The police lieutenant got off duty just after 12 o'clock midnight. Defendant testified that a "Willie Smith" had previously asked defendant to get him a job and that "Smith" telephoned to inform defendant that he was leaving Oakland for Los Angeles.

[1-4] Redden and May, according to their own testimony, were principals in each of the charged offenses of bookmaking (counts two and three); May directly committed the acts constituting those offenses and Redden advised and encouraged their commission. (Pen.Code, § 31.)

Since they are accomplices and are liable to prosecution for the identical offenses charged against defendant in counts two and three, their testimonies must be corroborated by other evidence tending to connect defendant with the commission of such offenses. (Pen.Code, § 1111.) Defendant urges that there is no such corroboration. The evidence above summarized is sufficient for that purpose. The corroborative evidence may be slight and entitled to little consideration when standing alone. (People v. Harper (1945), 25 Cal.2d 862, 876, 156 P.2d 249; People v. Trujillo (1948), 32 Cal.2d 105, 111, 194 P.2d 681.) "The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. [Citations.]" (People v. Henderson (1949), 34 Cal.2d 340, 343, 209 P.2d 785.) Defendant's association with police officials on the one hand and with Redden and May on the other hand, his peculiar explanation of his relations and dealings with the latter and his reason for receiving payments from them, his admitted knowledge that May was a bookmaker and that he advised May to abandon that enterprise, all tend to connect him with the commission of the book-making offenses.

Defendant insists that his explanation, in his extrajudicial statement to the deputy district attorney and in his testimony, of his claimed loan to May, "fantastic though it may be," does not supply corroborative evidence tending to connect defendant with the commission of the crimes. The theory upon which such evidence may be given probative effect is that the triers of fact could conclude that it was knowingly false and could further conclude that the intentional making of extrajudicial and testimonial false explanations indicates a consciousness of guilt. No California case discussing this matter has been cited by the parties or discovered by our research.

[5-7] The People rely upon City of Boston v. Santosuosso (1940), 307 Mass. 302, 349, 30 N.E.2d 278, and Sheehan v.

Goriansky (1944), 317 Mass. 10, 16, 56 N.E. 2d 883. We agree with the following reasoning of the Santosuosso case: "Of course, as has been pointed out many times, disbelief of evidence is not the equivalent of affirmative evidence to the contrary. [For example, in *Zarrillo v. Stone* (1945), 317 Mass. 510, 512, 58 N.E.2d 848, an action for personal injuries, Justice Wilkins, who also wrote the Sheehan opinion, pointed out that disbelief of defendant's testimony to the effect that he was not negligent could not supply proof that he was negligent.] But where a material fact is established by evidence and it is shown that a defendant's testimony as to that fact was wilfully untrue, this circumstance not only furnishes a ground for disbelieving other testimony of this defendant [citations], but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which with other evidence guilt or liability may be inferred. [Citations.]"

It should be emphasized that no inference of consciousness of guilt can be drawn from the mere fact that the jury, in order to convict, must have disbelieved defendant's explanation of his relationship with May and Redden; only where the false statement or testimony is intentional rather than merely mistaken and where such statement or testimony suggests that defendant has no true exculpatory explanation can it be considered as an admission of guilt. (See concurring opinion of Justice Traynor in *People v. Albertson* (1944), 23 Cal.2d 550, 581-582, 145 P.2d 7; *State v. Elsberg* (1941), 209 Minn. 167, 177, 295 N.W. 913.) Here defendant did not simply deny his guilt; he ventured upon an explanation so unusual that the triers of fact could conclude that it was an intentional fabrication indicating consciousness of guilt and the absence of any true exculpatory explanation.

Defendant asserts that the instructions on the subjects of liability for the actions of co-conspirators in furtherance of the criminal design and of corroboration of accomplices are erroneous and confusing. The trial court gave correct general instructions on these subjects. However, defendant says that the following instructions are conflicting: The court first told the jury that "Whether or not any witness in this case was an accomplice, as defined in these instructions, is for the jury to determine from all the testimony." The court then told the jury that if there was a violation of section 653f Redden as a matter of law was an accomplice, and that if there were violations of section 337a May and Redden as a matter of law were accomplices. The jury presumably followed the direction that they determine who was an accomplice "as defined in these instructions" and was not misled by the further instructions which not merely defined but also named accomplices.

As previously stated, count one alleges that defendant solicited May to offer and join in the offering of a bribe to police officials. Section 653f of the Penal Code provides for the punishment of "Every person who solicits another to offer or accept or join in the offer or acceptance of a bribe, or to commit or join in the commission of" other crimes not material here. The section further provides, "Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

Defendant argues that there is no evidence whatsoever, even in the testimony of Redden and May, that defendant solicited May; rather, he says, the prosecution evidence, if believed, establishes that the solicitation was by May and Redden. The evidence shows more than this; it could be inferred that after the original solicitation of defendant and after defendant interviewed or purported to interview the police he, in turn, solicited May to offer a bribe on the particular terms arranged.¹

1. May testified that at his first meeting with defendant (which, as stated, was after Redden had first told defendant of May's desire to operate a bookmaking

business without police interference) May told defendant that he wished to be "insured of protection" and defendant replied that "he could insure me against

[8-10] Defendant further argues (assuming that the testimonies of May and Redden could be viewed in such a light that they would tend to show that, after the original solicitation by May and Redden, defendant solicited May) that May as well as Redden was an accomplice, "liable to prosecution for the identical offense [of solicitation, as well as the above discussed offenses of bookmaking,] charged against the defendant on trial in the cause in which the testimony of the accomplice is given" (Pen.Code, § 1111). The trial court, on the other hand, instructed the jury that under section 653f of the Penal Code the person solicited is not an accomplice. This would be true if the evidence showed only that defendant solicited such person and nothing more. (People v. Baskins (1946), 72 Cal. App.2d 728, 731, 165 P.2d 510; People v. Haley (1951), 102 Cal.App.2d 159, 165, 227 P.2d 48; see also People v. Brown (1923), 61 Cal.App. 748, 752-753, 216 P. 58; People v. Montgomery (1941), 47 Cal.App.2d 1, 10, 117 P.2d 437.) The prosecution evidence, however, shows much more than that; May was not merely a participant in the criminal scheme but the instigator of such scheme. Nevertheless, the People urge, as to the offense charged in count one he could not be an accomplice whose testimony must be corroborated pursuant to section 1111, because he could not conspire to solicit himself. The People correctly state that "It is essential for the crime of solicitation defined in section 653f of the Penal Code that two or more persons must necessarily be involved. At least one person must necessarily be a solicitor and the other person must necessarily be the person solicited." But it does not follow, as they further state, that "To have both parties approach the crime from the same direction, i. e., as solicitors, would result in the commission of no crime." Where, as here, May first solicited Wayne in general terms and thereafter Wayne solicited May to join in

the offer of a bribe on specific terms, there are two criminal solicitations rather than "no crime." Furthermore, May, by his original solicitation of Wayne, together with his ensuing conduct, encouraged and abetted Wayne's subsequent more specific solicitation and thus became a principal in the latter crime under the provision of section 31 of the Penal Code that "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

The situation here is similar to that in People v. Wallin (1948), 32 Cal.2d 803, 806-807, 197 P.2d 734. The crime charged in the Wallin case was the violation of section 32 of the Penal Code, which provides that "Every person who, after a felony has been committed, * * * *aids a principal* in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, * * * is an accessory to such felony." (Italics added.) Liability for being an accessory, like liability for solicitation, cannot be incurred by one person acting alone; to constitute a violation of section 32 there must be a principal and an aider, acting in concert. In the Wallin case the People contended that a murderer "could not be an accessory after the fact to her crime and that therefore she was incapable of committing the offense with which defendant stands charged." This court replied, "It may be that a murderer who acts alone in concealing her crime cannot be separately charged as an accessory, but it does not follow that she cannot become liable as such if she encourages another to aid her in avoiding arrest and punishment. There are many instances in the law where a person is held to be criminally responsible for cooperating in an offense which he is

[sic] protection," that it "would cost me \$200 a week," and that certain methods of operation must be complied with.

Redden testified that at this first meeting "Mr. Wayne told Mr. May that * * * he would go along with 20 percent of the net, and that money was to

be spent to take care of his police protection," suggested that the payments be delivered from May to himself by Redden, and that "he would contact them [the police] * * * and see if May's location and everything was all right."

incapable of committing alone." For example, a female can be guilty of rape (People v. Bartol (1914), 24 Cal.App. 659, 661, 142 P. 510) or pimping (People v. Young (1933), 132 Cal.App. 770, 23 P.2d 524) if she aids and abets a male in the commission of such crimes, even though because of her sex she could not herself commit them. And although a person cannot commit incest or sodomy with himself, a witness who has participated in those crimes voluntarily and with knowledge of the wrongfulness of his act is an accomplice whose testimony must be corroborated. (People v. Adinolfi (1930), 106 Cal.App. 261, 262, 289 P. 176; People v. Singh (1932), 121 Cal.App. 107, 109, 8 P.2d 898.)

We conclude that, by analogy to the cases last cited, and to People v. Lima (1944), 25 Cal.2d 573, 579, 154 P.2d 698, May could be found to be an accomplice, liable to prosecution for the offense charged in count one, not because he solicited himself but because he actively encouraged and abetted defendant to solicit him. (Cf. People v. Brown (1923), supra, 61 Cal.App. 748, 752-753, 216 P. 58; People v. Montgomery (1941), supra, 47 Cal.App.2d 1, 10-11, 117 P.2d 437; People v. Baskins (1946), supra, 72 Cal.App.2d 728, 731, 165 P.2d 510; People v. Haley (1951), supra, 102 Cal.App.2d 159, 165, 227 P.2d 48, in each of which cases there was no active participation in solicitation or procurement, but at most, as in the Brown and Montgomery cases, mere willing compliance.)

Although the person solicited, in some cases, may be found to be an accomplice, it appears that in the circumstances of this case the giving of the instruction to the contrary was not prejudicial, for the verdict of the jury as to counts two and three

indicates that they believed the testimony of the accomplices, May and Redden, and the evidence of corroborating circumstances; such evidence in this case necessarily supports a verdict of guilty as to count one also.

The People assert that the holding that May could be an accomplice as to count one will cast doubt upon the holdings of People v. Clapp (1944), 24 Cal.2d 835, 151 P.2d 237, and People v. Wilson (1944), 25 Cal.2d 341, 153 P.2d 720. Those cases hold that a woman who solicits and encourages the commission of a criminal abortion upon herself is not an accomplice of the abortionist, because (page 838 of 24 Cal.2d, page 239 of 151 P.2d) "If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only,² and another statutory provision prescribes punishment for the acts of participants not subject to the first provision,³ it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction. The specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code⁴ that such acts subject the participant in the crime of the accused to prosecution for its commission."

The decisions concerning abortions are not controlling here. Section 653f of the Penal Code provides for the punishment of "Every person who solicits another to offer or accept or join in the offer or acceptance of a bribe"; there is no separate statutory provision specifically prescribing punishment for criminal participation, if

2. Pen.Code, § 274: "Every person who * * * administers to any woman * * *, or uses or employs any * * * means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable * * *." (Italics added.)

3. Pen.Code, § 275: "Every woman who solicits of any person any * * * substance whatever, and takes the same, or who submits to any * * * means

whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable * * *." (Italics added.)

4. Pen.Code, § 31: "All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

any, by the person referred to as "another" in section 653f; if he is liable to prosecution and punishment for participation in the violation of section 653f it is only because his conduct has made him liable as a principal under section 31 of the Penal Code.⁴ (Of course, the person solicited might have proceeded to directly commit or indirectly join in the commission of the offense solicited, in which case he would be punishable for that offense (*People v. Harper* (1945), *supra*, 25 Cal.2d 862, 877, 156 P.2d 249); however, the question of the effect of section 653f as the counterpart of section 275 in such a situation is not before us, for the prosecution has not seen fit to charge that a bribe was actually offered.)

The court instructed the jury that the corroborating circumstances required by section 653f of the Penal Code need only tend to establish the commission of the crime by someone, and need not connect the defendant with the commission of the crime. The analogous provision of section 1103a, which requires proof of corroborating circumstances to establish perjury, has been held to require corroboration which tends to connect defendant with the crime. (*People v. Woodcock* (1921), 52 Cal.App. 412, 417, 199 P. 565; *People v. Follette* (1925), 74 Cal.App. 178, 204, 240 P. 502; see also *People v. Wilson* (1944), *supra*, 25 Cal.2d 341, 346-347, 153 P.2d 720, which mentions but does not decide the question whether the corroboration of the woman's testimony required by section 1108 of the Penal Code in an action for seduction of a minor or abortion need connect the defendant with the crime.) Although the corroboration required by section 653f should tend to connect defendant with the crime, the instruction to the contrary did not harm defendant here, for the verdicts as to counts two and three necessarily imply a finding that the corroborative evidence was true and did tend to connect defendant with the criminal enterprise of which each of the offenses charged in the three counts was a part.

[11] Defendant contends that the prosecuting attorney was guilty of prejudicial

misconduct in several respects. The asserted facts that Redden and May were given short jail sentences and that two other persons who, according to the testimony herein, were involved in the book-making operations were not prosecuted, cannot, without more, affect the propriety of defendant's conviction.

[12] In the course of argument the prosecuting attorney said, "keep in mind that at the Grand Jury hearing they heard Joe May and other witnesses testify. Mr. Wayne himself was offered an opportunity to personally testify at that time, but refused on the ground that he might incriminate himself; and the indictment was returned by a responsible group of citizens who believed the evidence showed that Wayne had committed the crimes charged." Defendant's counsel objected to the reference to what the grand jurors believed but did not ask that the jury be admonished. The court said merely, "Proceed." Defendant complains that the remark that the grand jury "believed the evidence showed that Wayne had committed the crimes charged" constituted misconduct, and that the effect of such misconduct was not removed by the prosecuting attorney's further statement and the trial court's instruction that the indictment was not evidence and raised no presumption of guilt. The People urge that the quoted argument was not prejudicial misconduct but was in reply to defense counsel's statement that "once you are accused, as far as the public is concerned, they think you are guilty until you sit in a court room like this, as you ladies and gentlemen are, and you hear the truth." The argument was not responsive to the statement of defendant's counsel. The prosecuting attorney's comment as to what the grand jury believed was improper (*People v. Edgar* (1917), 34 Cal.App. 459, 467, 167 P. 891; *People v. Hale* (1947), 82 Cal.App.2d 827, 833, 187 P.2d 121), and in any reasonably close case could well require reversal of the judgment, but the conduct here was less serious than that considered in the *Edgar* and *Hale* cases; it was not particularly emphasized; and we conclude that on the record here it did not result in a miscarriage of justice.

4. See note 4 on page 553.

[13] On cross-examination defendant had testified, without objection, that he had appeared before the grand jury and, although he wished to testify there, upon advice of his counsel he refused to do so on the ground that he might incriminate himself. As appears above, the prosecuting attorney, briefly and without objection specifically directed to this particular matter, referred in argument to defendant's invocation of the privilege against self-incrimination. Defendant's counsel on appeal (who is not the counsel who tried the case) urges that the prosecuting attorney, by educating the testimony as to and commenting on defendant's failure to testify before the grand jury, destroyed his constitutional privilege to decline to answer on the ground that he might incriminate himself. If we consider this contention despite the lack of objection in the trial court, it is answered by *People v. Kynette* (1940), 15 Cal. 2d 731, 750, 104 P.2d 794. Defendants there, like defendant here, invoked the privilege against self-incrimination before the grand jury but at the trial took the stand and testified to their innocence and to exculpatory explanations of incriminating circumstances. It was held that "the use solely for impeachment purposes of a defendant's prior refusal to testify before a grand jury because of fear of self-incrimination, no more destroys that constitutional privilege than does the right to comment upon and consider a defendant's failure to explain evidence against him tend to destroy his equally valuable constitutional right to refuse to be a witness against himself." Other references of the prosecuting attorney to the grand jury were simply statements that it had indicted defendant and Redden and were not improper.

Defendant makes a number of general assignments of error, unsupported by argument or authority. He says that the trial court erred in admitting evidence of his extrajudicial statement, made under questioning by an assistant district attorney, because the corpus delicti had not been established. (See *People v. Quarez* (1925), 196 Cal. 404, 409, 238 P. 363.) Defendant is mistaken. The corpus delicti of each count was established by the testimony of

Redden and May; the corpus delicti of the bookmaking counts was further established by the testimony of the officers who raided the bookmaking establishment. Defendant further urges that his extrajudicial statement should not have been received because it did not corroborate the testimony of Redden and May. The statement contained relevant admissions, not necessarily incriminating in themselves, that defendant had associated with, warned, and received payments from May and Redden, as well as the relevant and damagingly peculiar explanation of the circumstances of the asserted loan to May. Insofar as the statement contained protestations of innocence its admission could not have harmed defendant.

Defendant's contention that the court should not have received any evidence as to the bookmaking activities of May and Redden is manifestly without merit.

[14] To show that he could not have been present at a conspiratorial meeting on November 28, 1950, defendant introduced the testimony of his mother-in-law, Mrs. Kiester, and of a roomer in Mrs. Kiester's home, Mr. Saucke. In rebuttal the People introduced evidence that these witnesses had lived together as man and wife. The trial court instructed the jury that this evidence was admitted only as tending to show bias on the part of Saucke and not as evidence against defendant. Defendant complains that it was prejudicial error to admit the evidence and that the instruction emphasized the prejudice. Such evidence was admissible, despite the fact that it tended to show an unconventional relation, because it might be inferred that it bore on the interest of Saucke in testifying favorably to defendant. (*People v. Gould* (1952), 111 Cal.App.2d 1, 6, 243 P.2d 809.) The instruction correctly limited the effect of the evidence and did not, as defendant asserts, improperly emphasize its prejudicial effect.

Defendant contends that the court erred in refusing to permit Mrs. Kiester to testify as to who was present at the time for which she gave him the alibi. The transcript discloses that she did testify as to

who was present. Defendant further contends that the trial court erred in refusing to permit Mrs. Kiester to answer the question, "When was the date of November 28th first discussed?" The reason for this question was as follows: The People had brought out that defendant had been previously tried for the offenses and at that trial had not produced the alibi; defendant wished to show the circumstances under which the witnesses Kiester and Saucke, before the second trial, learned of the importance of the date and recalled it to defendant's attention. There is testimony of defendant and Saucke as to the circumstances which refreshed defendant's recollection as to the date, and any testimony of Mrs. Kiester would have been cumulative.

Defendant asserts that the court erred in admitting testimony showing defendant's connection with slot machines, since such testimony inflamed and prejudiced the jury. Defendant himself testified that he was an electronics engineer and that he had been retained to service the slot machines at an officers' club in Alameda. It was through this work at the club that he met Redden and also a number of members of the police department. Defendant's counsel referred to this matter in oral argument. Certainly there was nothing inflammatory in letting the jury know that defendant had had part-time occupation repairing slot machines at a time when the presence of the machines in the officers' club on federal property was legal. There was testimony (including the testimony of defendant himself on cross-examination) which showed that he arranged to obtain a slot machine for a member of the police department. This testimony was relevant to show defendant's relation to the police department; indeed, according to the testimony of other witnesses defendant had admitted giving the machine to the officer under circumstances which might have indicated that it was in part payment for "protection."

Defendant claims that his trial was unfair because the public and the jury were aroused by newspaper and radio accounts of this case and of official investigations of similar cases in this and other states. This

matter was not raised before the trial court and is without support in the record.

For the reasons above stated the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



122 Cal.App.2d 192

In re LEVINE.

Cr. 4804.

District Court of Appeal, Second District,
Division 2, California.

Dec. 21, 1953.

Prosecution for forging prescription for narcotics. Defendant was convicted, he appealed, and judgment was affirmed. Defendant filed petition for writ of error coram nobis, which was referred to a referee for hearing. The District Court of Appeal, Moore, P. J., held that where defendant exercised his right to appeal, neglected to move for recall of the remittitur when conviction was affirmed, and was not a victim of duress, fraud, or mistake, there was no justification for issuance of writ of error coram nobis.

Petition denied.

1. Criminal Law ⇨997(16)

Where referee, to whom petition for writ of error coram nobis was referred for hearing, found, by orderly procedure, that there was no basis for defendant's contention that defendant had been improperly induced to plead guilty, the findings were adopted as the judgment of District Court of Appeal, and petition was denied. Pen. Code, § 1265; U.S.C.A.Const. Amend. 14; Const. art. 1, § 13.

2. Criminal Law ⇨997(17)

Where both bar association committee and attorney, who had been appointed to represent defendant and who subsequently

was relieved, found that there was no basis for exceptions to findings of referee to whom defendant's petition for writ of error coram nobis had been referred for hearing, appointment of another attorney would have been useless.

3. Criminal Law §997(4)

Where party convicted in criminal prosecution appealed, but neglected to move for recall of remittitur after conviction was affirmed, his neglect in this respect did not extend his rights, or justify issuance of writ of error coram nobis.

Morris Levine, in pro. per. Al Matthews, Los Angeles, of counsel, for petitioner.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Dep. Atty. Gen., for the People.

MOORE, Presiding Justice.

Petitioner was convicted in Los Angeles County in October 1951 of a felony, to wit, violation of the Health and Safety Code, § 11715. The crime was committed in June 1945 but prosecution was not barred by reason of defendant's extended absence from the State at the times alleged. Defendant (petitioner herein) appealed after he had been duly sentenced to prison. The judgment of conviction was affirmed by this court on December 9, 1952. On March 1, 1953, he filed here his petition for writ of error coram nobis which alleges that his imprisonment is in violation of the Fourteenth Amendment to the federal constitution, and Article I, section 13 of the California Constitution; that he was denied due process of law and a hearing on the merits in that the prosecution conspired "with defendant's attorney by the use of fraud, collusion and chicanery, trickery, deceit and what not, to make petitioner change his plea of not guilty to guilty, against his free will"; that he backs his contention with documentary proofs and affidavits.

[1] Upon the filing of such petition, it was referred to The Honorable Thomas J.

Cunningham, judge of the superior court of Los Angeles County, to determine whether petitioner was denied (1) due process of law by the trial court at the time of his conviction, (2) a hearing on the merits by reason of fraud, collusion, trickery and deceit participated in by the trial judge, the deputy district attorney and defendant's own counsel who represented him at the time of his conviction. The order appointing Judge Cunningham as referee directed him to hear and consider all material and relevant evidence offered by defendant or by the People with respect to the issue presented by the petition to the end that this court can determine whether or not a writ should be issued as prayed for and to make findings upon such issues and to return them to this court.

On June 12, 1953, the petition came on for hearing before such referee. The People were represented by Michael J. Clemens, Deputy Attorney General, and petitioner by attorney Leonard P. Baum, Esquire. By stipulation of counsel, the affidavits of three witnesses on behalf of petitioner were admitted. Each of those affidavits set forth that the affiant had witnessed a conversation between defendant and his current attorney who stated to defendant substantially that if he would change his plea to "guilty" he would be given probation. A sister and a brother of petitioner were sworn to testify on behalf of the latter. Each deposed that defendant's attorney, in the presence of affiant, had advised defendant to withdraw his plea of "not guilty" and to plead guilty; that if he did so, he would get probation or a suspended sentence; that he had spoken to the judge whom he personally knew and to a deputy district attorney. But Judge Ambrose who presided at the trial of defendant averred that he, at no time, made an agreement with counsel for defendant to give the latter probation if he would plead guilty to the accusation against him. John C. Galliano, the deputy district attorney who prosecuted defendant, made affidavit to the same effect. Attorney Brody who represented defendant at the trial swore that he at no time made any promise or gave any assurance, direct-

ly or by implication, to defendant or to any or all of his brothers or to his sister to the effect that if Morris changed his plea of "not guilty" to a plea of "guilty", the judge would grant him probation or a suspended sentence; that he was convinced of defendant's guilt by the testimony adduced at the preliminary trial and by defendant's failure to provide any explanation of his conduct or to offer any defense; that the plea of the statute of limitation was unavailing as a defense by reason of the fact that Morris had, prior to retaining him as his attorney, admitted to the police that he was absent from California at the times alleged in the pleading subsequently filed; that he advised defendant's sister, Mrs. Harris, of the facts above recited; that the sister stated she had talked with Morris and he had voluntarily acquiesced in the change of plea to guilty; that he never said or implied to defendant that the latter would be granted probation. While Judge Cunningham found that the attorney of defendant told the latter's sister and mother that defendant had no possible defense to the crimes charged against him; that there was a possibility that if defendant entered a plea of guilty to one count the court might dismiss the other counts in the interest of justice, but that it was not true that defendant's attorney promised directly or by implication to defendant or to any witness that if Morris should change his plea from "not guilty" to "guilty", the trial judge would grant him probation or suspend his sentence. The referee found generally in accordance with the testimony of the witnesses for the People and concluded that there was no basis for the contentions made by petitioner. Therefore, in view of section 1265 of the Penal Code, *People v. Sica*, 116 Cal.App.2d 59, 61, 253 P.2d 75 and the orderly procedure of the referee and of his findings of fact upon the issues presented by the pleadings and the testimony in support thereof and against the claims of petitioner, the findings and conclusion of the referee ought to be adopted as the judgment of this court and the petition should be denied.

[2] The findings of Judge Cunningham were filed with the clerk of this court on June 29, 1953, whereupon petitioner was notified to file his exceptions thereto. Pleading his poverty and his ignorance of the law in such matters, petitioner requested this court to appoint counsel to prepare exceptions to the findings and to serve his interests prior to rendition of judgment. After the Committee of the Los Angeles Bar Association on Criminal Appeals had concluded that the findings were sufficient, the court finally obtained the consent of attorney Al Matthews, Esq., to act on behalf of petitioner. But after an examination of the record, attorney Matthews requested to be relieved of "further responsibilities in this matter" for the reason that after "studying the record, I can find no meritorious basis for the said Exceptions." After Matthews' release, petitioner asked for the appointment of other counsel to assist him. But by reason of the completeness of the record and the harmony of the findings with the evidence adopted by the referee, the appointment of other counsel would be an idle act.

[3] No basis exists for the issuance of a writ of error coram nobis on behalf of petitioner. His appeal was a legal process to which he was entitled, and he exercised it. He might also have moved for a recall of the remittitur, but having failed to make such motion, his rights will not be extended by reason of his neglect. He was not subjected to duress, was not imposed upon by fraud, was not the victim of mistake—any of which if known to the trial court would have prevented a conviction. No pressure was applied to induce his plea of guilty. Therefore, the issuance of the writ is wholly unjustifiable. See *People v. Knight*, 73 Cal.App.2d 532, 535, 166 P.2d 399.

It is ordered that the findings and conclusion of the referee herein be and they are approved and adopted and the petition for the writ of error coram nobis is denied.

McCOMB and FOX, JJ., concur.

In re MACMILLAN'S ESTATE.***MACMILLAN v. DOCKWEILER et al.**

Civ. 19665.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1953.

Rehearing Denied Jan. 5, 1954.

Hearing Granted Feb. 10, 1954.

Proceeding was brought to settle final account of administrator. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order settling final account, and administrator appealed. The District Court of Appeal, Moore, P. J., held where trustee, who managed mineral lease in which estate of deceased had an interest, had a deliberate program to operate his office for aggrandizement of his own wealth, but administrator, instead of opposing trustee's policy, because of its adverse effect on deceased's estate, permitted and encouraged trustee to indulge such policy, with result that estate of deceased was required to pay excessive taxes and penalties because dividends from lease were paid in insufficient amounts in some years and in excessive amounts in other years, account of administrator was subject to surcharge for amount of excessive taxes and penalties state was required to pay.

Affirmed.

McComb, J., dissented.

1. Executors and Administrators ⇨117

Where trustee, who managed mineral lease in which estate of deceased had an interest, had a deliberate program to operate his office for aggrandizement of his own wealth, but administrator, instead of opposing trustee's policy, because of its adverse effect on deceased's estate, permitted and encouraged trustee to indulge such policy, with result that estate of deceased was required to pay excessive taxes and penalties because dividends from lease were paid in insufficient amounts in some years and in excessive amounts in other years, account of administrator was subject to surcharge for amount of excessive taxes and penalties state was required to pay.

2. Executors and Administrators ⇨475

In proceeding to settle final account of administrator, whose account was subject

* Subsequent opinion 274 P.2d 662.

to surcharge because administrator had permitted and encouraged trustee, who managed mineral lease in which estate of deceased had an interest, to operate lease so that estate of deceased was required to pay excessive taxes and penalties, record established that trial court's method of computing surcharge was correct.

3. Executors and Administrators ⇨86(1)

Administrator had duty, as personal representative of heirs of deceased, to prosecute such actions as were essential to preservation of corpus and revenues of estate of deceased. Probate Code, §§ 573, 612.

4. Executors and Administrators ⇨74

Administrator had obligation to pursue his duties promptly and expeditiously.

5. Executors and Administrators ⇨513(9)

In proceeding to settle final account of administrator, whose account was subject to surcharge because administrator had permitted and encouraged trustee, who managed mineral lease in which estate of deceased had an interest, to operate lease so that estate of deceased was required to pay excessive taxes and penalties, record established that amount of surcharge was not based on matters covered by administrator's account, which had been previously approved. Probate Code, § 931.

Guy Richards Crump, Wood, Crump, Rogers, Arndt & Evans, Los Angeles, for appellant R. S. Macmillan.

William K. Young, Los Angeles, for respondents.

MOORE, Presiding Justice.

The administrator appeals from those portions of the order settling final account and decree of distribution as follows:

"The account of the administrator is hereby surcharged in the sum of \$12,956.99, and it is hereby ordered, adjudged and decreed that Alice M. Dockweiler, Herbert Macmillan Booth and Malcolm R. Macmillan do have and recover said sum from R. S. Macmillan, as administrator, together with interest at 7% per annum from date of

the entry of this decree, and it is ordered that execution issue therefor."

The grounds of appeal are that (1) the amounts of the trustee's annual distributions were beyond appellant's control; (2) the amount of the surcharge was derived without factual foundation; (3) such amount is based largely upon matters recited in his first account which had been finally approved. The fallacy of appellant's logic will appear from the following account of his stewardship.

Herbert R. Macmillan died intestate January 13, 1945, leaving an insolvent estate, a brother and four heirs. His brother is R. S. Macmillan; his heirs are two sons, Gordon and Malcolm, a daughter, Alice Dockweiler, and a grandson, Herbert Macmillan Booth. The principal assets of his estate were 1918 shares of Macmillan Petroleum Corporation inventoried at \$21,098, and the Thrash lease in the east Texas oil field and situate in Rusk County, appraised at \$70,500. The potentialities of the lease were not wholly known at the time of decedent's passing but were fairly well obscured by decedent's debts, the asserted claims of Gordon in excess of \$190,000 and by the latter's claim that a dispute existed between him and his father as to their respective interests in the Thrash lease. The result of the impact of Gordon's claims with the administrator's duties was a compromise, and the ensuing contract of April 19, 1946 provided in part:

"The parties hereto agree as follows: 1. All right, title and interest in and to said lease (hereinafter for convenience called "the Thrash lease") and in and to the production therefrom, excepting the 12.5 per cent royalty reserved to the original lessor, and excepting also the 9.834 per cent hereinbefore referred to, is owned by Gordon Macmillan, in trust, however, for himself and the estate of Herbert R. Macmillan, deceased, as follows:

Estate of Herbert R. Macmillan, deceased..... 47 per cent
Gordon Macmillan .. 30.666 per cent."

Gordon's claims were thereby rejected except the demand for \$41,300 for his serv-

ices in managing the Thrash lease. That claim was approved on condition that when it should be paid the trustee would loan to the administrator \$27,500 without interest, repayable prior to final distribution of the estate. Thereafter, and pursuant to the contract which was approved by the court, Gordon administered the Thrash lease as trustee, in Los Angeles where the oil runs of the pipeline company were deposited by the trustee and the administrator maintained his principal office.

The administrator made an unwholesome beginning by bargaining with the trustee for a loan to be used by the estate to be repaid at an indefinite time. By such act, the administrator placed himself in a position whereby he might be tempted to serve the trustee rather than the best interests of the estate and initiated a policy of condoning the trustee's withdrawals of the trust's income for his personal advantage.

For illustration, Gordon had, for a salary of \$250 per month, managed the Thrash lease for two years prior to the passing of decedent in January 1945. During that period the 47 per cent interest in the lease had paid about \$40,000 net annually. Immediately following January 1945, Gordon as trustee suspended payment of dividends. Instead of fixing the dates for the payment of dividends and demanding compliance, appellant permitted the trustee to determine the annual amount (70 per cent of the net profits) to be divided among the beneficiaries, but silently acquiesced when Gordon departed from his own program. From the financial statements issued by the trustee, it was disclosed to appellant that while the trustee had ceased to pay dividends, he was constantly withdrawing the revenues of the trust and using them for his own account. Such withdrawals reached a high aggregate in May 1949 of \$81,635.57. Nor was haste made in reducing his debt or in returning to a normal policy of dividing the earning with the estate. In November 1950 he was still personally in debt to the trust in the sum of \$78,196.49. At that time he had already taken from the trust \$86,637.14 which did not include his traditional debt to the trust of \$35,-

512.49 at the end of July 1948. He did not offer to use his individual holdings to pay his debt or consult his co-heirs or consider the welfare of the estate, but awaited the cumulation of the dividends out of the profits of the trust and his fees as trustee to pay back the money he had taken.

There could be no excuse for the administrator's failure to know of the misappropriations. Statements on behalf of the trust were periodically issued and were currently examined by him. Indeed, when appellant had his only discussion with Gordon in July, 1948, concerning the lax handling of the finances of the trust, he told the latter that trouble was brewing and a restoration of such funds would be required before the estate could be closed. He made no demand for payment; in fact, he never became concerned about the perilous situation of the estate's welfare because he felt the trustee "had plenty of assets and I could make him put up the money." Notwithstanding such gratuitous reflections on Gordon's ability ultimately to restore the funds of the trust to the beneficiaries he knew that he could not close the estate until its debts were paid, knew that the only source from which the necessary money could be derived was the estate's interest in the Thrash lease and knew that with the passing of each day the possibility of a forced sale of the 47 per cent interest grew apace; knew that with the possible, adventitious occurrence of Gordon's demise the estate's capital assets might be dissipated. He knew the situation required exacting from the trustee a prompt and punctual repayment of the funds he had taken but the administrator made no demand for a return of the misappropriated funds or a dividend of recent profits of the lease. Although the income of the trust estate had been constant and fairly uniform for six years, the administrator borrowed from "the trustee" funds for payment of debts, while at the same time he did not ask the debtor to honor the estate with a dividend of surplus revenues. Although for the three years ending July 31, 1948, the profits of the trust

were \$112,836.54¹ not a dime was divided among its beneficiaries. While its profits during the six years ending July 31, 1951, were \$253,036.73, only \$113,125 or 45 per cent of the profits were paid in dividends during the same period while Gordon's debt to the trust continued to mount with his successive withdrawals. It would have required no more intelligence and training than that of a field hand for an administrator to discern that the trust's available funds would justify reasonable annual dividends; that the trustee was not dealing fairly with his beneficiaries; that by his personally using the income and depriving the beneficiaries thereof, they would surely suffer loss by reason of the unorthodox management of the trust, and that his methods might be corrected by the timely action of appellant.

The finding was that for the years 1947 to 1949, inclusive, the trustee could have paid \$53,000 in dividends, whereas he paid only \$32,564.29. But when he realized his sins were about to find him out, in order to obtain income to reduce his personal indebtedness to the estate, he paid exorbitant dividends throughout the succeeding three years (1950-1952) to the detriment of the beneficiaries whose taxes were, by reason of the trustee's conduct, necessarily enhanced.

Payment of reasonable dividends by the trust to the estate during the three years ending July 31, 1949 would have exceeded by more than \$20,435 the amount actually paid. The amount of dividends necessary to pay the estate its share of a reasonable dividend for the same three years was \$38,044. Practically all of it could have been paid at the same time out of the funds borrowed by the trustee with appellant's approval. In other words, if all the sums "borrowed" by the trustee had been paid to the estate and thence to the heirs in 1947 through 1949 as dividends, reasonable dividends could have been paid to all beneficiaries of the estate.

Not only did appellant know that the trustee had assets other than his interest

1. Year ending July 31, 1946 ..	\$22,984.53
Year ending July 31, 1947 ..	38,151.39

Year ending July 31, 1948 ..	51,700.62
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in the Thrash lease and that he was not applying them to his indebtedness to the trust, and was waiting for his dividends from the trust to pay his debts, but appellant knew also that in December 1947 he had borrowed from the trust \$12,900 while the trustee owed the trust \$13,000 and he knew that a reasonable dividend could have been paid by the trust at that time with the moneys the two men owed the trust. Likewise, one year later the trustee was still delinquent. The trust had earned \$51,700.62 in the fiscal year but he still owed the trust \$39,998.43. That sum in the treasury of the trust could have paid a neat dividend to the estate and have prevented the extra, generous, subsequent, increased dividends. But it was not there and the estate had no administrator to attempt to correct the erring course of its chief debtor who was also the source of practically all its revenues. While the trustee paid a total dividend of \$30,000 in 1949, he still owed the trust \$51,592.47, and the administrator owed it \$21,005.03. It is thus seen that while appellant was condoning the trustee's frenzied finance, he was inviting a certain loss by the estate and its beneficiaries. Had the trustee paid the estate out of the profits of the trust the estate's share in regular annual, fair dividends, the income taxes would have been levied upon only the estate's receipts during those years; but because of the receipt of excessive dividends in 1950 and subsequent years, the estate was required then and subsequently to pay more than it would have paid out of reasonable dividends regularly and annually paid during administration. That excess of income taxes paid by virtue of the failure of appellant in the first four years of his régime

to exhaust his endeavors to obtain larger dividends was \$12,956.99, the amount surcharged to appellant's account.² The amount of such surcharge is due mainly to the dividend paid by the trust to the estate on December 13, 1951 in the sum of \$44,769.38, at the same time Gordon's own share of the dividend enabled him to pay his debt to the trust in the sum of \$38,831.46 and to discharge appellant's debt of \$10,001.74 due the trustee. The tax levied on the estate's income for that year was \$20,861.82. By such method of treating the income of the estate it lost \$16,413.50 in excessive income taxes in 1951, which it would not have paid had the trustee declared and paid reasonable dividends annually from 1947 out of the trust's earned net profits during those years.

[1] In answer to the finding of his behavior as depicted in the foregoing, appellant contends that he was powerless to control the discretion of the trustee in the latter's exercise of his official powers. The trustee's discretion was never involved. He had a deliberate program to operate his office for the aggrandizement of his own wealth, while instead of opposing such policy because of its effect upon the estate, appellant's indulgence and indifference nurtured it and his loans from the trustee actually encouraged the latter in his thoughtless course. Solely by reason thereof the estate was required to pay excessive taxes and penalties to the extent found by the court, \$12,956.99.

Court's Method of Computation Was Correct

[2] (1) Appellant attacks the trial court's method of computing the surcharge.

2. A chart has been prepared showing the actual income taxes paid, the assumed income taxes based upon the income that

should have been paid out of actual profits; also, the annual difference during the five years, as follows:

Year	Actual Income Taxes	Assumed Income Taxes	Difference
1947	\$ 174.91	\$ 4,499.87	\$ 4,324.96
1948	5,060.97	6,243.83	1,182.86
1949	4,791.65	6,502.62	1,710.97
1950	10,432.82	6,670.54	-3,762.28
1951	20,861.82	4,448.32	-16,413.50
	<u>\$ 41,322.17</u>	<u>\$ 28,365.18</u>	<u>\$ -12,956.99</u>

He says a dividend was declared in 1946 for the benefit of all interest holders in an amount equal to decedent's debt to the trust at his death. Assuming that the estate's income in 1946 had been increased by the distribution of \$66,466.93, the surcharge would be the same for the reason that it is based on appellant's negligence during the years 1947 to 1951. No penalty is claimed on account of the transactions of 1946.

(2) Appellant argues that since the court found the net earnings of the trust for the year ending with July 1947 were \$38,151.39, of which the estate's share was \$20,492.64, a dividend of \$14,000 should have been paid to the administrator that year. Had such been done, he says according to the trial court there would have been an income tax payable by the estate in the sum of \$4,499.87. But, he contends, in obtaining that result, the court did not consider the prior commitment of \$66,466.93 as to the distributions and therefore the trustee did not then have sufficient funds to pay a \$26,000 dividend.³ But that dividend was assumed by the trial court based upon the funds the trustee had available to lend to himself and the administrator in November, 1947. Therefore, the computations performed by appellant are a gratuitous irrelevancy. The trust had the net earnings in its treasury and in the possession of the trustee and the administrator with which it could have paid a dividend in 1947 in the amount of \$26,000.

(3) Appellant contends that the dividend of 1946 in the sum of \$66,466.93 was not considered as income to the estate and necessarily therefore, the computation of the surcharge was based upon a false support. But the "dividend" of 1946 was not income. That sum was arbitrarily declared a "dividend" in order to cancel the indebtedness of decedent who had died 17 months before, owing the trust \$66,000. Now, if it be assumed that the estate would have been increased by the amount of \$66,466.93, the surcharge would not have been diminished. Its computation was based upon appellant's negligence in

the years 1947 to 1951. Appellant had so managed the estate that his negligence caused no damage until the exorbitant income taxes were assessed for 1950 and 1951. There was no penalty resulting from the extra "book" dividend in 1946. On the other hand, had the computation of the loss been based upon the income of 1951 only, the surcharge would have been \$16,413.50 or \$3,456.51 more than the judgment.

Appellant finally contends that there is "only one year, 1951, in which according to the exceptants' and the trial court's computations, the so-called 'negligence' of the administrator resulted in higher income taxes for which the administrator is surcharged." This argument was substantially answered in the preceding paragraph wherein it is shown that a consideration of appellant's acts over the entire five-year period provides the only fair method of computing the loss to which he had subjected the estate by his supine negligence if not by his conscious acquiescence in the trustee's abuse of his power. Appellant undertook to shift the responsibility for the extra generous dividend in 1951 to the heirs by testifying that he complained to the trustee that it was too large "but I felt that the heirs were so adamant about getting this thing closed up. * * * They put the pressure on to get this estate closed." The only "pressure" that adorns the story of this controversy is the urgent demands upon the trustee to square his own account with the trust. In his heat to comply, Gordon declared the dividend of \$44,769.38 causing a tremendous loss to the estate by way of the onerous income taxes that would have been reasonably mild had appellant duly taken action to enforce payment of the trustee's account by payment instead of acquiescing in Gordon's declaration of a large dividend in order to pay his own debt to the trust.

Final Account Basis of Surcharge

Appellant contends that the surcharge was based "in large part upon matters reported in the Administrator's First Ac-

3. The estate's share of a \$26,000 dividend paid by the trust would be about \$14,000.

count" which had been approved, citing Probate Code, section 931; *Estate of Roberts*, 27 Cal.2d 70, 78, 162 P.2d 461; *Security First National Bank of Los Angeles v. Superior Court*, 1 Cal.2d 749, 37 P.2d 69. But in his final account, appellant claimed credit for \$19,250.16 paid to U. S. Internal Revenue Collector as income taxes for 1951 and \$1,611.66 to California for the same year. Basing its conclusion on the finding of the disproportionate, unnecessary and excessive income of December 13, 1951 (\$44,769.38) and of appellant's encouragement of such payment, the court adjudged the surcharge. Neither prior accounts of appellant nor the payments of dividends of the earlier years of the estate were included in the court's computation.

[3-5] It was the duty of appellant as the personal representative of the heirs of decedent to prosecute such actions as were essential to the preservation of the corpus and revenues of the estate. Probate Code, secs. 573, 612; *Landis v. First National Bank*, 20 Cal.App.2d 198, 207, 66 P.2d 730. It is obligatory upon him to pursue his duties promptly and expeditiously. *Colden v. Costello*, 50 Cal.App.2d 363, 372, 122 P.2d 959. Because the trial court found upon competent evidence that appellant failed to perform his duties in the respects herein related, the order and decree should be and are affirmed.

FOX, J., concurs.

McCOMB, Justice.

I dissent. This is an appeal by R. S. Macmillan,¹ as administrator of the estate of Herbert R. Macmillan, deceased, from those portions of the order settling the final account and decree of distribution reading as follows:

"The account of the administrator is hereby surcharged in the sum of \$12,956.99, and it is hereby ordered, adjudged and decreed that Alice M. Dockweiler, Herbert Macmillan Booth and Malcolm R. Macmil-

lan do have and recover said sum from R. S. Macmillan, as administrator, together with interest at 7% per annum from date of entry of this decree (Oct. 24, 1952), and it is ordered that execution issue therefor."

Facts: Decedent died intestate on January 13, 1945, and letters of administration were issued to his brother. He left as heirs two sons, Gordon Macmillan² (appellant), and Malcolm R. Macmillan; a daughter, Alice M. Dockweiler, nee Alice Macmillan; and a grandson, Herbert Macmillan Booth, son of a deceased daughter.³

The principal assets of the estate consisted of (1) an oil and gas lease in Texas known as the Thrash lease and (2) 1,918 shares of the capital stock of Macmillan Petroleum Corporation.

During the lifetime of decedent a dispute existed between himself and Gordon as to what portion or share each owned in the Thrash lease. After the death of Herbert R. Macmillan the administrator and Gordon entered into an agreement dated April 19, 1946, which was approved by the probate court on June 7, 1946. This agreement contained the following provisions:

"3. R. S. Macmillan as administrator of the estate of Herbert R. Macmillan, deceased, will quitclaim to Gordon Macmillan all right, title and interest of the estate of Herbert R. Macmillan, deceased, in and to any interest in the Thrash lease or the production therefrom, other than the 47 percent undivided interest held in trust by Gordon Macmillan for the heirs of Herbert R. Macmillan, deceased.

"4. Gordon Macmillan waives any and all rights which he has or may have to participate as an heir or distributee in the matter of the estate of Herbert R. Macmillan, deceased, in and to such 47 percent, and hereby assigns all his interest therein, as heir or otherwise, to the other heirs of Herbert R. Macmillan, deceased, share and share alike."

By this agreement Gordon became the trustee of a 47% undivided interest in the Thrash lease for the heirs of decedent other

1. Hereinafter referred to as the administrator.

2. Hereinafter referred to as Gordon.

3. Mrs. Dockweiler and H. M. Booth will be hereinafter referred to as respondents.

than himself. In consideration of this agreement the administrator agreed to approve a claim of Gordon, individually, against the estate in the sum of \$8,651.74, while Gordon agreed to the rejection of a claim filed by him as trustee in the sum of \$99,114.78.

The net appraised value of decedent's estate was, \$97,788.13. The appraised value of the estate's 47% interest in the Thrash lease was \$70,500, and of the 1,918 shares of Macmillan petroleum stock, \$21,098 (or \$11.00 per share).

From the date of decedent's death until the filing of the final account on February 20, 1952 (approximately 7 years) the total income exclusive of a credit of \$66,466.93, which the parties mutually agreed had been received by decedent during his lifetime from the Thrash lease, was \$131,956.68, of which \$124,333.82 was received as distributions (sometimes called dividends), from the Thrash lease and \$7,384.30, as dividends on the Macmillan petroleum stock.

It was further agreed that Gordon should pay to himself individually \$41,300 as compensation for managing and operating the Thrash lease out of which sum Gordon was to loan the administrator \$27,500 to be repaid without interest before the final distribution of the estate.

The dividends received from the trust, and the taxes paid thereon by the estate are as follows:

Year	Dividends	Taxes
1947	\$ none	\$ 174.91
1948	16,114.29	5,060.97
1949	16,450.00	4,791.65
1950	28,200.00	10,432.82
1951	44,769.38	20,861.82
1952	18,800.15	

Respondents claim that the administrator "has been grossly negligent in the administration of the estate due to his failure to properly supervise the income received by the estate from the Thrash lease, with the result that the estate has paid burdensome and unnecessarily excessive income taxes on its income from said lease." Respondents support this claim by asserting that the

trust could have declared dividends in the following table, and that the taxes would have been as indicated, which would have resulted in the estate paying \$12,956.99 less than it actually paid in taxes.

Year	Assumed Dividends	Assumed Income Taxes
1947	\$14,000.00	\$4,499.87
1948	18,500.00	6,243.83
1949	20,500.00	6,502.62
1950	20,500.00	6,670.54
1951	21,000.00	4,448.32
1952	18,500.00	

This is the question presented: *Was the administrator negligent in the administration of the estate in not compelling the trustee of the Thrash lease to make annual distributions from trust income in such amounts as would best suit the income tax situation of the estate without regard to the tax situation of other beneficiaries and the discretionary right of the trustee to maintain adequate reserves for contingencies?*

This question must be answered in the negative and is governed by these pertinent rules:

(1) Courts do not attempt to exercise the discretion which has been confided to a trustee unless such discretion has been abused in some manner. Where the amount to be paid is to be determined by the trustee, the court should not specify the amount of payments to be made where the trustee's refusal to make such payments is based upon the belief that they are improper in the absence of a showing that the trustee is negligent or has otherwise abused his discretion. The rule is aptly stated by Mr. Chief Justice Gibson in *Estate of Marre*, 18 Cal.2d 184, 190, 114 P.2d 586, 590, thus:

"It is well settled that the courts will not attempt to exercise discretion which has been confided to a trustee unless it is clear that the trustee has abused his discretion in some manner (citing authorities)."

"It is the general rule that if the power of the trustee is discretionary, and the trustee is fairly employing his judgment to ad-

vance or not to advance, the court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere. (Bogart on Trusts & Trustees, Vol. 4, Part 1, pp. 168-169.) The court should not be burdened with the duty of administration, nor required, nor permitted to substitute its judgment and discretion for that of the trustee so long as it acts within proper limits; nor in any event until there is an entire failure or refusal on the part of the trustee to perform its duty." (In re Estate of Greenleaf, 101 Cal.App.2d 658, 662 [1], 225 P.2d 945, 948; City Bank Farmer's Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 223, 93 A.L.R. 598; cf. Cleveland Clinic Foundation v. Humphrys, 6 Cir., 97 F.2d 849, 121 A.L.R. 163, 174.)

(2) A trustee can properly withhold a reasonable amount of the income to meet present or anticipated expenses which are properly chargeable to income. (Restatement of Law of Trusts (1935) Vol. I, sec. 182, Comment b, p. 467; see also Scott on Trusts, Vol. 2d sec. 182, p. 969; Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192, 197, 125 A.L.R. 620.)

Applying the foregoing rules to the facts of the instant case it is clear that it rested in the discretion of the trustee of the Thrash lease, Gordon, to determine the amount and times of the payment of dividends to the estate, which discretion in the absence of a showing of abuse thereof was not subject to the control of the court let alone to that of the administrator of the estate. It follows that since the administrator had no power to control the amounts of the trustee's distributions, he was not negligent in not trying to do what he had no legal power to do. The administrator (appellant) in

his brief aptly illustrates the soundness of this position by saying:

"The manner in which a trustee shall exercise his function rests ordinarily within his discretion. If he exceeds his powers, acts negligently, or abuses his discretion, a beneficiary injured thereby may have redress, but a beneficiary has no power to control the action of the trustee.' (City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 223, 93 A.L.R. 598.)

"Applying this rule to the instant case, it is apparent that R. S. Macmillan as administrator of the estate of Herbert R. Macmillan had no power to control the amounts of the trustee's annual distributions, and it follows that the administrator was not negligent in not trying to do what he had no legal power to do.

"By way of emphasizing the point, let us consider the situation in which the trustee would have found himself, if two (or more) of the beneficiaries had insisted on his making a distribution to suit the respective income tax problems of each, and one had asked for a large and the other for a small dividend. Manifestly, the trustee could not be compelled to satisfy such conflicting claims, nor could he do so. Some one must have the last word and that some one is, [in the absence of an abuse of discretion] and must be, the trustee."

It should be noted that if Gordon, as trustee of the Thrash lease, acted improperly, the remedy is by a plenary suit against him for his misconduct. Such a suit, counsel stated in the oral argument, is now pending. However, the issues in such action were not before the probate court nor are they before this court on appeal.'

Those portions of the order from which an appeal is taken should be reversed.

In re MACMILLAN'S ESTATE. ***MACMILLAN v. DOCKWEILER et al.****Civ. 19665.**District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1953.

Rehearing Denied Jan. 5, 1954.

Hearing Granted Feb. 10, 1954.

Proceeding was brought for settlement of final account of administrator of estate of deceased. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order settling final account, and one of the heirs appealed. The District Court of Appeal, Moore, P. J., held that where deceased died intestate, leaving two sons, a daughter, and a grandson as heirs, and first son entered into compromise agreement with administrator whereby first son was to manage mineral lease as trustee and providing that interest of deceased's estate in lease was 47%, that administrator quitclaimed to first son, all interest in lease except 47%, and that first son waived all rights to participate as heir of deceased with respect to such 47% and assigned his interest therein to the other heirs, and agreement was approved by court, the other heirs were entitled to all of the 47% interest and all royalties arising therefrom.

Affirmed.

Descent and Distribution **86**

Where deceased died intestate, leaving two sons, a daughter, and a grandson as heirs, and first son entered into compromise agreement with administrator whereby first son was to manage mineral lease as trustee and providing that interest of deceased's estate in lease was 47 per cent, that administrator quitclaimed to first son all interest in lease except 47 per cent, and that first son waived all rights to participate as heir of deceased with respect to such 47 per cent and assigned his interest therein to the other heirs, and agreement was approved by court, the other heirs were entitled to all of the 47 per cent interest and all royalties arising therefrom.

* Subsequent opinion 274 P.2d 662.

Ernest Purdum, Los Angeles, for appellant Gordon Macmillan. Guy Richards Crump, Los Angeles, of counsel.

William K. Young, Los Angeles, for respondents.

MOORE, Presiding Justice.

From certain portions of the order settling the administrator's final account and decreeing distribution of nothing to him, Gordon Macmillan, a son, appeals. The facts assigned as the basis of the order are that for a valid consideration Gordon assigned all his interest therein, as heir or otherwise, to the other heirs of Herbert R. Macmillan, deceased, share and share alike.

Mr. Macmillan died intestate January 13, 1945. He left as heirs two sons, Gordon and Malcolm R., a daughter, Alice M. Dockweiler, and a grandson, Herbert Macmillan Booth. His insolvent estate included 47 per cent interest in the Thrash lease, an oil property in the east Texas oil field, and 1918 shares of Macmillan Petroleum Corporation. They are the only assets involved in this appeal. Prior to his decease, he was engaged in a dispute with Gordon as to the extent of the interest each owned in the Thrash lease. That was a factor for the consideration of the brother, R. S. Macmillan, when he qualified as administrator in 1945. However, a compromise was reached and on April 19, 1946, a contract was executed by Gordon and the administrator which contained the following covenants:

"3. R. S. Macmillan as administrator of the estate of Herbert R. Macmillan, deceased, will quitclaim to Gordon Macmillan all right, title and interest of the estate of Herbert R. Macmillan, deceased, in and to any interest in the Thrash lease or the production therefrom, other than the 47 per cent undivided interest held in trust by Gordon Macmillan for the heirs of Herbert R. Macmillan, deceased.

"4. Gordon Macmillan waives any and all rights which he has or may have to participate as an heir or distributee in the matter of the estate of Herbert R. Macmillan, deceased, in and to such 47 per cent, and hereby assigns all his interest therein, as heir or otherwise, to the other heirs of

Herbert R. Macmillan, deceased, share and share alike."

The contract was approved by the court.

By virtue of the terms of such writing, Gordon thereafter held the estate's interest of 47 per cent in the Thrash lease in trust for the other heirs, and he asserted no right to participate as heir or distributee of his father's estate in the 47 per cent of its revenues. The estate, therefore, did not convey or otherwise alienate any interest in the lease or its income. The 47 per cent still belonged to the estate of decedent, and at his passing became the property of his heirs as tenants in common, subject to his debts and the expense of administration under the guidance of the probate court and the administrator. Thus the law fixed the title of the interest owned by decedent at death and Gordon assigned all interest he might have had in it by his compromise with the administrator.¹ The status thus created poses for determination the following question: Where, in the course of the administration of an intestate's estate, one heir with the approval of the court conveys and assigns to his co-heirs his entire interest in a specific asset of the estate and waives right to all its revenues, are such co-heirs entitled to the immediate and full benefit of the assignment?

In his lifetime decedent acquired his interest in the Thrash lease, but caused its title to be taken in the name of Gordon who claimed a separate interest in his own right. At death, Herbert was insolvent: his debts far exceeded the value of his holdings. Among them were three claims of Gordon aggregating \$193,614. After the compromise, Gordon owned 30.666 per cent of the Thrash lease in his own right, while he held as trustee 47 per cent of that lease for the other heirs of decedent. In waiving "all rights to participate as an heir or distributee * * * in and to such 47 per cent," he "assigns all his interest *as heir or otherwise*, to the other heirs of Herbert * * * share and share alike." By virtue

of his contract with the administrator, appellant separated himself from every right to the 47 per cent interest, and his co-heirs became absolute owners thereof. Necessarily, such ownership entitled them to the royalties subsequently to accrue from the production of the lease. *Schiffman v. Richfield Oil Company*, 8 Cal.2d 211, 224, 228, 64 P.2d 1081. Consequently, after the April contract had been approved by the probate court, appellant was entitled neither to any share in the 47 per cent interest in the lease, nor to any benefits arising therefrom. After the royalties from such interest had been paid to the administrator in sufficient amounts to pay all the debts and expense of administration, the entire 47 per cent became the property of the heirs other than Gordon, and they were entitled to all benefits derived therefrom. The contract and conveyances executed by the administrator with the court's approval were as sufficient to convey the total interest in the 47 per cent, after debts and expenses had been paid, as a final decree of distribution could have done. It is clear, therefore, that the revenues from the 47 per cent interest paid the general indebtedness of the estate and the expense of administration.

There is no invalidity in the contract of the administrator with appellant. It must have been contemplated by the lawmakers, for it is statutory that an assignment by an heir must be recognized and given effect upon the settlement of the account that reports it. Prob.Code, sec. 1020; *Reed v. Hayward*, 23 Cal.2d 336, 342, 144 P.2d 561.

No construction of the agreement is reasonable other than that the phrase employed in "hereby assigns" was intended to, and did, convey a present interest in the 47 per cent. As further proof to warrant the conclusion that the 47 per cent was to pass at once to the heirs other than Gordon, he removed 30.666 per cent from the insolvent estate and thereafter enjoyed the revenues therefrom without let or hindrance.² In the meantime, the 47 per cent interest re-

1. Gordon's claim of a personal interest in the lease may have arisen out of his asserted claims against his father for services and otherwise. His separate interest was not defined until his agreement with the administrator.

2. The record is not clear that Gordon held any interest for himself prior to Herbert's demise.

mained in the treasury of the estate, charged with the obligation to pay the debts and expense of administration in the sum of \$93,285.63.

That feat having been accomplished, the administrator had no further right or power or discretion, Prob.Code, sec. 754, to dominate the 47 per cent interest in the Thrash lease which he and appellant had conveyed to respondents and Malcolm. That interest was wholly in the ownership of the beneficiaries of the trust held by appellant. While they owned it, their property had yielded \$37,128.85 which was properly applied by the administrator to the payment of the debts of the estate. Now the total value of the residue of the estate is \$24,865.19. This includes the 1918 shares of Macmillan Petroleum stock at its appraised value, to wit, \$21,098. Inasmuch as the 47 per cent of the Thrash lease supplied \$37,128.85 to pay the debts and expense of administration, the estate is in debt in that sum to the beneficiaries of Gordon's trust. But the solution is much simpler than having them paid by the estate. All of its assets belong to the three heirs other than Gordon. Inasmuch as he has no interest in the 47 per cent, but is entitled to one fourth of the residue outside the Thrash lease, to wit, the 1918 shares of Macmillan Petroleum stock, the trial court properly concluded that inasmuch as one-fourth of the indebtedness (\$37,128.85) of the estate is \$9,282.21, and since appellant's interest in the estate does not exceed \$6,216.29 and since the Macmillan shares and the balance of the assets are worth only \$24,865, and since one-fourth thereof is of a value far less than appellant's debt to the other heirs, appellant owns no equity in the residue of the estate. If it has no value in excess of that listed by the appraisers, to cause a sale thereof would result in a useless tax on the estate. To avoid such expense the trial judge afforded appellant a fair and reasonable opportunity and time to establish a greater value in the Macmillan shares than his debt to the estate. Only after he had failed to find a purchaser within fifteen days at an advanced price and had failed to establish its worth greater than the appraised value, the court ordered the

judgment under review. The procedure of the trial court in doing substantial justice and at the same time, avoiding expense and delay deserves only commendation.

The order and decree are affirmed.

FOX, J., concurs.

McCOMB, Justice.

I dissent. This is an appeal by Gordon Macmillan (hereinafter referred to as appellant) from that portion of the order of the trial court settling the final account of the administrator and decreeing distribution, holding in effect that appellant is entitled to nothing from the estate of decedent, his father, on the ground that he has assigned his right "to participate as an heir or distributee" in one asset of the estate to the other three heirs and as a consequence the proceeds of that asset should not have been used to pay any part of the debts of decedent, and since they were, appellant's share in other assets of the estate must be offset against such sums.

Facts: Decedent died intestate on January 13, 1945, and letters of administration were issued to his brother. He left as heirs two sons, Gordon Macmillan and Malcolm R. Macmillan; a daughter, Alice M. Dockweiler, nee Alice Macmillan; and a grandson, Herbert Macmillan Booth, son of a deceased daughter.

The principal assets of the estate consisted of (1) an oil and gas lease in Texas known as the Thrash lease and (2) 1,918 shares of the capital stock of Macmillan Petroleum Corporation.

During the lifetime of decedent a dispute existed between himself and Gordon as to what portion or share each owned in the Thrash lease. After the death of Herbert R. Macmillan, the administrator and Gordon entered into an agreement dated April 19, 1946, which was approved by the probate court on June 7, 1946. This agreement contained the following provisions:

"3. R. S. Macmillan as administrator of the estate of Herbert R. Macmillan, deceased, will quitclaim to Gordon Macmillan all right, title and interest of the estate of Herbert R. Macmillan, deceased, in and to

any interest in the Thrash lease or the production therefrom other than the 47 percent undivided interest held in trust by Gordon Macmillan for the heirs of Herbert R. Macmillan, deceased.

"4. Gordon Macmillan waives any and all rights which he has or may have to participate as an heir or distributee in the matter of the estate of Herbert R. Macmillan, deceased, in and to such 47 percent, and hereby assigns all his interest therein, as heir or otherwise, to the other heirs of Herbert R. Macmillan, deceased, share and share alike."

By this agreement Gordon became the trustee of a 47% undivided interest in the Thrash lease for the heirs of decedent other than himself. In consideration of this agreement the administrator agreed to approve a claim of Gordon, individually, against the estate in the sum of \$8,651.74, while Gordon agreed to the rejection of a claim filed by him as trustee in the sum of \$99,114.78."

The trial court made the following finding:

"The court finds that the sum of \$37,128.85 was disbursed from said Thrash lease income to pay the general debts and cost of administration of said Estate, and that the said sum should be considered as a loan to the Estate from the heirs, other than Gordon Macmillan, which should be repaid to them *pro tanto* from other assets of the Estate, amounting to \$24,865.19, included in which sum is \$21,098 representing the appraised value of 1,918 shares of the common capital stock of the Macmillan Petroleum Company at \$11.00 per share. The court finds that the heirs of said decedent, or their assignees, excepting Gordon Macmillan, are

entitled to have distributed to them the whole of said Estate * * *."

Pursuant to this finding the probate court made an order that the assets of the estate be distributed to the heirs, excluding appellant, unless he, within 15 days from the date of the said order, establishes to the satisfaction of the court that the then market value of the Macmillan stock exceeded \$17.50 per share.

Thereafter on May 29, 1952, an order was made by the probate judge reciting that no proceedings having been initiated for the purpose of establishing the value of the stock, distribution was ordered as specified above.

This is the sole question necessary for us to determine:

Did the probate judge err in finding that the administrator of decedent's estate improperly used the sum of \$37,128.85, which he received as a distribution from appellant as trustee of the Thrash lease, subsequent to April 19, 1946 (the date of the agreement above referred to), to pay debts of the estate, and charged such amount against appellant's share in the balance of the assets of the estate?

This question must be answered in the affirmative and is governed by these pertinent rules:

(1) All the property, real or personal, of a decedent dying intestate is chargeable with the payment of his debts and the expenses of administration of the estate. (Probate Code, secs. 300¹, 754²; In re Estate of King, 19 Cal.2d 354, 357, 121 P.2d 716.)

(2) An administrator may use his discretion in determining what property to sell

1. Section 300 of the Probate Code reads as follows:

"When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other

disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

2. Section 754 of the Probate Code reads as follows:

"In selling property to pay debts, legacies, family allowance or expenses, there shall be no priority as between personal and real property. When a sale of

to pay debts subject to a showing upon the return of a sale that facts support the exercise of his discretion. (In re Estate of George, 123 Cal.App. 733, 737, 12 P.2d 86.) It necessarily follows that he may use his discretion as to what cash assets he may use to pay the debts of the estate.

(3) An assignee of an heir stands in his assignor's shoes, and is entitled to no more than the assignor would be entitled to. (See cases in 11b Cal.Jur.(1934), Executors and Administrators, sec. 1297, note 8, p. 800; Blair v. Hazzard, 158 Cal. 721, 725, 112 P. 298; Smith v. Barrick, 41 Cal.App. 28, 31, 182 P. 56.) If an heir conveys his interest in an estate he conveys such interest only as will remain to him after satisfying the debts of administration. (In re Estate of Moore, 57 Cal. 437, 442; Hamilton v. Elvidge, 132 Cal.App. 21, 26, 22 P.2d 239. See cases cited in 9 Cal.Jur.(1923) Descent and Distribution, sec. 27, notes 6 and 7, p. 479.)

Under the foregoing rules it is clear that appellant, in conveying all of his right to participate as an heir in the 47% of the Thrash lease belonging to the estate, could and only did convey such interest as he might have after administration of the estate and upon distribution. Therefore, since the administrator in his discretion, of which there is no showing of an abuse, saw fit to use the income received from the Thrash lease to pay debts of the estate, this was proper. (See rule (2), supra.) This result is consonant with the agreement of April 19, 1946, between appellant and the administrator wherein appellant waived all of his right as an "heir or distributee," and assigned his interest as "an heir or otherwise."

The agreement clearly contemplated appellant was assigning whatever rights he might have as an heir or distributee and not any personal right. He, of course, could not have assigned any interest in the estate

so as to free it from the obligation to creditors and the expenses of administration. See In re Estate of Dobbins, 36 Cal.App.2d 536, 541, 97 P.2d 1051, 1054, where Mr. Presiding Justice Moore says, " * * * Always, when during administration an heir conveys his interest in any part of an estate in probate, such conveyance is subject to the perils of the proceeding. If, for any necessity, a sale of the assets of the estate should be ordered, it might alienate to an utter stranger the very property affected by such conveyance."

The proceeding should be, in my opinion, remanded to the probate court with instructions to enter a decree in accordance with the views just expressed.



122 Cal.App.2d 15

PEOPLE v. ESCOBAR.

Cr. 5092.

District Court of Appeal, Second District,
Division 1, California.

Dec. 14, 1953.

Rehearing Denied Dec. 21, 1953.

Hearing Denied Jan. 11, 1954.

Proceedings on application for probation after entering of pleas of guilty to charges of burglary and forgery. The Superior Court of Los Angeles County, Jurtz Kauffman, J., denied probation, and defendant appealed from the judgment of conviction. The District Court of Appeal, White, P. J., held that statement of court that probation was denied, amounted to a determination of the application, as required by statute, and court was not required to orally state that the report of probation officer had been considered, but

property of the estate is necessary for any such purpose, or when it is for the advantage, benefit, and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the same, either at public auction or private

sale, using his discretion as to which property to sell first, except as provided by Sections 750 and 751 of this code.

"The executor or administrator in making any such sale may sell the entire interest of the estate in the property or any lesser interest or estate therein."

signing of statement to effect that report had been considered, and filing of statement with the clerk of court was sufficient.

Judgment affirmed.

1. Criminal Law Ⓒ982

Statement of court, after hearing considerable argument on defendant's application for probation after pleas of guilty to charges of forgery and burglary, that "Well, probation is denied", amounted to a "determination" of the application as required by Penal Code. Pen.Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Determination".

2. Motions Ⓒ51

If language used in determining a motion is such as to identify with reasonable certainty the order which is made, such order, if otherwise tenable, will be given effect.

3. Criminal Law Ⓒ982

Signing by court of statement that report of probation officer had been considered and that such statement was filed with the clerk, was sufficient compliance with statutory requirement that after hearing and determining an application for probation, the court, in connection therewith, must consider any report of the probation officer, and must make a statement that it has considered such report which must be filed with the clerk, and it was not required that court orally state that it had considered the probation officer's report. Pen.Code, § 1203.

4. Criminal Law Ⓒ982

The fact that an accused has previously been arrested on various criminal charges may be properly included in the probation officer's report, to be considered by the court in its determination of application for probation. Pen.Code, § 1203.

5. Criminal Law Ⓒ982

Where court, when making determination on application of defendant for probation after pleas of guilty to burglary and forgery, was informed of another pending charge against defendant in another and separate information to which plea of not guilty had been entered, and court stated that it would assume that defendant was

innocent until proven guilty of such charge, even if court was not entitled to consider the pending robbery charge in making its determination on the application, circumstances disclosed no consideration by court of the robbery accusation to the prejudice of defendant.

6. Criminal Law Ⓒ1144(17)

Where no motion was made at hearing on application of defendant for probation, to strike statement made by deputy district attorney referring to proof on another and separate pending charge of robbery by defendant, and defendant's counsel had previously commented on the inadequacy of proof on such charge, it would be assumed that the remarks of the deputy district attorney were invited by remarks of defendant's counsel, and that they did not, under the circumstances, prejudice defendant.

7. Criminal Law Ⓒ982

Inclusion in report of probation officer, relative to defendant's application for probation after entering pleas of guilty to charges of burglary and forgery, of information concerning another pending robbery charge, was not error especially when such information was not considered by court to the prejudice of defendant, and when defendant produced no witnesses, as he might have done, to testify in mitigation of his punishment if he deemed the report insufficient or inadequate. Pen.Code, § 1204.

8. Criminal Law Ⓒ982

Where report of probation officer on application for probation after pleas of guilty to forgery and burglary recommended that matter be continued for further information pending the outcome of a separate and distinct robbery charge placed against defendant, and defendant proceeded with hearing on the probation application as filed, without objection, or suggestion that a supplementary report be filed, there was a waiver of any right defendant may have had to an express recommendation of probation. Pen.Code, § 1203.

Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in Count I with the crime of burglary and in Count II with the offense of forgery. He entered a plea of not guilty to both offenses charged against him. At the request of defendant the Public Defender was appointed as his counsel. Subsequently, defendant, with leave of court, withdrew his plea of not guilty and pleaded guilty to the offenses charged in both Counts I and II. As to the offense of burglary charged in Count I, the court found it to be of the second degree. Defendant was granted permission to file an application for probation. When the hearing on the application for probation and pronouncing of judgment and sentence came before the court, defendant's motion to substitute present counsel as his attorney in the place and stead of the Public Defender was granted. Probation was denied and defendant was sentenced to state prison on each count of the information, the sentences to run concurrently. From the judgments of conviction defendant prosecutes this appeal.

The record reflects that the aforesaid information was filed on December 31, 1952, and that thereafter defendant was arrested and charged with the crime of robbery, and the information charging the latter offense was transferred for trial to the same department of the court in which the prior information was pending. At the time judgment was pronounced on the first information, the robbery charge remained undisposed of and was thereafter dismissed.

As his first ground for reversal, appellant contends that the court erred in not hearing and determining his application for probation, in failing to rule on said application and in failing to make an order with respect to such application for probation. It is appellant's contention that when an accused has made application for probation, the court must make two orders—one determining the defendant's application for

probation, and secondly an order denying probation.

Section 1203 of the Penal Code provides in part: "At such time or times fixed by the court, the court must hear and determine such application * * *."

[1] In the instant case, the record discloses that the court did hear the application and there was considerable argument presented by respective counsel during such hearing. At the conclusion thereof, the court stated, "Well, probation is denied". We entertain no doubt that this amounted to a determination of the application.

[2] " * * * 'Determine' means to decide, to adjudge (*Edwards v. Hellings*, 99 Cal. 214, 33 P. 799), to adjudicate (*Glenn v. Mitchell*, 71 Colo. 394, 207 P. 84), to come to a decision, to decide on after investigation, to perform a judicial act, to settle by judicial sentence. *Smith v. Board of Education*, 174 Ga. 735, 164 S.E. 41. * * *" *Tracy v. MacIntyre*, 29 Cal.App.2d 145, 149, 84 P.2d 526, 528. "Language is but a means of conveying thought; the certainty of its meaning is but relative. If the language used in determining a motion is such as to identify with reasonable certainty the order which is made, such order, if otherwise tenable, will be given effect." *Cox v. Tyrone Power Enterprises, Inc.*, 49 Cal.App.2d 383, 389, 121 P.2d 829, 833.

[3,4] Equally without merit is appellant's contention that the court erred in failing and refusing to make a statement that it had considered the report of the probation officer.

In that regard, section 1203 of the Penal Code in part provides that after hearing and determining an application for probation, the court, in connection therewith, must "consider any report of the probation officer, and must make a statement that it has considered such report which must be filed with the clerk * * *."

In the instant case it is conceded that the court did sign a statement that the report of the probation officer had been considered and that such statement was filed with the clerk. Such action was in all respects a

compliance with the aforesaid code provisions.

Contrary to appellant's contention, the statute does not require that the statement of the court that it has considered the probation officer's report be made orally. Indeed, the requirement that it be "filed with the clerk of the court as a record in the case" immediately suggests a legislative intent that such statement by the court may be, as here, in writing, so that it might be filed as a record in the case.

It is next contended by appellant that the court erred in considering "as another count in the information, for the purposes of pronouncing judgment, a charge of robbery in another information which was then pending against him."

As heretofore pointed out, at the time judgments were pronounced in the case at bar there was pending in the same department of the court a charge of robbery against appellant, which was contained in another and separate information, to which last mentioned charge appellant had pleaded not guilty. The latter now urges that since no motion had been made to consolidate the cases, he was prejudiced by the court giving consideration to the robbery charge as another count of the information on which he was before the court for hearing upon an application for probation and for pronouncement of judgment and sentence.

[5] The fact that an accused had previously been arrested on various criminal charges may be properly included in the probation officer's report, to be considered by the court. *People v. Hopper*, 20 Cal. App.2d 108, 113, 66 P.2d 459; *People v. White*, 109 Cal.App.2d 296, 298, 240 P.2d 728. While it is true that appellant was arrested for robbery subsequent to his apprehension upon the charges now engaging our attention, we fail to perceive wherein the reasoning applicable to giving mention in the probation officer's report of prior arrests is not equally applicable to arrests occurring subsequent to the apprehension of an accused on the charge pending before the court on hearing of an application for probation.

[6] Furthermore, aside from mention of the robbery charge in the probation officer's report, it was the subject of discussion between counsel for the People and appellant at the time the matter of probation on the burglary and forgery charges was before the court, and at which time the robbery case was on the same court calendar for disposition. The court was advised that as to the robbery charge, appellant had pleaded not guilty, whereupon, the court stated that with reference to the application for probation on the burglary and forgery charges, insofar as the robbery charge was concerned, "I will assume he is innocent in the other case until he is proven guilty." Whatever may be said regarding the right of the court to consider the pending robbery charge in making its determination on the application for probation in the burglary and forgery matters, it is at once manifest that no showing has been made that the court did consider the robbery accusation to the prejudice of appellant.

The next assignment of error is that the court received statements of the Deputy District Attorney concerning the robbery with which appellant was charged, in connection with the pronouncement of sentence on the burglary and forgery charges.

At the hearing of the application for probation on the latter charges, appellant's attorney first made a statement to the court concerning the robbery charge when he said: "And in the second count, the defendant stated that he had an alibi, and our investigator in checking that, located four witnesses who placed the defendant definitely away from this scene at that time, at the time of the robbery. I do not wish to get into the merits of the matter, but I think certainly it is a proper background for the Court to consider where there is a robbery case pending and undisposed of, and where he has put in a plea. That is all I have to say as to the merits."

Thereupon, the Deputy District Attorney said, "I do not normally address the Court on matters of this kind, but with reference to counsel's statement on the robbery, the Court I am sure can sense the fact that by taking a plea to two separate felonies, we

believe we gave the Court sufficient latitude to handle both matters. As to the robbery, where there may be an alibi produced, there was positive identification from not only the victim but from her husband."

Appellant's objection is aimed mainly at the last sentence of the remarks of the Deputy District Attorney, which it is claimed, is a violation of Penal Code section 1204, which requires that all facts offered or received by the court in aggravation or mitigation of punishment must be presented by the testimony of witnesses examined in open court or upon deposition.

[7] No motion to strike the statement was made. And, if there was any impropriety involved therein, we are justified in assuming that the remarks complained of were invited by the assertion of appellant's counsel that he had four alibi witnesses for appellant on the robbery charge. *People v. Smith*, 100 Cal.App. 344, 349, 279 P. 1022; *People v. Page*, 28 Cal.App.2d 642, 648, 83 P.2d 77.

[8] It is next urged by appellant that it was error for the probation officer to include in his report on the burglary and forgery charges, information concerning the pending robbery charge. As we have heretofore pointed out, there was no impropriety in the action of the probation officer in setting forth in his report such information as he had concerning the robbery charge. And, that the court was not at all misled, to appellant's prejudice, by reference thereto in the report, is evidenced by the statement of the court heretofore adverted to that appellant would be considered innocent of the robbery charge until his guilt was proven. Appellant urges that if it was proper for the probation officer to include information relative to the robbery charge in his report, he should have made a more complete investigation of the facts surrounding it. That the report included just enough about the robbery to indicate that appellant was guilty thereof. If the latter believed the report insufficient or inadequate, he was entitled to present witnesses to testify in mitigation of his punishment at the time of the hearing on the probation application. Penal Code, § 1204. This he did not do and cannot now

be heard to complain. Also, as hereinbefore narrated, the statement of the court with reference to its consideration of the robbery charge in passing upon the application for probation on the burglary and forgery charges, completely negatives the assumption of any prejudice to appellant or his rights.

Finally, appellant predicates error and consequent prejudice because, as he asserts, the probation officer failed to make written recommendations as to the granting of probation to appellant, and as to the conditions of probation if it should be granted, contending that this was in violation of section 1203 of the Penal Code, which reads in part, that the probation officer must "* * * make a written report to the court of the facts found upon such investigation and must accompany said report with his written recommendations as to the granting or withholding of probation to the defendant and as to the conditions of probation if it shall be granted * * *."

In his report, the probation officer recommended as follows: "However, in view of the Robbery charges now pending, it is believed that the Court should be aware of the final decision of that case before disposition of the burglary and forgery charges. If he is found guilty of the pending robbery, probably more severe sentence should be imposed. For these reasons it is believed that the matter should be continued for further information which could possibly be finally disposed of at this hearing.

"Recommendation:

"It is respectfully recommended that matter be continued for further report."

At the first hearing on the application for probation, appellant's counsel addressed the court as follows: "But I note that in the evaluation the probation officer indicates this man would probably benefit from counseling under probationary supervision, but then raises the question about the unsettled robbery charge. If your Honor feels he could go ahead in this matter and go ahead in the light of the implied recommendation for probation I would be happy to proceed on that. But if your Honor

feels the matter should be put over for a while, we can do that."

At no time thereafter did appellant suggest or ask that any supplementary report be filed, but proceeded with the hearing on the probation application as filed, without objection.

[9] When appellant agreed to proceed on what he conceived to be an implied recommendation for probation, he waived any right he might have had to an express recommendation. If appellant's counsel felt that the recommendation was insufficient or not in full compliance with the statute, it was his duty to apprise the court thereof. If he "remains silent while the court does or allows an unauthorized act, he waives the right of reversal by reason thereof." *People v. Lloyd*, 98 Cal.App.2d 305, 313, 220 P.2d 10, 15.

Finding no prejudicial error in the record, it is ordered that the judgments appealed from be, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.



121 Cal.App.2d 798

PEOPLE v. STANCIELL.

Cr. 2949.

District Court of Appeal, First District,
Division 2, California.

Dec. 10, 1953.

Defendant was convicted of possession of heroin. The Superior Court of the State of California, in and for the City & County of San Francisco, Eustace Cullinan, Jr., J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence sustained conviction.

Judgment affirmed.

1. Poisons ☞9

Evidence sustained conviction for possession of heroin. Health and Safety Code, § 11500.

2. Poisons ☞9

Conduct, admissions, contradictory statements, and explanations of defendant are frequently sufficient to show knowing possession of narcotics. Health and Safety Code, § 11500.

C. L. Shinn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Dep. Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was found guilty by the court sitting without a jury of a violation of section 11500, Health and Safety Code (possession of heroin). Her only claim on appeal is that the evidence is insufficient to support the judgment. A police officer testified that on September 15, 1952 he entered the home of appellant with another officer. He found a woman named Anderson lying fully clothed on the bed in one bedroom. In the other bedroom, which he testified the appellant said was hers, he found a bundle of heroin in a wall cabinet under a dresser scarf. He examined appellant's arms and found on them numerous puncture marks of the type made by a hypodermic needle. In his opinion these were of recent origin. He arrested appellant and the other woman and he testified that on the way to the Hall of Justice appellant and her companion suggested that they could lead the officers to a man from whom they could purchase heroin, if the officers would let them go. He further testified that appellant "stated that she had had that from the previous Saturday night, and then she stated that she had been using narcotics since February of 1952 up until the present time of arrest."

Appellant flatly denied this conversation, denied any knowledge of the bundle of heroin, denied that there were any fresh puncture marks on her arms and testified that she had not used any narcotics since February of 1952.

[1, 2] The case presents only the familiar conflict of evidence which is for the trier of fact to resolve. Appellant argues that where two persons have equal access to and occupancy of premises the mere finding of narcotics therein will not support a

conviction of possession. There is ample additional evidence here to sustain the finding that appellant knowingly possessed the heroin found in her bedroom. "To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient." *People v. Foster*, 115 Cal.App.2d 866, 868, 253 P.2d 50, 51.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



STAFFORD

v.

LOS ANGELES COUNTY EMPLOYEES' RETIREMENT BOARD et al. *

Civ. 19780.

District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1953.

Hearing Granted Feb. 3, 1954.

Proceeding by former deputy sheriff against county employees retirement board for pension allegedly due under retirement system. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment of dismissal, and former deputy appealed. The District Court of Appeal, Fox, J., held that former deputy sheriff, who was awarded lump sum as workmen's compensation after his retirement because of amputation of his left leg following gunshot wound received in line of duty, was not entitled to receive retirement payments, even though he had paid into retirement fund all fees, dues, and contributions required by law.

Judgment affirmed.

1. Sheriffs and Constables ⇨32

Under statute providing that, if workmen's compensation is paid in sum equal to or greater than pension payments due, beneficiary shall not receive any retire-

ment payments until total amount of such payments which would otherwise be paid equal such amount received, former deputy sheriff, who had been awarded lump sum as workmen's compensation after his retirement because of amputation of his left leg following gunshot wound received in line of duty, was not entitled to receive retirement payments, even though he had paid into retirement fund all fees, dues, and contributions required by law. Government Code, §§ 31900 et seq., 31908, 32055, 32081.

2. Counties ⇨69(3)

Under County Peace Officers' Retirement Law, term "beneficiary" is not limited to one in possession of the benefit but comprehends one who is named as person to whom a benefit will accrue at a certain time or upon certain contingencies, and especially one who, upon accrual of such time or such contingencies, has become entitled to the benefit. Government Code, §§ 31900 et seq., 32081.

3. Counties ⇨69(3)

Under County Peace Officers' Retirement Law, member of system, who is retired for physical disability resulting from injury in line of duty, is entitled to receive pension equal to one-half of his terminal pay less any sum he receives as an award for such injuries under the Workmen's Compensation Act. Government Code, §§ 31900 et seq.

4. Constitutional Law ⇨110

Where former deputy sheriff, who had been retired by reason of amputation of his left leg following gunshot wound received in line of duty, had been awarded lump sum for his injury, refusal of retirement board to pay him retirement payments under county peace officers' retirement system did not constitute a deprivation of former deputy's benefits of judgment he had obtained under Workmen's Compensation Act in violation of constitutional inhibitions. Government Code, § 31900 et seq.

5. Constitutional Law ⇨102(2)

Pension rights of former deputy sheriff, who had paid into fund created by County Peace Officers' Retirement System all fees, dues, and contributions required

by law but who had been retired because of amputation of his left leg following gunshot wound received in line of duty, were vested, but such rights were only those provided for under County Peace Officers' Retirement Law, and, therefore, refusal of retirement board to make retirement payments did not constitute an unconstitutional impairment of former deputy's vested rights since refusal was authorized by retirement law. Government Code, § 32081.

6. Sheriffs and Constables 32

Deduction from pension of former deputy sheriff, who had been retired by reason of amputation of his left leg following gunshot wound received in line of duty, of amount equal to that he had received as workmen's compensation did not unjustly enrich retirement fund since such deduction was made pursuant to provision of County Peace Officers Retirement Law. Government Code, §§ 31900 et seq., 32081.

Elsan H. Stafford, in pro per.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

FOX, Justice.

In August, 1946, petitioner entered the service of Los Angeles County as a deputy sheriff, and became a member of the County Peace Officers' Retirement System. Thereafter he paid into the fund created by the system all fees, dues and contributions required by law. In January, 1950, petitioner was retired by reason of the amputation of his left leg, caused by a gunshot wound which he received in the line of duty. In May, 1950, the Industrial Accident Commission awarded petitioner \$5,603.53 for his injury. This award was paid in one sum by the State Compensation Fund, which was the insurance carrier of Los Angeles County. At that time petitioner was not receiving a pension under the retirement system. He has since made repeated demands for the payment of a pension, but respondent has refused the same. Thereupon petitioner sought a writ of mandate to compel such payment. A demurrer was sustained, without leave to amend,

to his amended petition. He appeals from the ensuing judgment of dismissal.

In 1931 the state Legislature passed the Peace Officers' Retirement Law, which has since been codified as Government Code, Title 3, Div. 4. Pt. 3, Chap. 4, Section 31900 et seq. This act was duly adopted by Los Angeles County as the basis for its Peace Officers' Retirement System.

Section 32055 of the Government Code provides that "Upon retirement of a member for service connected disability, he shall receive an annual pension, payable in monthly installments, equal to one-half of his terminal salary * * *." However, section 32081 of the same code provides in part that "If any beneficiary receives compensation under any workmen's compensation act * * * the [retirement] benefits shall be modified as follows:

"(a) If the amount is paid in one sum * * * the beneficiary shall not receive any retirement payments until the total amount of the retirement payments which would otherwise be paid equals the total amount received under the workmen's compensation act * * *."

Respondent based its refusal to make retirement payments to petitioner on this latter section. This decision by respondent was correct.

[1-3] Petitioner's first contention is that section 32081 of the Government Code is not here applicable, since he was not receiving retirement payments at the time the award under the workmen's compensation act was made and paid, and hence he was not then a "beneficiary" under the retirement system. He bases this argument on section 31908, Government Code, which defines a "beneficiary" as "* * * any person in receipt of a pension, or other benefit provided by the retirement system." While it is true petitioner was not at that time receiving pension payments, nevertheless he was in receipt of "other benefits" under the system because the right to a future retirement allowance may be considered a benefit. *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 127, 208 P.2d 764. "The term 'beneficiary' is not limited to one in possession of the benefit. It com-

prehends one who is named as the person to whom a benefit will accrue at a certain time or upon certain contingencies, and especially one who, upon the accrual of such time or such contingencies, has become entitled to the benefit." State ex rel. Curran v. Brookes, 144 Ohio St. 582, 60 N.E.2d 62, 67. It is thus clear that petitioner is a beneficiary under section 31908, and therefore section 32081 is here applicable. But, argues petitioner, the latter section is ambiguous and uncertain and is without meaning and legal effect. There is no merit at all in this argument. The language is simple and clear. The section means exactly what it says. As applied to petitioner's situation, the unmistakable meaning of this and the other sections of Chapter 4, when read together, is that a member of the system who is retired for physical disability resulting from injury in the line of duty is entitled to receive a pension equal to one-half of his terminal pay less any sum he receives as an award for such injuries under the workmen's compensation act. Petitioner, nevertheless, argues that the receipt of such an award does not affect his right to receive pension payments. The simple answer to this argument is that the legislative enactment, which is the foundation of his pension benefits, provides to the contrary, as above pointed out. In support of his argument, however, petitioner urges the pertinency of *Larson v. Board of Police and Fire Pension Com'rs*, 71 Cal.App.2d 60, 162 P.2d 33; *Johnson v. Board of Police and Fire Pension Com'rs*, 74 Cal.App.2d 919, 170 P.2d 48, and *Holt v. Board of Police and Fire Pension Com'rs*, 86 Cal.App.2d 714, 196 P.2d 94. Those cases all dealt with a section of the Long Beach city charter which said that the pension provision was intended to be in lieu of and take the place of the workmen's compensation act. That was the converse of the problem that we have in the instant matter; consequently those cases are wholly inapplicable.

[4] Petitioner further argues that he cannot be deprived of the benefits of the judgment he obtained under the workmen's compensation act without violating consti-

tutional inhibitions. The complete answer to this argument is that petitioner has not been deprived of any of the benefits of the workmen's compensation award for he has received full payment thereof.

[5] Petitioner's next proposition is that his pension had become a vested right and could not thereafter be impaired in violation of constitutional inhibitions. He argues that since he has contributed to a common fund from which he is entitled to receive a pension it would amount to an impairment of his contractual rights to allow respondents to withhold his pension just because he received payment of an award against his employer's insurance carrier. Petitioner's pension is a vested right, but only a vested right to the amount provided for in the Peace Officers' Retirement Law. That law provides, in section 32081, *supra*, for the deduction from retirement payments of the amount received under the workmen's compensation act. That is precisely what has taken place in petitioner's case. He has received exactly that for which he bargained. This is made crystal clear by section 32080, Government Code, which reads: "It is the intention of this chapter that pensions allowed for injury incurred in line of duty shall not be cumulative with the benefits under workmen's compensation awarded for the same injury or disability."

[6] Petitioner's final contention is that to permit a deduction from a pension of an amount equal to that received as workmen's compensation unjustly enriches the retirement fund. There is no support for this claim. All pension payments to petitioner and other retired peace officers are paid by the County Employees Retirement System. The County is required to appropriate funds to this system and such appropriations, as well as the contributions of the members, are adjusted by the Board of Supervisors from time to time as circumstances necessitate. The Retirement Board is limited in the use it can make of its funds. It is, of course, not in business, generally. These funds are in the nature of trust funds and can be paid out only in accordance with the laws that authorized the establishment of

the system and govern its operations. The County Employees Retirement System is simply an agency through which pension payments are made in accordance with the law. The fact that it may not be required to make payment on a pension for some particular period does not mean that the system is thereby becoming unjustly enriched to that extent. It rather means that contributions and the appropriations of the County will thus be correspondingly less.

On the other hand, if petitioner receives his pension without any credit thereon for his workmen's compensation award the County would be paying twice for the same injury in that the County pays premiums to the State Compensation Insurance Fund and the rate varies according to the accident experiences of the insured. Such a result is unmistakably contrary to the intention of the Legislature as expressly stated in Section 32080, Government Code.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



122 Cal.App.2d 188

CADWELL et al. v. BOROUGH.

McLAUGHLIN et al. v. BOROUGH et al.
Civ. 19559.

District Court of Appeal, Second District,
Division 2, California.
Dec. 21, 1953.

Actions by guests for injuries caused by negligence of driver in failing to keep automobile on line with reverse curve of road, while proceeding on road forming S curve, and thereby causing automobile to turn over down a steep cliff. Superior Court, Los Angeles County, C. C. McDonald, J., after verdict for defendant, granted plaintiffs' motion for new trial and defendant appealed. The District Court of Appeal, Moore, J., held that trial court's

order granting new trial was within its discretion.

Order affirmed.

McComb, J., dissented.

1. New Trial ⇐68

In actions by guests to recover for injuries caused by driver's negligence in failing to keep automobile on line with reverse curve of road while proceeding at 15 miles per hour on road forming S curve and thereby causing automobile to turn over down a steep cliff, order of trial judge granting new trial to plaintiffs was within his discretion.

2. Appeal and Error ⇐977(1)

Trial court's discretion in ruling on motion for new trial will not be questioned on appeal unless its abuse clearly appears.

3. New Trial ⇐68

When motion for new trial is made, trial court must review evidence, weigh inferences fairly deducible from facts and determine whether verdict was fair and just as to paramount issue in controversy.

4. New Trial ⇐68

When motion for new trial is made, even though evidence is free of conflict, the trial court must draw his own inferences and, from his own appraisal of the facts, determine whether evidence was sufficient to support judgment.

5. New Trial ⇐72

When trial court concludes that jury has found contrary to weight of evidence, it may grant a new trial.

6. Appeal and Error ⇐977(3)

When order of trial court granting new trial can be upheld upon any rational view of the evidence, it will not be disturbed.

7. Appeal and Error ⇐977(3)

Order of trial court granting new trial is conclusive in absence of clear and affirmative showing of gross, manifest or unmistakable abuse of discretion.

Crider, Runkle & Tilson, Los Angeles, by Elber H. Tilson and Garvin F. Shallenberger, Los Angeles, for appellant.

Erb, French & Picone, Beverly Hills, by Samuel B. Picone, Beverly Hills, for respondents.

MOORE, Presiding Justice.

Appeal from an order granting plaintiffs' motion for a new trial in an action for damages allegedly arising out of injuries suffered by defendant's guests who were riding in her automobile. The order was based upon the grounds that the evidence was insufficient to justify the verdict and that it is against law.¹

The accident occurred in Arizona in September 1951. The road on which the motorist and her guests proceeded was winding, up-grade, 15 feet wide, of hard surface, covered with granite or coarse gravel. On the right side the decomposed granite was piled about 9 inches high for some 5 miles prior to reaching the point at which the accident occurred. A mountain stood to the left, and on the right was "an area down below." The vehicle was a 1949 station wagon in good mechanical condition; tires all new, steering gear in order, windshield clean. Neither fog nor rain nor other object obscured the vision. Visibility along the way was good; not a cloud in the sky; not another vehicle on the horizon. They were on the Senator Highway in the vicinity of Prescott. Mr. McLaughlin sat beside defendant who drove; Mesdames Cadwell and Bell and Mr. Roberts occupied the rear seat.

Defendant testified that as she was proceeding at a speed of 15 miles per hour, "staying to the right side of the road * * * the right front wheel went off first * * * hit a soft shoulder of this gravel and the car wheels just went down and I couldn't right the car in time to get it back on the highway * * * the weight of the car took us right over." At the time of the fall into the ravine, the car was in an S curve. She "realized if there was a car coming down, that I needed to be over to the right and evidently stayed too far to the right * * * when my right front wheel got on the gravel portion

* * * my right front wheel went down." Mrs. Bell testified that the automobile turned over twice down a steep cliff.

[1-7] The trial judge's discretion will not be questioned on appeal unless its abuse clearly appears. *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 358, 170 P.2d 465; *Shellihaas v. Petrolane Ltd.*, 98 Cal. App.2d 171, 176, 219 P.2d 797; *Dearing v. Fessler*, 94 Cal.App.2d 260, 262, 210 P.2d 535. When the motion comes before him it is his duty to review the evidence, weigh the inferences fairly deducible from the facts and thereby determine whether the verdict was fair and just as to the paramount issue in the controversy. *Pearl v. Kaline*, 82 Cal.App.2d 910, 912, 188 P.2d 58. Even though the evidence is free of conflict, the trial judge is obliged to draw his own inferences and, from his own appraisal of the facts, determine whether the evidence was sufficient to support the judgment. *Blumenthal v. W. I. Hollingsworth & Co.*, 69 Cal.App.2d 337, 340, 159 P.2d 75. And if he concludes that the jury has found contrary to the weight of the evidence, he may grant a new trial. *Gardner v. Marshall*, 56 Cal.App.2d 62, 66, 132 P.2d 833. If the order granting the new trial can be upheld upon any rational view of the evidence, it will not be disturbed. *In re Estate of Standing's*, 99 Cal. App.2d 668, 674, 222 P.2d 465, 223 P.2d 255. The order is conclusive in the absence of a clear and affirmative showing of gross, manifest or unmistakable abuse of discretion. *Gray v. Robinson*, 33 Cal.App.2d 177, 184, 91 P.2d 194.

There is some uncertainty in the record as to the exact path of the vehicle immediately preceding the accident, but a scrutiny of the testimony indicates that the trial judge could reasonably have inferred that the highway at this point was in the form of an S curve consisting of a swing to the left and then a reverse curve to the right; that defendant had completed the left curve and was in the process of making the right swing; that she negligently failed to steer her car so as to keep it aligned

1. Two actions were filed, but they arose from the same facts, hence were consolidated.

with the reverse curve of the road; that her negligence in this respect was the proximate cause of her car's going off this serpentine highway and the consequent injuries to the plaintiffs.

Who can say that defendant was not negligent? She was attended by four congenial persons, all in close proximity to her and to one another, each requiring some of her attention. She was driving on a mountainous, ascending, winding road with loose gravel on it, a road where a greater amount of care is required of a motorist than is necessary on a straight, level highway. Her caution might have been sufficient to evade perils on a normal country road but insufficient to be reasonably safe on the Senator Highway. If the trial judge thus concluded, how can it be said he was wrong and the jury right?

In the case of *Druzanich v. Criley*, 19 Cal.2d 439, 122 P.2d 53, the facts closely parallel those at bar. The driver was going 50 or 55 miles an hour on a paved highway. Her car was traveling on the outer lane of a left-hand curve. The good lady hit a soft shoulder on the curve, lost control and her vehicle went over the embankment, turning over. There was no positive evidence that anything was on the highway that would have caused her to skid, or that a tire was loose or flat, or that the steering device was not operating properly. "Never-the-less," said the court, "the car left the road with the result above mentioned. Automobiles, when driven with due care and caution do not leave the highway under these circumstances. Respondent Dorothy Criley has failed completely to rebut the inference of negligence raised by the attending circumstances. Such failure necessitates a finding of negligence in accordance with the inference." Id., 19 Cal.2d at page 445, 122 P.2d at page 56.

Order affirmed.

FOX, J., concurs.

McCOMB, Justice.

I dissent. The mere fact that an accident happened, considered alone, does not

support an inference that some party or any party was negligent. (*Miller v. Cranston*, 41 Cal.App.2d 470, 475[3], 106 P.2d 963; *Van Derhoof v. Chambon*, 121 Cal. App. 118, 125, 8 P.2d 925; *Diamond v. Weyerhaeuser*, 178 Cal. 540, 543, 174 P. 38; cf. *Harpke v. Lankershim Estates*, 103 Cal.App.2d 143, 145, 229 P.2d 103; *Seedborg v. Lakewood Gardens, etc., Ass'n*, 105 Cal.App.2d 449, 455, 233 P.2d 943.) The rule is accurately stated in California Jury Instructions Civil, page 155.

In the present case I fail to find any evidence which would sustain a finding that defendant did any specific act or acts in a negligent manner. I would reverse the judgment.



122 Cal.App.2d 211

PEOPLE v. KIMBALL.

Cr. 5010.

District Court of Appeal, Second District,
Division 3, California.

Dec. 21, 1953

Prosecution for rape committed with force and violence. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction of assault with intent to commit rape, a lesser offense than that charged in information but necessarily included therein, and entered order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that defendant struck, beat, and choked prosecutrix with intent to commit rape.

Order affirmed.

I. Indictment and Information **189(10)**

Assault with intent to commit rape is an aggravated form of attempted rape and is included in offense of rape.

2. Indictment and Information $\hookrightarrow$ 189(10)

In absence of any showing in record that defendant had testified that he had completed act of sexual intercourse with prosecutrix at time alleged rape was committed, trial court was not required to find defendant guilty of rape or to find him not guilty of any lesser included offense. Pen. Code, § 1159.

3. Rape $\hookrightarrow$ 51(4)

In rape prosecution, evidence sustained finding that defendant struck, beat, and choked prosecutrix with intent to commit rape. Pen.Code, § 1159.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loeb, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with the crime of rape committed with force and violence. Trial by jury was waived. He was adjudged guilty of "Assault with Intent to Commit Rape, a felony, a lesser offense than that charged in the information but necessarily included therein." He was sentenced to imprisonment in the state prison. He appeals from the order denying his motion for a new trial.

Defendant contends that the court erred in finding him guilty of assault with intent to commit rape.

Vera, the prosecutrix, had known defendant about four months prior to July 13, 1952, the day of the alleged offense. During the first three months they saw each other about every day and he treated her kindly and gave her a few small gifts. They agreed to be married in September. On June 10, 1952, defendant moved to the Cromwell Hotel. Vera was present when he registered at the hotel, and he told the hotel clerk that he was going to marry Vera, and he asked the clerk if Vera might go upstairs. The permission was granted, and Vera went to his hotel room and helped him unpack his suitcase and trunk. She testified that she did not recall whether or

not, thereafter, she went with him on many occasions to his room. About three days after he moved to the hotel, she went alone to his room, got a shirt and jacket, and took them to him. She testified that she did not have a key to his room, but she always told him to tell the clerk that she was coming; and that he told the clerk by telephone that he was sending Vera to his room to get wearing apparel for him. About one month before July 13 while defendant was in her home she refused to go with him, and he picked up a "buggy cart" and slammed it against a window—breaking the glass and the frame of the window. She then told him that she did not want to see him again and that he should pay for the damage to the window.

On said July 13 the defendant, who was working at a parking lot near Seventh and Hill Streets in Los Angeles, requested her to meet him at 2 p. m. at a corner of those streets to make arrangements about fixing the window. She met him there and then they went into a bar and he drank a glass of beer and she drank a "coke." After they left the bar he asked her if \$7 would pay for fixing the window. She replied that she did not know. He said that it was a hot day and he would like to go to his room and change to lighter clothes, and then they would return and have a lunch. They arrived at his room about 4 p. m. She testified that he changed his shirt four or five times, and when she saw that he would not leave any shirt on, she became suspicious and opened the door, intending to leave, but he jumped at her like a beast, grabbed and twisted her arm, and shoved her onto the bed; they started wrestling and fighting; he struck her mouth with his hand, pulled her hair, slapped, beat, bit, and choked her; she fought him until he overpowered her; he forced her to take off her coat and skirt; he yanked her blouse off and took her pants off; he finally forced his privates into her privates; she was bleeding, and the sheet and her slip were bloody; he pulled her off the bed; when she said she wanted a drink of water, he shoved her face into the wash bowl; he told her that he would kill her if she told anything; she had never had sexual intercourse be-

fore; they were in his room about three hours. She testified further that after they left the hotel they walked to and stopped at several bars; he took her in a taxicab to her home; on the way there he stopped and bought a can of beer; they arrived at her home about 8:30 p. m. and defendant dismissed the taxicab; she made no complaint to anyone while in the bars or on the way home, and she was too frightened to leave defendant; he was watching her all the time; she went into her house; he went to the door, but she would not let him in; then he threw the beer can against the outside wall; he remained at her house five or ten minutes; she lent a flashlight to him; she called a taxicab for him; then her brother arrived and she fainted.

Her brother Robert testified that when he arrived the defendant got into a taxicab and left; blood was on her neck, arms, knees, and calves of her legs; she had a swollen nose, swollen cheek, and scratches on her neck and arms. She received medical attention at the receiving hospital.

A police officer testified that he saw Vera on July 13 before she went to the receiving hospital; he could see what appeared to be bruises on both sides of her neck, extending from back of the ear to the front of the throat.

After defendant had testified that he went to Vera's home about 2:00 a. m. of said July 13 and went to bed with her and stayed at her home until 10:30 a. m., she was recalled by plaintiff for further direct examination. She then testified that defendant came to her house about 3:00 a. m. of said day and knocked on the door; she told him to leave, but he came in; she served coffee and tried to reason with him about coming there at that time; she would say that he left about 5:00 a. m. "because he had a habit of leaving when people were getting up."

Defendant testified further that, before he moved to the Cromwell Hotel, he stayed at Vera's house about two months; he moved some of his belongings to her house, such as a television, clock, tool box, and some clothing; during that time he slept with her on her bed many times, and they

tried to have intercourse but she claimed she was too small for him; he brought the groceries and gave her five or ten dollars a week; she helped him move to the hotel on June 10; she went with him to his hotel room many times; she has gone to his room when he was not there; he made arrangements with the hotel clerk so that she could get the key to his room; about every time they were in the room they would lie on the bed, and he would try to have intercourse with her but she always claimed she was too small for him; when he left her house about 10:30 a. m. on July 13, she agreed to meet him at a bar next to the parking lot where he was working; after she met him there he drank a beer and she drank a "coke"; he said he wanted to change his clothes; when they arrived at his room he went down the hall and took a shower; when he returned to the room she took her skirt off and lay on the bed; then he lay on the bed; they "tried to have intercourse and the phone rang"; he answered the telephone three times; he did not push her head into the wash bowl; he did not threaten her or say anything about having a gun; he did not tear any of her clothes; they were in the room about three hours; after leaving the hotel they walked to a bar which was about a block away; he ordered a beer for himself and orange juice with Vodka in it for her; then they walked to another bar; up to that time she had not complained that he had hurt her in any way; after she had tried to telephone to her brother, she complained about feeling ill from the drink; he told her that he would send her home in a taxicab; when he hailed a taxicab she looked sick and told him that she did not feel well; he decided to take her home; he went into her house with her; he told her he would wait for her brother (who was coming to the house) and the brother could take him down town; she said that she did not feel well and wanted to go to bed, that he should go home in a taxicab because it would not look right for him to be there when her brother came; and she also said that her brother might be mad on account of the window.

Five witnesses, called by defendant, testified that Vera's general reputation for

truthfulness and chastity was bad. A witness, called on rebuttal by the People, testified that her reputation for morality and chastity was good.

[1-3] Section 1159 of the Penal Code provides that: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Assault with intent to commit rape is an aggravated form of attempted rape. *People v. Rupp*, 41 Cal.2d 371, 260 P.2d 1. Such an assault is an offense which is included in the offense of rape. *People v. Chavez*, 103 Cal. 407, 408, 37 P. 389 (Under the facts in some cases, however, the court is not required to give an instruction to that effect. See *People v. Cardaropali*, 115 Cal.App.2d 235, 251 P.2d 692.) Appellant argues to the effect that under the facts of this case the judge was required to find the defendant guilty as charged or not guilty of any offense. That argument is based upon appellant's claim that he admitted that he had sexual intercourse with her at the hotel on July 13. Statements in his brief are calculated to imply that he testified that he accomplished such an act at said place and time. He states in his brief that the testimony of appellant, "in its simplest form," was that he did in fact have an act of intercourse with her but the act was not accomplished by force and violence; that "the testimony on both sides conceded the issue of an act of sexual intercourse on July 13, 1952." Those statements are so qualified that they do not amount to statements that appellant testified that he had sexual intercourse with her at the hotel on July 13. One of the statements is that his testimony "in its simplest form" was that he did in fact have an act of intercourse with her. The other statement is that "*the testimony on both sides conceded the issue*" of

an act of sexual intercourse on July 13. Those statements are conclusions of appellant that the effect of his testimony was that such act was accomplished. Appellant does not state in his brief that he testified that he had sexual intercourse with her at the hotel on July 13. The record does not show that he so testified. In addition to the testimony of appellant hereinabove stated, to the effect that they tried to have intercourse at her house and at the hotel, appellant was asked if he had sexual intercourse with her at any time during the period that he lived at the hotel, and he replied: "I wouldn't say we had intercourse. We tried to have it." He was then asked: "Well, describe what you mean by that?" and he replied: "Well, I tried to have an intercourse with her but she would always say it hurt her and so I wouldn't complete the act." It thus appears that the word "tried" was emphasized by appellant in his testimony regarding the alleged act. Under the testimony before the trial judge, wherein appellant stated repeatedly that he tried to accomplish the act (as distinguished from his conclusions on appeal that he testified that he had accomplished the act), it might well be that the judge, in giving appellant the benefit of the doctrine of reasonable doubt, accepted his statements that he tried to accomplish the act, and for that reason did not find him guilty as charged. The judge was not required to find appellant guilty of rape or to find him not guilty of any offense. The evidence was sufficient to support a finding that appellant struck, beat, and choked the prosecutrix with the intent to commit rape. Of course, there could be no basis for a claim that she consented to be so assaulted and battered.

The order denying the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

121 Cal.App.2d 765

In re KING'S ESTATE.**BREWER et al. v. KING.****Civ. 19527.**District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1953.

Rehearing Denied Dec. 30, 1953.

Hearing Denied Feb. 3, 1954.

Proceeding involving account of deceased executor, wherein disinherited wife, individually and as administratrix with will annexed, filed objections to account. The Superior Court, Los Angeles County, Newcomb Condee, J., entered order allowing and settling account, and wife appealed. The District Court of Appeal, McComb, J., held, *inter alia*, that where wife filed petition for family allowance and for probate homestead but more than eight years elapsed from time such petitions were filed, without wife taking any action to have them disposed of, wife had abandoned such petitions and laches had intervened to prevent her from asserting any claims to estate and hence wife would not be person interested in husband's estate by virtue of such claims and would not be entitled to appeal from order striking her objections to account of deceased executor.

Order affirmed.

1. Wills ⚭476

Original will and codicils thereto were to be read together and interpreted as though they were parts of a single instrument. Probate Code, § 101.

2. Executors and Administrators ⚭510(3)

Where second codicil to decedent's will provided that decedent was not making any provision for his wife because he was transferring to his wife certain specified property, wife was not a devisee under decedent's will and was not interested as such in his estate and did not obtain such an interest because decedent left his foster daughter \$1 under will, and hence wife was not entitled to maintain appeal, as an individual, in proceeding involving account of deceased executor. Probate Code, §§ 101, 932.

3. Executors and Administrators

⚭189, 510(3)

Where wife who had been excluded under husband's will filed petition for family allowance and for probate homestead but more than eight years elapsed from time such petitions were filed, without wife taking any action to have them disposed of, wife had abandoned such petitions and laches had intervened to prevent her from asserting any claims to estate and hence wife would not be "person interested" in husband's estate by virtue of such claims and would not be entitled to appeal from order striking her objections to account of decedent executor. Probate Code, § 932.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested".

4. Executors and Administrators ⚭504(2)

Administratrix with will annexed was not entitled to object to account of deceased executor as a "person interested" in estate of decedent within probate code provision that any person interested in estate may appear and file written exceptions to account, where if action had been or were to be prosecuted against deceased executor and his successors, and property actually recovered for estate, same property would be distributed to deceased executor under will of decedent. Probate Code, §§ 581, 927, 932.

5. Appeal and Error ⚭337(2)

A minute order or memorandum decision is not the rendition of the judgment or order for purpose of determining validity of notice of appeal filed before entry of judgment. Code Civ.Proc.1941, § 939.

6. Appeal and Error ⚭436, 454

A premature notice of appeal does not divest a trial court of jurisdiction of the proceeding, and does not vest any jurisdiction in an appellate court, whether or not the lack of jurisdiction is called to the attention of the appellate court. Code Civ. Proc.1941, § 939.

7. Executors and Administrators ⚭459**Wills** ⚭367, 368

Where will contestant in probate proceeding filed notice of appeal prior to filing of judgment nonsuited contestant and or-

der admitting will to probate, such notice was premature, notwithstanding entrance of minute order prior to filing of such notice, jurisdiction remained in probate court and hence notice to creditors published after filing of notice of appeal was valid and the time for filing of creditors' claims having expired, contestant who was administratrix with will annexed could not maintain objections to account of deceased executor on theory that such time had not expired. Code Civ.Proc.1941, § 939; Probate Code, §§ 581, 927, 932.

8. Pleading ⇨362(3)

A court has inherent power by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action and defenses that are sham, frivolous or wholly vexatious.

9. Executors and Administrators ⇨504(2)

Where disinherited wife by one action or proceeding after another kept litigation involving property of decedent pending since death of decedent in 1941 and wife successfully frustrated attempts of executor, who was sole devisee and legatee with exception of bequest of \$1, to realize something from assets of estate and wife consistently clouded title to property of executor and of estate, trial judge in proceeding involving account of deceased executor correctly ruled that wife was not entitled to pursue objections to account and further impose upon time of court. Probate Code, § 932.

10. Appeal and Error ⇨786

The court should not permit the appellate processes to be abused.

11. Costs ⇨260(5)

In proceeding involving account of deceased executor, wherein disinherited wife who by one action or proceeding after another kept litigation involving property of decedent pending since death of decedent in 1941 and whose appeal in present proceeding was obviously frivolous, filed objections, case was proper one for imposition of penalty and sum of \$250 would be assessed against wife and added to costs as penalty for taking of frivolous appeal. Code Civ.Proc. § 957; Probate Code, § 932.

Prudence M. Thrift, Los Angeles, for appellant.

Danielson & St. Clair, Los Angeles, for respondents.

McCOMB, Justice.

Gladys King, individually and as administratrix with the will annexed of the estate of George W. King, appeals from the order allowing and settling the account of a deceased executor, Griffin W. Wilson, which was filed by the respondents herein.

Facts: The present appeal is one step in a long series of litigation that appellant commenced with the death of George W. King in December, 1941. In Re Estate of King, 63 Cal.App.2d 365, 146 P.2d 952, some of the facts concerning the relationship of appellant and decedent are set forth. Appellant and George W. King were married in Reno, Nevada, in September, 1938, after a somewhat quarrelsome trip. At that time decedent was 85 years of age and appellant 34.

By his will executed November 5, 1928, decedent gave all his estate to Griffin Walter Wilson and his wife or to the survivor. A codicil executed August 8, 1934, gave \$1 to Lydia A. King, the testator's foster daughter, and two months after his marriage, on November 28, 1938, decedent executed another codicil republishing his former will and codicil, declaring that he had married Gladys King and that he was making no provision for his wife as he was transferring certain property into her name and his as joint tenants.

The wills and codicils were filed for probate, appellant filed a contest, a nonsuit was granted, and appellant unsuccessfully prosecuted an appeal therefrom. (See Estate of King, supra.)

The wife of Griffin W. Wilson predeceased him and he became entitled to the entire estate of George W. King except for the sum of \$1 bequeathed to Lydia A. King, the foster daughter.

While the appeal of the will contest was pending, appellant, as special administratrix of this estate, filed on June 6, 1942, an action against Griffin W. Wilson and oth-

ers by which she sought to recover for the estate certain described property. When the judgment in the will contest was affirmed on appeal, Griffin W. Wilson was substituted as plaintiff in the action and dismissed it. Gladys King, at about the same time made a motion to be made plaintiff in the action in her individual capacity, which motion was denied. She then filed a petition for a writ of review with the District Court of Appeal, questioning the jurisdiction of the trial court to make the substitution of Griffin W. Wilson. She alleged she had the right to file an action individually to establish her interest in the property in question, and she sought to have the order of the probate court set aside so that the property would be made subject to a *lis pendens*, while a suit was being prepared and filed for her. The District Court of Appeal denied such petition on September 8, 1944. On September 2, 1944, Gladys King filed an action to quiet title and for an accounting against Griffin W. Wilson and others in which she sought to recover for herself, individually, all the property which was included in the action filed by her as special administratrix. No summons was issued at the time the suit was filed. After demurrers to the complaint and to amended complaints were sustained, defendants filed an answer to the third amended complaint on June 7, 1945. No proceedings were taken to have the matter set for trial until two years later in June of 1947, at which time defendants made a motion for dismissal for failure to prosecute. Thereafter Gladys King made repeated attempts to postpone and continue the trial of the action, until finally on September 21, 1948, two days before the scheduled trial she voluntarily dismissed the action when her motion for a continuance was denied.

On June 30, 1945, Gladys King filed another action against Griffin W. Wilson and others to quiet title and for an accounting in which action she again sought to recover individually the same property. No summons was issued and served when the complaint was filed. Approximately three years later, in April, 1948, a demurrer was sustained to the second amended complaint

without leave to amend. In November, 1948, the action of the lower court sustaining such demurrer was affirmed in *King v. Wilson*, 96 Cal.App.2d 212, 215 P.2d 50.

On June 6, 1946, Gladys King filed another action against Griffin W. Wilson as executor of the estate herein, on a rejected, amended claim of \$6,000 for services as nurse, housekeeper and assistant to her husband from date of marriage to the date of death. No summons was issued on the filing of the complaint, and no summons was served until April of 1948. After a demurrer had been sustained to the complaint, the action was voluntarily dismissed by appellant on July 12, 1948.

On August 27, 1947, while the three actions last described were still pending, Gladys King filed another action to quiet title and for an accounting against Griffin W. Wilson and others by which she again sought to recover individually the identical property covered by the former actions. This action proceeded to trial on March 7, 1950, and after several days of trial upon the affirmative defenses set forth in the answer of defendants the court found that the action was barred by the statute of frauds and rendered judgment for defendants. Appellant prosecuted an appeal therefrom which was dismissed by the District Court of Appeal by a decision reported in *King v. Wilson*, 101 Cal.App.2d 242, 225 P.2d 270.

On March 23, 1951, an action was filed by Gladys King, individually and as administratrix with the will annexed of the estate of George W. King, deceased, against the estate of Griffin W. Wilson and others by which in separate counts she sought to recover individually and as administratrix all the property covered by the former actions. After the sustaining of a demurrer without leave to amend as to the action by her as an individual, the cause is now pending by her as administratrix and is awaiting trial.

Lis pendens were filed in the above actions which have resulted in clouding title to such property of Griffin W. Wilson, his estate and the numerous other defendants practically continuously from June, 1942, to date.

After the death of Griffin W. Wilson on June 8, 1950, Gladys King, as the surviving spouse of decedent George W. King, was appointed administratrix with the will annexed of the estate of George W. King.

Joseph E. Brewer and Daniel Carmichael, as executors of the last will and testament of Griffin W. Wilson, filed an accounting of said deceased executor under section 932 of the Probate Code. In said accounting it was alleged, and the file in the proceeding corroborates, that the only assets of the estate of George W. King consisted of a pile of lumber appraised at \$200 and a lot being purchased by decedent on a contract of sale. Griffin W. Wilson, as executor, filed a return of sale of said property but the return of sale was ordered off calendar because Gladys King had clouded title to the property through litigation. Thereafter a petition for an order approving sale of the personal property was filed, but the matter was again placed off calendar upon the objection of appellant Gladys King to the approval of such sale. Thereafter another return of sale of personal property was filed to which Gladys King again objected, stating in writing that she was the owner of the real property, entitled to the exclusive possession thereof as a result of the purchase of the lot, and further stated she had acquired the right to the personal property and would not permit any one to enter on the real property to remove such personal property. Gladys King also filed in this proceeding a notice of forfeiture, stating she had acquired the real property which decedent was purchasing under such contract of sale and she was thereupon declaring a forfeiture of all rights of the estate of George W. King therein. As a result of such actions Griffin W. Wilson, executor of the estate, never came into possession of any property of decedent and consequently on the account-

ing of said deceased executor there was no property for which to account.

Appellant, as administratrix with the will annexed of George W. King and also individually filed objections to the account of the deceased executor, alleging she was an heir under the will of George W. King, that as special administratrix of the estate she had commenced an action in 1942 against Griffin W. Wilson and others seeking to recover certain real property and for an accounting of rents, profits and issues therefrom, and that Griffin W. Wilson, while he was the only acting executor of the estate, caused the action to be dismissed.

Respondents served upon appellant a notice of motion to strike the aforesaid objections. After hearing upon the motion of respondents the probate judge, The Honorable Victor Hansen, made an order striking the objections to the account of the deceased executor. Thereupon Judge Condee approved the account of said deceased executor. Appellant appeals from this order.

Questions: First: Was Gladys King, individually, a person interested in decedent's estate?

[1,2] *No.* Gladys King claims that she is a person interested in decedent's estate, for "she states that she is an heir of the estate." This assertion is a mere allegation of a conclusion of law and is contrary to the facts which appear in the record. Decedent's second codicil¹ expressly provided that decedent was not making any provision for his wife (appellant) because he was transferring to her certain specified property. Therefore she is obviously not a devisee under decedent's will and not interested as such in his estate. She is not entitled to maintain this appeal individually.

[3] There is likewise no merit in appellant's contentions, (1) that she is interested because a foster daughter of dece-

1. Section 101 of the Probate Code provides: "Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have

effect as far as possible." It is therefore apparent that the original will and codicils were to be read together and interpreted as though they were parts of a single instrument. (In re Estate of Cutting, 172 Cal. 191, 195 et seq., 155 P. 1002.)

dent was entitled to receive \$1 under his will, since this fact does not in any way make appellant a party interested in the estate; (2) that she in 1945 filed a petition for a family allowance and for a probate homestead and thus was a person interested in the estate, because more than eight years elapsed from the time such petitions were filed without appellant's taking any action to have them disposed of. Therefore it is clear that she has abandoned such petitions, and that laches has intervened to prevent her from asserting any claims to the estate. She is not therefore a person interested in the estate and as such is not entitled to appeal from the orders of the probate court.

[4] Second: *Was appellant, as administratrix of the estate, a person interested within the meaning of section 927 of the Probate Code² and thus entitled to object to the account of the deceased executor?*

No. Griffin W. Wilson, the deceased executor, was the devisee and legatee of all the property excepting \$1 of the estate of George W. King. Probate Code, section 581, referring to the power of the representative of an estate provides in part:

"* * * After the time to file or present claims has expired he is not entitled to recover the possession of any property of the estate from any heir who has succeeded to the property in his possession, or from any devisee or legatee to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee or legatee entitled thereto."

The foregoing section is applicable to the

facts in the instant case. If any action had been or were to be here prosecuted against Griffin W. Wilson and his successors, and property actually recovered for the estate, then the same property would be distributed to him under the will of decedent. The appellant attempts to avoid the effect of such section by asserting the time to file creditors' claims had not expired because the notice to creditors was published after a notice of appeal was filed, which assertedly divested Griffin W. Wilson as executor of all his powers.

This argument by appellant would be valid only if the notice of appeal were effective, which it was not. The following chronology is important in determining the validity of the notice of appeal:

(1) Minute order of November 19, 1942, granting nonsuit of will contest and admitting will and codicils to probate;

(2) Notice of appeal filed November 25, 1942;

(3) Judgment of nonsuit and order admitting will to probate and appointment of executor without bond signed and filed November 30, 1942;

(4) Letters Testamentary issued to Griffin Walter Wilson December 2, 1942;

(5) Formal entry of judgment December 3, 1942;

(6) Publication of notice to creditors, first publication December 30, 1942.

At the time the above notice of appeal was filed, Code of Civil Procedure, section 939 was the effective statute relating to the time of appeal. Such statute was substantially the same as Rule 2 of Rules on Appeal, which controls appeals at the present time. Section 939, Code of Civil Procedure then provided in part: "An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other

claims not passed upon on the settlement of any former account and not reduced to judgment, may be contested for cause shown. The court may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to them to be paid out of the estate."

2. Section 927, Probate Code, reads:

"Any person interested in the estate may appear and file written exceptions to the account, and contest the same. Upon the hearing, the executor or administrator may be examined on oath touching the account and the property and effects of the decedent, and the disposition thereof. All matters, including allowed

code, or under any other statute, within sixty days from the entry of said judgment or order. No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry."

[5] In the instant case notice of appeal was filed November 25, 1942, which was before the entry of judgment on December 3, 1942. Such notice was premature unless it falls within the saving clause provided in the last sentence above quoted. The question then to be determined is whether the appeal was taken after the rendition of the judgment. The authorities are uniform in holding that a minute order or memorandum decision is not the rendition of the judgment or order.

In *Supple v. Luckenbach*, 12 Cal.2d 319, 84 P.2d 52, the trial judge on January 13, 1938, filed a paper entitled "Memorandum Decision and Order for Findings," in which he stated that the judgment should be for plaintiff and directed plaintiff's counsel to prepare findings and conclusions. Defendant thereafter, but before a valid judgment was signed by the judge, filed a notice of appeal. The motion to dismiss the appeal on the ground that the notice of appeal was filed prematurely was granted. The Supreme Court said, 12 Cal.2d at page 320, 84 P.2d at page 52: "It is well settled in this state that an appeal from a judgment taken prior to the rendition of the judgment is prematurely taken and does not vest the appellate court with jurisdiction to entertain the attempted appeal. *Aspegren & Co., Inc., v. Sherman [Sherwood] Swan & Co.*, 199 Cal. 532, 250 P. 400."

In considering a similar problem our Supreme Court in the case of *In re Estate of Lopus*, 12 Cal.2d 651, 652 et seq., 86 P.2d 818, 819 said: "It appears that on May 25, 1937, the probate judge rendered what is expressly captioned in the record an 'Opinion' which concluded with the words 'Let a formal order be presented.' On June 17, 1937, the appellant filed her notice of appeal. But, it was not until June 24, 1937, that the court signed and filed its findings of fact and judgment. It is immediately apparent that the notice of appeal antedated the judgment by several days.

"Appellant urges that contrary to the early rule, it is now provided by statute that 'No appeal * * * shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry.' Sec. 939, Code Civ. Proc.; sec. 1233, Prob.Code. *However, it is definitely settled that the 'rendition' of a judgment, within the meaning of the quoted language, occurs upon the signing and filing of the findings of fact and conclusions of law.* *Aspegren & Co. v. Sherwood, Swan & Co.*, 199 Cal. 532, 250 P. 400; 2 Cal.Jur. 398, sec. 167. Here, as stated, the findings and judgment were signed and filed several days after the filing of the notice of appeal. There had been no 'rendition' of judgment at the time of the noticing of the appeal." (Italics added.) (See also *In re Estate of Dodds*, 52 Cal.App.2d 287, 289 [2], 126 P.2d 150.)

[6] It is settled that a premature notice of appeal as in the instant case does not divest the trial court of jurisdiction of the proceeding, and does not vest any jurisdiction in an appellate court, whether or not the lack of jurisdiction is called to the attention of the appellate court. The rule is thus well stated in *Brady v. Burke*, 90 Cal. 1, 5; 27 P. 52, 53: "If the attention of this court had been called to the fact that it had before it an appeal from a judgment which had never been entered, and which was still within the control of the lower court, the appeal would have been dismissed. But, whether this was done or not, the appeal was ineffectual, and this court was in fact without jurisdiction to entertain it. The appeal was futile, and the case remained in the lower court undisturbed. *Home for Care of Inebriates v. Kaplan*, 84 Cal. [486] 488, 24 P. 119."

[7] In the instant case the minute order of November 19, 1942, did not constitute the rendition of a judgment or order, and it expressly provided that the attorney for the proponent was to prepare the order. Before the judgment of nonsuit and order admitting the will to probate and appointment of executor without bond was signed or filed the notice of appeal was filed by appellant. Since this notice was premature and

before the rendition of judgment or order it was wholly ineffective for any purpose.

This being true the jurisdiction of the matter remained in the probate court regardless of the fact the District Court of Appeal did hear the matter on appeal. This also being the fact, there was no suspension of the powers of Griffin W. Wilson as executor of the estate. Therefore the notice to creditors first published on December 30, 1942, was valid and the time for filing of creditors' claims has long since expired.

Under these facts section 581 of the Probate Code prevents the action against Griffin W. Wilson or his successors from recovering possession of property to which he was entitled to take as devisee and legatee under the will herein.

Appellate as the successor representative, being unable in the face of section 581 of the Probate Code to maintain any action against the successors of Griffin W. Wilson is not a person interested in the estate within the provisions of Probate Code, section 927. Therefore she was not entitled to object and contest the accounting filed on behalf of the deceased executor.

[8] For the foregoing reasons the probate court was justified in dismissing the objections to the account of the deceased executor for the purpose of preventing further vexatious and harassing action and to prevent misuse and abuse of the court's processes. A court has inherent power by summary means to prevent and abuse of its processes and peremptorily to dispose of causes of action and defenses that are sham, frivolous or wholly vexatious.

The rule is aptly stated in *Pueblo de Taos v. Archuleta*, 10 Cir., 64 F.2d 807, 812 as follows: "It is strongly urged that if a trial court may not dismiss with prejudice an action brought merely for vexation, that the process of the court cannot be protected from abuse; that where the mere pendency of the action seriously impairs property rights, counsel may continue to use the pendency of the action as a weapon of extortion by refiling the case *ad infinitum*. *Houston v. City and County of San Francisco* (C.C.) 47 F. 337. The court is not powerless, for it has wide disciplinary pow-

ers over counsel and litigants who attempt to abuse its process.

"The trial court found that the cause was not filed for the purpose of obtaining a judicial determination of the titles to the real estate described, but for the purpose of inducing Congress to make additional appropriations for the benefit of plaintiff. While the evidence has not been preserved, the record in the other case discloses support for this finding. The predecessor to this case was filed for more than a year, with no effort to get service. The court specifically found that two other similar cases were brought by the same counsel, with no effort to get service. Under the Pueblo Lands Act [25 U.S.C.A. § 331 note], the mere pendency of the case prevents the filing of the field notes, and clouds the title of the settlers. Because of these record facts, and because the evidence before the trial court is not preserved, we accept the conclusion of the trial court that the filing of this action is an abuse of the process of the court.

"A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended—the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319, 47 S.Ct. 361, 71 L.Ed. 658; *Houston v. City and County of San Francisco* (C.C.) 47 F. 337. In *Gumbel v. Pitkin*, 124 U.S. 131, 145, 8 S.Ct. 379, 384, 31 L.Ed. 374, the Supreme Court said: 'As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party.'"

[9] In the instant case appellant by one action or proceeding after another has kept

litigation involving the same identical issue pending since the death of George W. King in December of 1941. She successfully frustrated the attempt of Griffin W. Wilson as executor to realize something from the assets that were in the estate. She has consistently clouded title to the property of Griffin W. Wilson and of his estate as well as other defendants named in the various actions.

Since the affirmance of the appeal on appellant's unsuccessful will contest, she has filed five lawsuits against Griffin W. Wilson and others, four of which were practically identical, in seeking to recover on a trust theory certain described property which was allegedly held for her deceased husband who had, not without cause, disinherited her. The record of such actions clearly evidence the fact that appellant was not proceeding in good faith to secure a judicial determination of her alleged rights. The pattern she followed was typical of the procedure of one using the processes of the court for the purposes of harassment, vexation and delay rather than for a determination of bona fide controversies. Actions were filed without the issuance or service of summons, actions were not set for trial when at issue, actions were voluntarily dismissed and every effort was made to delay and procrastinate. Gladys King objected to and delayed all efforts of the executor to liquidate the limited assets that were actually in the estate until she finally was able to acquire rights to the property and declare a forfeiture of the estate's interest, thereby preventing any recovery for the estate.

Appellant has filed six actions against the same defendants. In addition she has filed numerous objections in the estate proceedings and has intermeddled without right in the estate of Griffin W. Wilson. She has prosecuted four appeals in the appellate court and filed a separate petition for writ of review in all of which she was unsuccessful. Justice may be blindfolded, but it is not stupid and the courts have the pow-

er to prevent abuse of their processes. The probate judge, in ruling on the motion of respondents had before him the files in the numerous actions above mentioned. A study of these could lead to only one conclusion, namely, that the multiplicity of actions filed and maintained by appellant were not for the purpose of adjudication but were filed and maintained for the purpose of vexation and harassment. Even though there is still pending one action by appellant, as administratrix with the will annexed of the estate of George W. King against respondents and others, the trial judge correctly ruled that appellant was not entitled to pursue her objections to the account of the deceased executor, and further impose upon the time of the court and misuse and abuse the processes of the courts for the purpose of continued vexation and harassment.

[10, 11] The appeal in the instant case being obviously frivolous it is a proper case to impose damages as provided in section 957 of the Code of Civil Procedure. The court should not permit the appellate processes to be abused. See *Toohey v. Toohey*, 97 Cal.App.2d 84, 88, 217 P.2d 108, 111, where Mr. Presiding Justice Peters pertinently states the rule applicable to the instant case: "Not only has this frivolous appeal imposed a wholly unnecessary burden on respondent, but, by improperly consuming the time of a busy court, it has adversely affected the rights of other litigants properly before the court. This warrants the imposition of a penalty. *Hendricks v. Pappas*, 82 Cal.App.2d 774, 187 P.2d 436."

The order is affirmed and pursuant to section 957 of the Code of Civil Procedure, the sum of \$250 is assessed against appellant and added to the costs as a penalty for the taking of a frivolous appeal.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

121 Cal.App.2d 825

NEWMAN v. SAN MATEO COUNTY.
Civ. 15564.District Court of Appeal, First District,
Division 1, California.
Dec. 14, 1953.

In action by pedestrian against county for injuries sustained in fall allegedly due to defect in sidewalk. The Superior Court in and for the County of San Mateo, Edward L. Kellas, Assigned Judge, entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held, *inter alia*, that the evidence supported the jury's conclusions that county had constructive notice of existence in pathway of hole four to six inches deep and about the size of, and apparently caused by, a horse's hoof, and that such hole created a dangerous or defective condition imposing upon the county a duty to repair it.

Affirmed.

1. Appeal and Error ⇨110

Order denying motion for new trial was not appealable.

2. Highways ⇨211

In action against county for injuries resulting from fall allegedly due to claimed defective sidewalk, evidence was sufficient to establish that hole in sidewalk caused fall.

3. Negligence ⇨121(5), 136(25)

Plaintiff in negligence case must prove causation, and finding of causation cannot be predicated on mere speculation or conjecture, but such finding may be predicated on inference, if reasonable, and such question is generally one of fact for jury.

4. Evidence ⇨19

It is a matter of common knowledge that it is impossible to maintain sidewalk in perfect condition. Government Code, § 53051.

5. Municipal Corporations ⇨768(1)

A municipality cannot be expected to maintain surface of its sidewalks free from all inequalities and from every possible obstruction to travel, and minor defects due

to continued use, or action of elements, or other cause, will not necessarily make city liable for injuries caused thereby. Government Code, § 53051.

6. Highways ⇨213(2)

Where issue is reasonably debatable whether defect in sidewalk is of nature to be classified as dangerous or defective and sufficient by its continued existence to give notice and to impose duty upon county to repair, or whether it is trivial, is question of fact. Government Code, § 53051.

7. Highways ⇨211

In action by pedestrian against county for injuries sustained in fall allegedly due to defect in sidewalk, evidence supported jury's conclusions that county had constructive notice of existence in sidewalk of hole four to six inches deep and about the size of, and apparently caused by, a horse's hoof, and that such hole created a dangerous or defective condition imposing upon the county a duty to repair it. Government Code, § 53051.

8. Municipal Corporations ⇨791(1), 795

After notice of defect in sidewalk, public agency is under duty to make reasonable inspection and is chargeable with constructive notice of what such an inspection would have disclosed. Government Code, § 53051.

9. Highways ⇨193

After citizen's complaint to county concerning condition of disrepair in whole length of sidewalk, county was under duty to inspect sidewalk and was chargeable with notice of all defects that reasonable inspection would have disclosed, and such complaint had a continuing effect so long as deteriorating condition existed and covered all defects later occurring. Government Code, § 53051.

Millington, Dell'Ergo, Weeks & Morrissey, Wayne R. Millington, Redwood City, for appellant.

Mack, Wilson & Jorgenson, Menlo Park, for respondent.

PETERS, Presiding Justice.

[1] Plaintiff Edna B. Newman brought this action under the Public Liability Act,

Government Code, § 53051, for damages for injuries resulting from falling upon a claimed defective sidewalk under the control of defendant county. The jury brought in a verdict of \$5,000. Defendant appeals from the judgment entered on the verdict, from the order denying its motion for judgment notwithstanding the verdict, and from the order denying its motion for a new trial. The order denying a motion for a new trial is not appealable, and the appeal therefrom must be dismissed.

It was stipulated that the sidewalk in question is under the jurisdiction of appellant. The evidence shows that in San Mateo County the county roads and sidewalks are maintained by the county engineer's office, and that regular crews are employed for this purpose.

The respondent lives on Mills Avenue in Menlo Park, near its intersection with the Alameda de las Pulgas. The accident occurred on the Alameda, a street the respondent traversed at least twice daily on her way to and from work. The Alameda has but one sidewalk, on the east side. This sidewalk had been constructed in 1948 by employees riding in county trucks of "hard top" consisting of rock and tar, and seemed to be a form of asphalt.

Respondent testified that by January of 1950 the sidewalk was badly deteriorated, full of holes and ruts, and that, because it was badly broken, it was uneven and varied from eight inches to two feet in width. During that year, by telephone, she complained of these conditions to the Menlo police, to a private neighborhood policeman, to the Atherton police, and to the sheriff's office of San Mateo. As to this last complaint the respondent testified that she told the sheriff's office of the conditions existing along the whole length of the sidewalk and requested that the sidewalk be made safe. Under date of January 20, 1950 (the accident happened on December 30, 1950), the chief deputy of the sheriff's office wrote to respondent acknowledging receipt of the oral complaint and stating "we have relayed your information to the County Engineer and he called at your home on January 19, 1950 and was unable to contact you." Respondent testi-

fied that she found the engineer's card under her door and that on January 21, 1950, she saw four men looking over the sidewalk. No work was done upon the roadway or sidewalk after this inspection, and conditions continued to get worse.

Respondent also testified that in June or July of 1950 she was walking down the Alameda on her way to work when she observed a deep hole four to six inches deep in the pathway about the size of, and apparently caused by, a horse's hoof. She called this hole to the attention of a woman who lived in a house fronting on the path, and that night she noticed that someone had filled it with loose gravel and sand. It was this hole that respondent claims caused her to fall on December 30, 1950, at about 6:30 p. m.

At that time respondent was walking north along the path in the company of her then eleven-year-old son. It had rained hard during the afternoon, but was not then raining. The night was dark and cloudy. There were no street lights in or near the area of the accident. It was so dark that respondent, while walking, could not see her feet. Respondent was wearing galoshes, was carrying her purse and raincoat in one hand, and a package in the other. Her shoes had medium heels. While walking in the path respondent suddenly fell and suffered the injuries of which complaint is made. When asked what caused her to fall respondent testified: "A hole in the road. I must have stepped in it, I couldn't see it." She also stated that she was so badly injured by the fall that she must have stepped into a hole.

Respondent testified that she stayed on the ground for sometime after she had fallen because she was in great pain and feared that she had broken her arm and shoulder. Her son testified that as he crouched over his mother he saw the hole in question about six inches from her feet. Respondent discovered the hole when she tried to get up, and testified that it was the same hole she had seen during the summer of that year. The rains had washed out the sand and gravel and the hole was filled with mud and water. The son testified that the area immediately adjacent to

the hole was pretty clear and that there were no loose rocks nearby. The hole was the only thing in the general area that could have caused the fall. Three photographs of the hole were introduced which show the hole and other broken spots in the path.

Respondent suffered severe and serious injuries as a result of the fall. No contention is made that the damages awarded are excessive.

Defendant, at the close of plaintiff's case, moved for a nonsuit on the ground of insufficiency of evidence. When this motion was denied, the county refused to produce any evidence at all but instead moved for a directed verdict, which was denied. Thereafter, motions for a judgment notwithstanding the verdict and for a new trial were made and denied. In denying these motions the trial judge filed a memorandum opinion in which he considered all of the contentions now made by appellant, and found them factually and legally unsound.

[2,3] The first contention of appellant is that there is no evidence to establish that the hole in the sidewalk caused the accident. This contention is without merit. There is both direct and circumstantial evidence that the fall was caused by the hole. Respondent testified that it was the hole that caused her to fall, and that she remembered stepping down just before she fell. After she fell her feet were about six inches from the hole, and she and her son excluded other factors that might have caused her to fall. While it is of course the law that the plaintiff must prove causation, and that a finding of causation cannot be predicated on mere speculation or conjecture, *McKellar v. Pendergast*, 68 Cal.App.2d 485, 156 P.2d 950; *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 64 P. 480; *Greene v. Atchison, T. & S. F. Ry. Co.*, 120 Cal. App.2d 135, 260 P.2d 834, it is also the law that such finding may be predicated on an inference, if reasonable, and that the question is generally one of fact for the jury. *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886; *Stanford v. Richmond Chase Co.*, — Cal.App.2d —, 263 P.2d 108; *Sokolow v. City of Hope*, 41 Cal.2d 668, 262 P.2d 841.

It is next contended that there is no evidence that the sidewalk was in a dangerous or defective condition within the meaning of section 53051 of the Government Code, it being claimed that, as a matter of law, the defect, if any, was a minor one that the appellant was under no duty to repair. The section in question reads as follows:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[4,5] Under this section it has been held that an obvious minor defect is not sufficient to give the governmental agency constructive notice of its existence by reason of its continued existence, and does not place upon the agency the duty to repair it. *Nicholson v. City of Los Angeles*, 5 Cal. 2d 361, 54 P.2d 725. The proper rule was stated in *Whiting v. City of National City*, 9 Cal.2d 163, 165, 69 P.2d 990, 991, as follows: "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect." In this case the defect was "plainly visible" and the plaintiff tripped over it in the daytime "without anything to obstruct her vision". The court also emphasized the plaintiff's knowledge of the area and that plaintiff and others had passed over the walk many times without mishap. It is these last two

factors that appellant emphasizes in the instant case. But here the accident happened on a very dark night, the details of the sidewalk could not be seen, and respondent testified that there were so many ruts and broken spots that it was impossible to avoid them at night. Moreover, there was no evidence in the instant case of the absence of other accidents or complaints.

In some cases it can be said, as a matter of law, that the defect is a minor one within the meaning of the rule under discussion, but those cases involve trivial defects. Thus, the Whiting case involved a $\frac{3}{4}$ inch rise between squares of a city pavement, while the Nicholson case involved a break in a square of pavement causing a rise of $1\frac{1}{2}$ inches. See, also, Meyer v. City of San Rafael, 22 Cal.App.2d 46, 70 P.2d 533; Balmer v. City of Beverly Hills, 22 Cal.App.2d 529, 71 P.2d 854; Rodkey v. City of Escondido, 8 Cal.2d 685, 67 P.2d 1053. Most of the pertinent cases are collected and discussed in the recent case of Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977, where a one-half inch ridge in a sidewalk was held, as a matter of law, to be a trivial defect that imposed no duty on the city. The case, while reversing a plaintiff's verdict, contains, 41 Cal.2d on page 73, 256 P.2d on page 980, a helpful listing of cases where the defects have been held not to be minor.

[6] Where the issue is reasonably debatable whether a defect is of the nature to be classified as dangerous or defective and sufficient by its continued existence to give notice and to impose a duty to repair, or whether it is trivial, is a question of fact. Allen v. City of Los Angeles, 43 Cal.App.2d 65, 110 P.2d 75; Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 104 P.2d 399; Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596; Owen v. City of Los Angeles, 82 Cal.App.2d 933, 187 P.2d 860; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Warren v. City of Los Angeles, 91 Cal.App.2d 678, 205 P.2d 719; Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 131 P.2d 874; see, also, Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773.

In most of these cases the defect was smaller than the one here involved and the accident happened under circumstances more favorable to the public agency, yet the question was held to be one of fact. In Balkwill v. City of Stockton, 50 Cal. App.2d 661, 123 P.2d 596, the plaintiff fell at noon on a downtown sidewalk in a hole smaller and not as deep as the one here involved, but the court, holding that the question was one of fact, affirmed a judgment for the plaintiff. After discussing many of the cases here cited the court concluded, 50 Cal.App.2d at page 667, 123 P.2d at page 599: "In spite of the fact that defects in sidewalks may be so slight or trivial as to create mere questions of law regarding their dangerous nature, it is, nevertheless, true that when the evidence is so conflicting that different conclusions may reasonably be drawn regarding the dangerous character of the defects, or concerning the question of notice thereof on the part of the officers of the city, the determination of such questions should be left to the jury and their conclusions should not then be disturbed on appeal."

[7] We are convinced under these authorities as to whether the hole in the instant case created a dangerous or defective condition imposing on the city a duty to repair if it had actual or constructive notice of its existence presented a question of fact, and that the jury's conclusion is amply supported.

The last contention of appellant is that it had neither actual nor constructive notice of the defect as required by section 53051 of the Government Code.

The evidence shows that in January of 1950, eleven months before the accident, the appellant was notified that the sidewalk was in a bad state of disrepair. Of course it did not know of this particular hole, because the evidence shows that such hole was not observed until June or July of 1950. Appellant contends that the January notice could not serve as a blanket notice sufficient to predicate liability for subsequently arising conditions where the particular defect was not a natural and probable consequence of the normal wear or tear but was caused, apparently, by a horse's hoof.

We do not find it necessary to decide whether the appellant had actual notice of the defect because we are of the opinion that under the facts the jury was entitled to find that the defect was of such a nature and had existed long enough to give appellant constructive notice. Appellant urges that as soon as the hole appeared it was filled with sand and gravel by a property owner so that it no longer existed. It also contends that the respondent testified that the hole remained filled with sand and gravel until the very morning of the accident, so that it had no reasonable opportunity to repair it. The testimony of respondent in this respect is quite ambiguous. She replied "yes" to the question if on "the morning you went to work it [the hole] was filled up with gravel but the rain washed it out." The appellant interprets the "morning" in this question as the morning of the accident. From the preceding question asked respondent it is equally reasonable to believe that respondent meant the morning six months before the accident when she first observed the hole, and that sometime after it was filled the sand and gravel were washed out. The appellant assumes that the hole did not exist after it was filled with sand and gravel. Of course such an impermanent filling did not correct the defect. Even if the gravel and sand remained in the hole for some time the jury could find that such a filled hole was easily visible and reasonably discoverable upon inspection.

[8, 9] The law is quite clear that at least after notice the public agency is under a duty to make a reasonable inspection and is chargeable with constructive notice of what such an inspection would have disclosed. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773; *Van Dorn v. City & County of San Francisco*, 103 Cal.App.2d 714, 230 P.2d 393. Clearly, the appellant was put on inquiry by the complaint made in January of 1950. That complaint covered the condition of disrepair in the whole length of the sidewalk. This complaint was directed to the generally deteriorating condition of the entire sidewalk. After receiving the notice the appellant was under a duty to inspect and is

chargeable with notice of all defects that a reasonable inspection would have disclosed. *Bigelow v. City of Ontario*, 37 Cal.App.2d 198, 99 P.2d 298. The respondent's general complaint had a continuing effect as long as the deteriorating condition existed and covered all defects later occurring.

The appeal from the order denying a new trial is dismissed; the appeal from the order denying the judgment notwithstanding the verdict and the appeal from the judgment are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



122 Cal.App.2d 167

In re MORAN'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

v.

WAGNER et al.

Civ. 19844.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1953

Probate proceeding. The Superior Court of Los Angeles County, Newcomb Condee, J., entered decree of distribution, and testatrix' nieces appealed. The District Court of Appeal, White, P. J., held that testatrix' nieces, who did not appear in probate proceedings nor file objections to petition for distribution but asserted their rights by an appeal from decree of distribution, did not waive, forfeit, or lose their right to insist that the charitable bequests be limited to one-third of estate in accordance with statutes imposing such limitations.

Decree reversed and cause remanded with directions.

1. Wills ⚔13(4)

Nieces of testatrix, who made gifts to two charitable institutions in violation of

Probate Code provision limiting such gifts to one-third of estate, were not required, in order to avoid waiver of such statute, to have contested will, or its validity, within the six months' statutory period. Probate Code, §§ 41, 380, 1202.

2. Wills ⇨222

Purpose of a will contest is to determine issues of fact involving due execution of the will, competency of testator, presence or absence of duress, menace, fraud or undue influence, or any other question substantially affecting validity of will. Probate Code, § 371.

3. Wills ⇨13(3)

A testamentary gift to charity, though made within 30 days of testator's death, is valid in absence of objection thereto by aggrieved parties. Probate Code, § 41.

4. Wills ⇨13(4)

Testatrix' nieces, who did not appear in probate proceedings nor file objections to petition for distribution but asserted their rights by an appeal from decree of distribution, did not waive, forfeit, or lose their right to insist that the charitable bequests be limited to one-third of estate in accordance with statutes imposing such limitations. Probate Code, §§ 41, 380, 1202.

Louis Thomsen, Los Angeles, for appellants.

W. R. Hervey, Jr., Los Angeles, for respondent Security-First Nat. Bank of Los Angeles, as executor under will of Henrietta Moran, deceased.

WHITE, Presiding Justice.

More than thirty days but less than six months prior to her death Henrietta Moran executed a holographic will whereby, after a specific bequest of jewelry to Nancy Stromstaedt, she left the "balance" of her estate to the respondents Bensenville Home Society and The Angel Guardian Catholic Orphan Society of Chicago, both charitable institutions in the state of Illinois. Pursuant to directions in the will, respondent Security-First National Bank of Los Angeles was appointed executor. The decedent was survived by two nieces, Lillian Wagner

and Irma Brown, who are the appellants herein. The appellants entered no appearance or demand for notice in the probate proceedings, pursuant to section 1202 of the Probate Code or otherwise. In due course respondent bank, as executor, filed its final account and petition for distribution, praying that the estate be distributed pursuant to the will in equal shares to the two orphanages. Appellants did not appear at the hearing of the account and petition or file objections thereto. The superior court entered its decree distributing the estate to the orphanages, and the present appeal is from that decree.

Section 41 of the Probate Code provides as follows:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any per-

son who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

The decree of distribution, being in contravention of the quoted Probate Code section (in that it distributes the entire residue of the estate to the named charities, rather than limiting the charitable bequests to one-third of the estate), should be reversed as erroneous, unless it can be properly held that the appellant nieces have waived their rights under the section. It is appellants' position that since they have taken a timely appeal from the decree of distribution, they cannot be held to have waived their rights.

[1-3] Respondent executor argues that charitable bequests in violation of section 41 are not void, but voidable only, at the instance of the aggrieved heir; that one attacking a decree of distribution must be diligent in asserting his rights, which may be waived by failure to appear before entry of the decree. It is further urged by the respondent that appellants should have contested the will "or its validity" within the six-months' period prescribed by section 380 of the Probate Code. There is no merit to this last-stated contention. The purpose of a contest is to determine issues of fact involving due execution of the will, competency of the testator, the presence or absence of duress, menace, fraud or undue influence, or "any other question substantially affecting the validity of the will". Probate Code, Sec. 371. As pointed out by respondent itself, the will is "valid" in the absence of objection by the aggrieved parties. In re Estate of Haines, 76 Cal.App.2d 673, 173 P.2d 693. An attempted contest on the ground that the charitable provisions of the will were in contravention of section 41 of the Probate Code could have resulted only in the dismissal of the contest and the admission of the will to probate, with the power remaining in the probate court to decree distribution at the proper time in accordance with applicable law.

The sole question presented is whether persons situated as were the appellant nieces herein can be held to have waived, forfeited or lost their right to insist that the charitable bequests be limited to one-third of the estate by reason of the fact that they entered no appearance in the probate proceedings and filed no objections to the petition for distribution, but asserted their rights by an appeal from the decree of distribution.

It is stated in 154 A.L.R. at page 686: "The protection of a statute limiting the testator's power to make charitable bequests by declaring them to be invalid if made within a specified time prior to the testator's death, or in excess of a specified fraction of his estate where the testator is survived by certain named persons, may also be waived by actions from which the intention of the person to waive the protection of the statute may be inferred. What acts amount to such an implied waiver is, of course, a question of fact."

In urging that the omissions of appellants in the present cause amounted to a waiver, respondent executor emphasizes that the appellants did not request special notice of proceedings in the estate, did not appear on the hearing on the petition for distribution, although they received notice thereof, and did not file a petition for determination of heirship. The appellants learned of the death of the testatrix shortly following her demise, and at about the same time learned of the contents of the will and sought legal advice. On the other hand, it appears from the affidavits of the appellants (filed in support of their motion to vacate the decree of distribution, which motion was denied) that they were advised by their attorneys that it would be too difficult and expensive to institute proceedings to contest the will, and consequently they did nothing until the decree of distribution was entered, whereupon they filed their notice of appeal. The appellants were not residents of California and secured their advice from attorneys in Illinois.

[4] The record presents no basis for a conclusion that the appellants had waived their rights to succeed to two-thirds of the

estate. While they did not request notice or file objections to the final account and petition for distribution, they did file a timely appeal from the decree of distribution which was erroneous under section 41 of the Probate Code. The cases relied upon by respondent executor are not applicable in the present situation, where a timely appeal was taken, but involved situations where an attack was made upon a decree after it had become final. In *Federal Farm Mtg. Co. v. Sandberg*, 35 Cal.2d 1, 215 P.2d 721, the decree of distribution had been final for two years. *McGavin v. San Francisco Protestant Orphan Asylum Soc.*, 34 Cal.App. 168, 167 P. 182, involved an attack upon a decree which had been final for more than a year, and which, although perhaps erroneous, was conclusive, there being no showing of extrinsic fraud or mistake. Similar facts were involved in *Re Estate of Loring*, 29 Cal.2d 423, 175 P. 2d 524, 529, where the court on appeal said: "It is settled, however, that, *once final*, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error." (Emphasis added.)

In *re Estate of Lingg*, 71 Cal.App.2d 403, 162 P.2d 707; In *re Estate of Scrimger*, 188 Cal. 158, 206 P. 65, and *Metzger v. Vestal*, 2 Cal.2d 517, 42 P.2d 67, are merely further illustrations of the rule applicable to judgments generally, that an attack thereon, when the judgment has become final, must meet the settled equitable rules that the attacking party must not be guilty of laches.

Respondents have cited no authority which holds that parties situated as were the appellants herein cannot preserve their rights by a timely appeal from the decree of distribution.

Manifestly, the gifts by will to the charitable institutions are in violation of the express provisions of section 41 of the Probate Code. Pursuant to the code provisions just cited, these gifts must be reduced to one-third of the net distributable estate. Respondent Nancy Stromstaedt, because of the specific bequest in the testamentary document, is entitled to receive the oval pin set with stone resembling cameo, also

numerous small white stones resembling pearls; the white and yellow metal ring set with numerous small white stones resembling diamonds; and the yellow metal ring set with one green stone resembling emerald and white stones resembling diamonds, all appraised at a total value of \$147.

One-third of the balance of the estate, less the foregoing bequest of jewelry, goes to respondent charitable institutions, and the remaining two-thirds goes, pursuant to the laws of succession, equally to appellants, the nieces and sole heirs at law of decedent.

The decree from which this appeal is taken is reversed, and the cause remanded with directions to the court below to decree distribution in accordance with the views herein expressed. Appellants to recover costs on appeal, payable out of the estate.

DORAN AND DRAPEAU, JJ., concur.



121 Cal.App.2d 819

PEOPLE v. TROLINDER.

Cr. 2443.

District Court of Appeal, Third District,
California.

Dec. 11, 1953.

Hearing Denied Jan. 6, 1954.

Defendant was convicted of violating sections 288 and 288a of the Penal Code. The Superior Court, Plumas County, Macmillan, J., entered judgment, and defendant appealed. The District Court of Appeal, Paulsen, J. pro tem., held that Superior Court did not abuse its discretion in permitting seven year old daughter of defendant to testify, that evidence was sufficient to sustain convictions, and that, in view of instructions given, Superior Court did not err in failing to give further cautionary instruction regarding child witnesses.

Judgment affirmed.

1. Witnesses ⚭40(1)

A child of seven may be a competent witness.

2. Criminal Law ⚭1153(2)**Witnesses** ⚭40(2)

Question whether seven year old child is competent to be a witness lies within discretion of trial judge, and his conclusion as to question of child's qualification is final on appeal, unless there is an affirmative showing that trial judge has abused his discretion in the matter.

3. Witnesses ⚭40(1), 45(2)

If child possesses sufficient intelligence, understanding, and ability to receive and fairly accurately recount his impressions, and he has knowledge of nature of an oath, and moral sense to realize that he should tell nothing but the truth, and is likely to be punished for telling falsehoods, he is competent to testify.

4. Witnesses ⚭79(2)

Whether there has been an abuse of discretion by trial judge in permitting a seven year old child to testify is to be determined by an examination of all testimony of the child, especially where the evidence is uncorroborated.

5. Witnesses ⚭78

Record in prosecution of father for violating sections 288 and 288a of the Penal Code established that trial court did not abuse its discretion in permitting seven year old daughter to testify against father. Pen. Code, §§ 288, 288a.

6. Infants ⚭20

Evidence sustained conviction for violations of sections 288 and 288a of the Penal Code. Pen.Code, §§ 288, 288a.

7. Criminal Law ⚭768(1)

In prosecution for violations of 288 and 288a of the Penal Code, court properly instructed that charges such as those made against defendant were such charges as are easily made, and, once made, difficult to disprove even if the one accused is innocent, and that because of the nature of such a case, complaining witness and accused usually are the only witnesses, and that there-

fore the law requires that jury examine testimony of complaining witness with caution. Pen.Code, §§ 288, 288a.

8. Criminal Law ⚭829(16)

Where trial court properly found that seven year old daughter was competent to testify in prosecution of father for violations of sections 288 and 288a of the Penal Code, court did not err in failing to instruct jury that jury should view testimony of daughter with caution because child her age might not be able to perceive the facts or relate them accurately, in view of instructions given. Pen.Code, §§ 288, 288a.

Gordon D. Schaber and Lawrence F. Girolami, Sacramento, for appellant.

Edmund C. Brown, Atty. Gen., by Gail A. Strader, Sacramento, for respondent.

PAULSEN, Justice pro tem.

After trial before a jury, defendant was convicted on two counts of an information charging violations of sections 288a and 288 of the Penal Code. Thereafter he was found not to be a sexual psychopath and an application for probation was denied. He was sentenced for the term prescribed by law on each count, the sentences to run concurrently.

His notice of appeal states that he appeals from the judgments and from an order denying his motion for a new trial. The record discloses that no motion for a new trial was made and the subject has not been referred to in the briefs. The appeal will therefore be considered as one from the judgments only.

As grounds for reversal it is contended that (1) the evidence was insufficient to support the verdicts; (2) it was an abuse of discretion on the part of the trial court to permit the prosecuting witness to testify; and (3) a proper cautionary instruction regarding child witnesses should have been given.

Donna Mae, 7½ year old daughter of defendant, was the victim of both offenses and her testimony concerning the details of the offenses was not directly corroborated.

It is undisputed that Donna Mae, her brother John, aged 9, and her brother Leslie, aged 5, had been living at the Juvenile Hall in Quincy for about a year prior to July 13, 1952; and that on the afternoon of that day defendant took them to the Clark cabins, one of which was occupied by him as a tenant of Mrs. Clark. There was testimony of apparently disinterested witnesses to the effect that defendant and the children first visited Mrs. Clark at her cabin and later, assisted by the children, defendant moved his belongings from cabin number 5 to cabin number 2.

During the afternoon Donna Mae and her brothers played various games about the cabins, defendant participating with the children in the games. After about two hours devoted to such activities, defendant and Leslie went into the cabin.

Donna Mae testified that for a short time after that she picked flowers and then went into the cabin where she found defendant and Leslie lying on the bed; that defendant called her and helped her onto the bed. Leslie was lying on the side next to the wall, defendant in the middle and Donna Mae on the outside. She further testified as follows:

"Q. What happened next, if anything? A. Daddy jerked me over to the other side.

"Q. Daddy jerked you over to the side of him, is that what you just said? A. Yes.

"Q. And what happened next, if anything? A. And I didn't want to go over there.

"Q. You didn't want to go over there? A. No.

"Q. Why not? A. Because.

"Q. You were over here and he jerked you over there, is that right? (Indicating.) A. Yes.

"Q. Did anything else happen? A. Yes.

"Q. What happened, Donna; tell us. A. Daddy jerked my head down towards him and then he made me suck his penis.

"Q. Daddy jerked my head toward him and made me suck his penis, is that what you said? A. Yes.

* * * * *

"Q. Did you try to stop him from pulling your head down? A. Yes.

"Q. You did. How did you try to stop him? A. I stopped like that. (Witness illustrates.)

"Q. Did he try to do anything to you at that time on the bed beside putting his penis in your mouth? A. Yes.

"Q. And will you tell us what that was? A. He bit me.

"Q. Where did he bite you? A. On my penis.

"Q. On your penis. Down where you go to the bathroom, you mean? A. Yes.

"Q. Was it right on the place where you go to the bathroom or the leg or where? A. Right where I go to the bathroom."

Donna Mae complained to her older brother immediately after the acts occurred. Later, while defendant was asleep, the children returned to the Juvenile Hall and she complained to the matron.

When Donna Mae was called as a witness the following occurred:

"Q. What is your name, Donna, your full name? Is it Donna Mae? A. Donna Mae.

"Q. And your last name is Trolinder, isn't it? A. Yes.

"Q. T-r-o-l-i-n-d-e-r? A. Yes.

"Q. Where do you live? A. In the Children's Home.

"Q. In the Children's Home in Quincy? A. Yes.

"Q. And do you have any brothers and sisters? A. I have some brothers.

"Q. What are their names? A. Leslie and Johnny.

"Q. How old is Leslie? A. Five.

"Q. How old is Johnny? A. Nine.

"Q. How old are you? A. Seven.

"Q. And when will you be eight?
A. November 10.

"Q. Do you go to school, Donna?
A. Yes.

"Q. Where do you go to school?
A. Pioneer.

"Q. Pioneer. That is in American Valley, is that right? A. Yes.

"Q. And in what grade are you?
A. First.

"Q. Are you starting the First Grade this year or have you finished the First Grade? A. I finished.

"Q. What grade will you be in next year? A. Second.

"Q. Do you go to Sunday School?
A. Yes.

"Q. How often? A. Every Saturday.

"Q. And at Sunday School are you taught the difference between telling the truth and telling lies? A. Telling the truth.

"Q. You mean you are taught to tell the truth? Are you taught to tell lies? A. No.

"Q. Why? Do you know what happens to people that tell lies? A. (Witness nods head.)

"Q. What happens? A. Get spanked.

"Q. If we ask you some questions here today will you tell us the truth or will you tell us lies? A. Truth.

"Mr. Janes: I'll ask that the witness be sworn, Your Honor.

"Mr. Keane: No objection.

"The Court: Very well. I doubt if she knows what an oath is but—"

The witness was then sworn and the examination proceeded as follows:

"Mr. Janes: Q. Donna, do you realize that you just took an oath to tell the truth? A. Yes.

"Q. Do you know what it means to put your hand up like that and say to tell the truth? A. Yes.

"Q. Does that mean you will tell us only the truth and not tell lies at all?
A. Yes."

She then recited many details of family life—of interest only to the extent that they throw light on the question of her competence—and gave the details of the commission of the crimes already set forth herein.

Defendant's first and second contentions are so closely related that they will be considered together.

[1] He does not question the well-established proposition that a child of seven may be a competent witness but insists that the trial court abused its discretion in permitting her to testify after expressing a doubt of her ability to understand the nature of an oath and that the error in so doing is demonstrated by the unreliable character of her uncorroborated testimony.

[2] In the first instance, the question whether or not a child of that age is competent to be a witness lies within the discretion of the trial judge, and his conclusion as to the question of qualification is final on appeal unless there is an affirmative showing that he has abused his discretion in the matter. *People v. Trippell*, 7 Cal.2d 612, 61 P.2d 929; *People v. Goff*, 100 Cal. App.2d 166, 223 P.2d 27; and *People v. Terry*, 99 Cal.App.2d 579, 222 P.2d 95.

[3] It is said in *People v. Meraviglia*, 73 Cal.App. 402, at page 410, 238 P. 794, at page 797: "The test of the competency of a child to testify in the trial of a case is that they may possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount their impressions, and that they have knowledge of the nature of an oath, and the moral sense to realize they should tell nothing but the truth, and are likely to be punished for telling falsehoods."

[4] It has been held that the *voir dire* examination should be sufficiently broad and extensive to establish these requisites. *People v. Watrous*, 7 Cal.App.2d 7, 45 P.2d 380. But whether or not there has been an abuse of discretion is a question to be determined

by an examination of all the testimony of the child, especially where it is uncorroborated. *People v. Arcia*, 85 Cal.App.2d 127, 192 P.2d 31.

Defendant contends that the testimony of the child shows that she had been coached; that it is therefore unworthy of belief and demonstrates the impropriety of permitting her to testify. He points out the fact that she used the word "penis" when referring to the acts committed by her father and argues that a child of her tender years would not have been familiar with the word and must have been told what to say. He points out further that she remembered the details of the crimes but did not remember that she helped her father move his things from one cabin to the other.

The record discloses that she had discussed the case with the matron and others, but she explained the use of the word by saying she learned it from one of her brothers. Her explanation seems more reasonable in view of the fact that she also used the word in describing her own private parts.

[5,6] Her recollection of the events of the day, generally, appeared to be excellent. She appeared to be truthful and intelligent and her testimony affords no evidence of her having been coached. A careful examination of the record convinces us that the court did not abuse its discretion in permitting Donna Mae to testify and that the evidence is sufficient to support the verdicts.

It is finally contended that the court should have instructed the jury to view the testimony of the prosecuting witness with caution because a child of her age might not be able to "perceive the facts or relate them accurately."

[7] The court of its own motion gave the following instruction:

"Charges such as those made against the defendant in this case are ones, which, generally speaking, are easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore, I charge you that the law requires that you examine the testimony of the prosecuting witness with caution."

Such an instruction should be given in all cases of this kind, and the particular reason mentioned therein should be stated. *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367; *People v. Lucas*, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485.

In *People v. Putnam*, supra [20 Cal.2d 885, 129 P.2d 369], the defendant requested the following instruction: "You are hereby instructed to view with great care and caution the testimony of a child of immature years." The request was refused. In upholding the ruling the Supreme Court said: "There is no general rule that the testimony of children admittedly competent as witnesses is less trustworthy than the testimony of older persons; hence there is ordinarily no occasion for a cautionary instruction on that basis."

[8] In this case the child was competent to testify and the court not only instructed on the rules to be followed in evaluating the testimony of witnesses generally but gave the cautionary instruction already quoted. There was no error in failing to instruct further on that subject.

The judgments are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

122 Cal.App.2d 30

STEVENS et al. v. CURTIS.

Civ. 4716.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1953.

Action to determine whether purchasers were obligated to pay assessments which might be made on water stock and whether loan which was obtained by water corporation, and which would be repaid from stock assessments, was encumbrance on real estate which received water from water corporation, and for damages resulting from allegedly fraudulent representations as to water supply for land. The Superior Court, Orange County, Franklin G. West, J., gave declaratory judgment for vendor upon first cause and entered judgment of nonsuit in damages action, and purchasers appealed. The District Court of Appeal, Barnard, P. J., held that where purchasers held option to purchase, and after making improvements on land, exercised option, even though they knew that water supply was not as vendor had represented it, but announced that they did not waive right arising from misrepresentation, they had cause of action for fraud.

Affirmed in part and reversed in part.

1. Waters and Water Courses ⇨234

Purchasers, who bought water shares as part of contract to purchase land, were charged with knowledge that water corporation might and would levy assessment on shares, either to pay costs of operation and maintenance directly, or to repay money borrowed for such purposes.

2. Waters and Water Courses ⇨234

Where water corporation borrowed money for costs of operation and maintenance, the indebtedness was not a lien on shares of corporation until assessment to pay indebtedness was made. Civ.Code, §§ 330.24, 331.

3. Waters and Water Courses ⇨234

Assessments made on stock in water corporation become a lien on the stock, not on the land of the stockholder. Civ.Code, §§ 330.24, 331.

4. Vendor and Purchaser ⇨134(1)

Where vendor promised to convey land free of encumbrances which were not of record, and to transfer water stock entitling purchaser to water, loan which water corporation obtained, with purchasers' knowledge, and which was disclosed on books of corporation, was not an "encumbrance" within contract.

See publication Words and Phrases, for other judicial constructions and definitions of "Encumbrance".

5. Fraud ⇨35

Where a party, after discovery of fraud, enters into new arrangements or engagements concerning subject-matter of contract, he is deemed to have waived any claim for damages on account of fraud, excepting where he had proceeded so far under the contract that rescission would afford an inadequate remedy.

6. Fraud ⇨35

Where tenants, who had option to purchase, made extensive improvements, and then exercised option even though they knew that water supply was not as vendor had represented it, but announced that they did not waive rights arising from misrepresentations, they had cause of action for damages for fraud.

Rimel & Johnston, Santa Ana, for appellants.

Guthrie, Darling & Shattuck, Donald K. Hall, Hugh W. Darling, Los Angeles, for respondent.

BARNARD, Presiding Justice.

On May 26, 1947, the defendant leased 71 acres of land in the "Pauma Rancho" to the plaintiffs for two years, with an option to buy. The agreement provided for a rental of \$15,000 payable in advance and \$15,000 payable on December 1, 1948, with an option to purchase the property prior to May 31, 1949, by paying an additional \$5,000 and giving a note and trust deed for \$35,000. It was agreed that the plaintiffs should pay all water bills and "all water assessments levied" during the term of the lease; that the plaintiffs should have the

right to vote the defendant's water stock in the Pauma Valley Water Company during said term; and that if the option was exercised the water stock would be transferred to the plaintiffs and the land conveyed by grant deed by which the defendant "warrants that his title shall be subject only to covenants, conditions, restrictions, rights and rights of way of record."

The plaintiffs took immediate possession of the property; paid the \$30,000 rental as agreed; paid the water assessments during the lease period amounting to \$1,853; attended and took part in the meetings of the water company; and spent some \$13,000 in improving the property.

At the time the lease and option was executed the parties secured a preliminary title report, which made no mention of water. Shortly prior to May 31, 1949, the plaintiffs gave notice of their intention to exercise the option. On June 13, 1949, the escrow agent secured another preliminary title report, to which was appended a note stating that by an agreement between the Pauma Valley Water Company and the United States of America dated April 13, 1948, provision was made for a loan of \$8,500 to the water company subject to stock assessments to be levied by the company for repayment of the debt, and that the water company had executed a trust deed in favor of the United States in this amount covering rights of way for irrigation purposes over certain land. The defendant executed a deed conveying the property to the plaintiffs, and the plaintiffs paid a further \$5,000 and executed a trust deed covering the remainder of the purchase price. On July 7, 1949, the escrow holder wrote to the title company authorizing it to record the deed and deed of trust when it could issue its policy of title insurance showing title in plaintiffs, subject only to the matters shown in the preliminary report. On the same day, July 7, 1949, the plaintiffs' attorney wrote to the defendant stating that it had been necessary for them to exercise the option and execute the deed of trust in order to protect their interests because of the extensive improvements made during the lease term, and that they did not waive any rights they might have because of misrepresentations in regard to

water conditions, or a breach of the agreement to transfer the water stock free of encumbrances. Later, the deed and deed of trust were recorded and a policy of title insurance was issued. The water stock was transferred to the plaintiffs on August 1, 1949.

With respect to the government loan, it appears that in the spring of 1947 the water company had applied for such a loan of \$15,000 with which to make certain improvements to its distribution system and in that connection the defendant and other stockholders had waived certain rights in favor of the government until the loan was paid, and had agreed to pay all assessments, duly levied on their stock, for the operation and maintenance of the distribution system and for the repayment of the indebtedness. This agreement and the trust deed in favor of the government were recorded on June 3, 1947. In 1948, in accordance with that agreement, the water company borrowed an additional \$8,500 from the government in order to complete the improvements.

The plaintiffs brought this action on May 25, 1950, for declaratory relief and for damages. In the first cause of action it was alleged that, without the knowledge of the plaintiffs, the defendant and other stockholders of the water company had executed an agreement with the government requiring them to pay assessments levied for the purpose of repaying the sums borrowed from the government; that a controversy exists between the parties with reference to plaintiffs' obligation to pay said assessments; that plaintiffs contend that because the shares of water stock are appurtenant to the land this encumbering of the water company's distribution system constituted a breach by defendant of his covenant against encumbrances; that the defendant contends that he has committed no such breach; and that the plaintiffs desire a declaration of their rights and duties, with a judgment for such amount as may be due. In a second cause of action it was alleged that the defendant represented to the plaintiffs that an ample water supply from the Pauma Valley Water Company was available; that he knew that the supply available through the company's facilities was inadequate, and

that its facilities were in poor condition and would require the expenditure of large amounts in order to provide sufficient water; that the plaintiffs believed and relied on the false statements made by the defendant, and in reliance thereon had spent large sums of money; that before they were able to learn the true facts with reference to the insufficiency of the water supply they had spent such large amounts that they were obliged to and did exercise the option; and that they were damaged in the sum of \$17,000.

At the conclusion of the plaintiffs' case, the defendant moved for a judgment of nonsuit as to each cause of action. The court denied the motion as to the first cause of action, and granted the motion as to the second cause of action on the ground that after learning that the water supply was insufficient the plaintiffs had not rescinded but had gone ahead and spent large sums of money; that they had then entered into a further contract with the defendant by exercising the option; and that they had thereby waived any claim for misrepresentation. The trial then proceeded with respect to the first cause of action. The court made findings in favor of the defendant, finding and concluding that the defendant had not breached any covenant or warranty against encumbrances, and ordering a declaratory judgment declaring that there had been no breach by defendant of any covenant or warranty; that defendant's warranty against encumbrances had not been violated by any water stock assessments arising out of these government loans to the Pauma Valley Water Company; and that it is plaintiffs' duty to pay any such water stock assessments. Judgment was entered accordingly, and the plaintiffs have appealed from that judgment and from the judgment of nonsuit in the second cause of action.

With respect to the first cause of action, the appellants contend that the findings to the effect that the defendant had not breached any covenant or warranty are not supported by the evidence; and that the conclusions of law, to the effect that these water stock assessments did not con-

stitute encumbrances within the meaning of the original contract and the grant deed, are contrary to law and to correct findings. It is argued that under section 1113 of the Civil Code the word "grant" in the deed implied a covenant against encumbrances; that section 1114 provides that the word "encumbrance" includes "taxes, assessments, and all liens upon real property"; that under section 658 the words "real property" include that which is appurtenant to land; that since this water stock was appurtenant to the land it was a part of the real property; that the deed given relates back to the date of the option agreement; and that the obligation to pay the government loans was an encumbrance since the water stock would be subject to sale if the assessments levied for the purpose of repaying those loans were not paid. The appellants admit that it would be unreasonable to contend that assessments on the water stock, to cover the cost of ordinary operation and maintenance of the distribution system, would constitute a breach of a covenant against encumbrances. They argue, however, that since the respondent consented to the various instruments required by the government in making these loans, including an agreement to pay assessments levied for the purpose of repaying the loans, this constituted an encumbrance covered by the warranty; that the fact, as found by the court, that the appellants had prior knowledge of the government loans is immaterial since respondent's warranty required him to pay off that encumbrance; and that there was no waiver or estoppel since respondent was notified on July 7, 1949, that the appellants did not waive any rights which they might have because of a breach of the agreement to transfer the water stock free and clear of encumbrances.

[1-4] The appellants were charged with knowledge that such a water corporation might and would levy assessments upon its shares for the purpose of paying the costs of operating and maintaining its distribution system. *Watson v. Santa Carmelita Mut. Water Co.*, 58 Cal.App.2d 709, 137 P. 2d 757. A normal part of such maintenance includes such things as the laying of pipe-

lines and redrilling of wells, which here appear. No logical distinction can be drawn between such costs when paid for out of cash on hand, or out of money borrowed and which must later be repaid. No cases are cited, and we have found none, which would make any distinction in that regard. Such assessments do not become liens on anything until the assessments are actually made. When made, they become a lien on the water stock itself rather than on the land. Civil Code, §§ 330.24 and 331. Such assessments would not constitute encumbrances in the sense contended for by the appellants. *Jaques v. Tomb*, 179 Cal. 444, 177 P. 280; *In re Mead's Estate*, 133 Misc. 370, 232 N.Y.S. 606; *White v. Immenschuh*, 106 Kan. 333, 187 P. 667. A further consideration is that the respondent's obligation was to convey the property subject to conditions and rights which were of record. The records of the water company disclosed the full situation with respect to these government loans, the appellants knew of these loans and that future assessments would be required to repay them, and they were required to and did pay assessments made for that purpose during the term of the lease. The only reasonable inference is that they expected to continue to do the same thing if they exercised the option, and the circumstances were sufficient to estop them from relying on such an implied warranty as that now asserted. No reversible error appears in connection with the judgment on the first cause of action.

[5, 6] With respect to the second cause of action it is contended that the court erred in granting the nonsuit. The nonsuit was granted on the well-known theory that when a party, after discovery of the fraud, enters into new arrangements or engagements concerning the subject-matter of the contract he is deemed to have waived any claim for damages on account

of the fraud. *Schmidt v. Mesmer*, 116 Cal. 267, 48 P. 54; *Schied v. Bodinson Mfg. Co.*, 79 Cal.App.2d 134, 179 P.2d 380. There is an equally well settled rule, however, that where a party at the time he discovers the true conditions has proceeded so far with his plans and so far obligated himself that rescission would have afforded an inadequate remedy, he may elect to complete the contract without waiving his right to claim damages for the fraud. *Rothstein v. Janss Inv. Corp.*, 45 Cal.App.2d 64, 113 P.2d 465; *Hines v. Brode*, 168 Cal. 507, 143 P. 729; *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 192 P.2d 935; *Schmidt v. Mesmer*, 116 Cal. 267, 48 P. 54. In electing to exercise the option here the appellants were not entering into a new arrangement or engagement concerning the subject-matter of the contract, but they were merely exercising their right under the original contract. Before the escrow was closed they notified the respondent that they would not waive any rights they might have because of any misrepresentations with respect to the water conditions. The evidence received, and the evidence offered and refused, presented questions of fact with respect to the claimed misrepresentations as to the water conditions, and these questions of fact did not become immaterial merely because the appellants had exercised the option given by the original agreement. They had a right to affirm the contract and sue for damages, instead of seeking a rescission. It follows that the motion for a judgment of nonsuit, with respect to the second cause of action, should not have been granted.

The judgment is affirmed with respect to the first cause of action, and reversed with respect to the second cause of action. The appellants to recover their costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

122 Cal.App.2d 312

PEOPLE v. RAVEL.**Cr. 5029.**

District Court of Appeal, Second District,
Division 3, California,
Dec. 28, 1953.

Defendant was convicted of two offenses of grand theft. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and order denying motion for new trial and order denying probation, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to sustain convictions.

Appeal from order denying probation dismissed and judgment and order denying motion for new trial reversed with instructions to dismiss the cause.

Larceny ⇐65

Evidence was insufficient to sustain grand theft convictions. Pen.Code, § 484.

Bernard B. Cohen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Francis Ravel appeals from a judgment convicting him of two offenses of grand theft, and from an order denying motion for new trial. He was denied probation and sentenced to State prison.

The case was tried without a jury on the testimony received at the preliminary examination and additional testimony given by defendant and his witnesses upon the trial. Included also were exhibits consisting of books of purchase orders, a packing slip, receipt books, a note book, shipping bills, purchase receipts, a number of control sheets, as well as invoices, purchase orders and sales orders.

We should say at the outset that the record on appeal is confusing to a degree that we have seldom, if ever, encountered

in a simple case. We have studied it with care and have come to the conclusion that the prosecution was the outgrowth of what was at most a dispute between an employer and an employee over financial matters which the former took to the criminal courts, although the very matters in dispute were the subject of a pending civil action brought by the employee. We are of the opinion that had the facts been truly stated to the authorities, criminal proceedings would not have been instituted prior to the determination of the civil litigation, if at all.

Ravel was employed by a man named Constantine, who was in the business of selling television sets under the business name of Conlan Bros. He was in Constantine's employ for some four months immediately preceding the latter part of February, 1952. He was a salesman of television sets, and he worked strictly on a commission basis, the profits of his sales being divided between himself and Constantine. There appears to have been no regularity in the matter of computation and settlement of Ravel's earnings. It had been the practice, agreed to by Constantine and Ravel, for the latter to purchase for himself articles on Constantine's credit, the amounts of which were deducted from Ravel's earnings from time to time. Upon one occasion Constantine paid out in cash \$100 on a purchase made by Ravel when there were no unpaid commissions due the latter. In the latter part of February Ravel was insisting upon an accounting. The records of the business were in such shape that it was apparently difficult, if not impossible, to determine how much was due him. In the course of a discussion between Ravel and Constantine as to the amount due the former, Constantine gave Ravel a blank check, told him that the joint signatures of Jean Grike, the bookkeeper, and himself were required, instructed him to take the check to Jean Grike at her home, have it filled out and return it, when he, Constantine, would sign it. Ravel took the check and went to the home of Jean Grike, but was unable to find her because Constantine in the meantime had telephoned

and instructed her to conceal herself. Constantine testified that shortly thereafter he discharged Ravel, and Ravel testified that he quit. Ravel then had in his possession eight or nine purchase contracts approved by the bank which was discounting contracts; he offered to give these to Constantine but requested that he be given a receipt for them. Constantine refused to give a receipt and called the police. His purpose was to force Ravel to surrender the contracts without a receipt. Ravel waited for a considerable time, but when the police had not arrived, he left the contracts with Constantine without getting a receipt.

Following the termination of his employment Ravel brought an action for money due from Constantine, and he caused an attachment to be issued. Constantine immediately went to the authorities and swore to a criminal complaint accusing Ravel of four offenses of felony. A complaint was issued charging: (1) Theft of a television set valued at \$559.95; (2) theft of a television set of the value of \$380.00; (3) theft of \$245.00 in money from Ira Lloyd Peers; and (4) forgery of a receipt in writing for \$45.00, with intent to defraud Constantine, Conlan Bros. and Jean Grike.

The complaint did not describe the television sets alleged to have been stolen otherwise than by stating their value. The evidence at the preliminary disclosed that the set referred to in count I was an Admiral set acquired by defendant on the credit of Constantine, and upon which Ravel turned in to Constantine as part payment a Hoffman set which he owned. The set referred to in count II was an RCA set purchased by one Peers for \$245, for which Peers gave Ravel his check in that amount. The sum involved in this transaction was the identical amount that Ravel was accused of having stolen from Peers in count III of the complaint. The forgery alleged in count IV was the claimed alteration of a receipt for \$245 in favor of defendant, signed by Jean Grike on behalf of her employer. This related to the Peers check in that amount.

Eight witnesses testified for the People at the preliminary; defendant did not

testify. The evidence related to all four of the transactions which were the subject of the complaint. At the conclusion of the evidence defendant was bound over on counts II and III, namely, theft of the RCA set that was sold to Peers, and theft of the \$245 in money, represented by Peers' check to defendant. This check was never cashed. Defendant was not bound over on count I, which charged theft of the Admiral set, nor upon the charge of forgery as alleged in count IV.

In due time an information was filed charging in separate counts: I. Theft of the Admiral set, as to which the charge had been dismissed by the magistrate; II. Theft of the RCA set that was sold to Peers; and III. Theft of \$245 from Peers. Defendant was convicted of theft of the Admiral set (count I) and theft of the RCA set (count II) and was acquitted on count III.

The grounds for reversal are: (1) That defendant was improperly tried on count I for the reason that the offense charged in that count of the information was the same as that charged in count I of the complaint, for which defendant had not been held to answer, see *Parks v. Superior Court*, 38 Cal.2d 609, 241 P.2d 521, and (2) there was insufficient evidence to justify a finding of guilt of the theft of the Admiral set, as charged in count I of the information, or of the RCA set as charged in count II. We have concluded that the second ground of appeal is valid as to both counts, and that it is not necessary to consider the first ground. The principal, if not the only question as to the first ground is whether the objection on the ground that count I related to a transaction as to which the magistrate had entered a dismissal was timely made.

With respect to our discussion of the sufficiency of the evidence we may say that our recital of the evidence is but a summary of the pertinent facts which were established without dispute. A more detailed statement of the evidence, as it was given, would tend to obscure rather than illuminate the case in true perspective. The testimony at the preliminary comprises 188 pages. It related to all of the

charged offenses indiscriminately. It covers such matters as Constantine's methods of doing business, the practices of his employees and the business practices of the houses from which he purchased the products which he handled; it developed that Ravel had been constantly ordering television sets for Conlan Bros. with Constantine's approval and as his "purchasing agent"; that it had been a common practice for Ravel to purchase articles for himself and charge them to Constantine with the latter's approval, and to pay for them out of his earnings (a Hoffman TV at a cost of \$286, an O'Keefe & Merritt stove, a Sunbeam toaster, tires for Ravel's automobile, a Reliable water heater and a Motorola car radio). Constantine admitted the existence of the arrangement but did not testify that any limitation had been placed upon defendant's purchases on Constantine's credit, either as to time or amount.

After the preliminary, Constantine was adjudged a bankrupt and Ravel filed a claim for commissions due him. Constantine testified that at the time Ravel was discharged, or resigned, there was no money due him. At the trial it was established that Constantine owed Ravel \$1,000, and a certified copy of the order of the referee approving his claim was in evidence.

There were two vital questions in the case: (1) Whether Ravel had authority from Constantine to purchase a television set and charge it to Constantine; and (2) whether Ravel had money due him, or agreed credit, sufficient to cover the amount of his purchase. Both facts were conclusively established in Ravel's favor.

As to the Admiral set (count I), Constantine himself testified that he had agreed with Ravel that the latter might purchase a television set for himself, charge it to Constantine and turn in as part payment his Hoffman set above mentioned. It was established that the Hoffman set was delivered to an Admiral dealer for credit to Constantine's account, that Constantine knew it came from Ravel, received it, that it went into the hands of his trustee in bankruptcy

and was liquidated as an asset of the estate in bankruptcy. It was proved beyond question that when Ravel made a purchase on the credit of Constantine, either for himself or a customer, the seller promptly notified Constantine in writing, by invoice, and that such notification would go into Constantine's records. There was, in our opinion, no evidence to justify a conviction under count I. When Constantine was informed of Ravel's purchase, instead of charging any balance of the price of the set to Ravel's account he accused Ravel of theft. We do not see how he could have acted in good faith in stating the case to the authorities.

As to count II, it was established by the testimony of Constantine and Peers that Peers examined an RCA set, made an arrangement with Constantine to buy it at a wholesale price, that Constantine was advised by Peers that he had bought the set under an arrangement with Ravel, that it had been delivered to him, and that Peers told Constantine that he had given Ravel a check for the purchase price of \$245. There was no evidence that Constantine objected to the transaction, either to Peers, or to Ravel, or that he ever demanded from Ravel payment for the set. Although Constantine testified that Ravel had no authority to make purchases for him in the ordinary course of business, it was proved beyond question that it had been the general practice of Ravel to make such purchases and that in the case of one of the largest distributors Ravel was the only one in the Constantine organization who issued such orders. It was not denied that Constantine was well aware of this practice. When Ravel purchased the Admiral set for himself Constantine was promptly given written information of the sale and also of the delivery of the set to defendant. When Peers bought his set the seller likewise forwarded to Constantine a record of this sale and of the delivery of the set. There was nothing whatever in evidence to show that Ravel was guilty of any act which could have been successfully concealed from Constantine. This for the reason we have pointed out, that each purchase was charged

to Constantine by the sellers, openly and in a manner that had been customary.

There was uncontradicted testimony by Peers that he gave defendant a check for \$245 in payment for the RCA set. For some undisclosed reason Peers stopped payment on the check and it was never presented for payment. Later Peers gave a check for \$245 to the trustee in bankruptcy in payment for the set, but this check bore the unaccountable notation that it was not to be presented for payment until disposition had been made of the criminal charges pending against Ravel. Apparently some undisclosed person thought it would be better that the court should not know that Peers had paid for the set.

Defendant testified that he gave the first \$245 check to the bookkeeper, Mrs. Grike. He produced a carbon copy of a receipt by Mrs. Grike for \$245 on which was noted the word "cash". Mrs. Grike testified at the preliminary that she did not receive this check. She testified that she had given Ravel a receipt for \$20 in a cash transaction about the time of the \$245 check transaction. It was claimed by the People that if the \$245 receipt had been genuine defendant would have had the original instead of a copy. However, it was developed in the evidence, and commented upon by the court at the trial, that there was no uniformity in this practice; sometimes the original would be given out and at other times it would be kept in the book, and a copy would be given out. The trial court was satisfied that Peers issued the first \$245 check and gave it to defendant, and the court so stated. In discussing the evidence the court found that Ravel did not steal \$245 from Peers, an obviously correct conclusion. It also found that defendant had stolen the RCA set from Constantine (the one that went to Peers), notwithstanding Constantine's knowledge and approval of the sale. If defendant had cashed the check it could have been inferred either that he intended that the amount would be charged against his commissions or that he had some dishonest motive. In summary, this transaction was one in which Peers got the set through defendant with Constan-

tine's knowledge and approval, paid for it in full, and defendant got nothing.

With respect to the receipt for \$245 and the evidence respecting the receipt for \$20 there was much confusion in the evidence. Apparently there were several receipts for \$20. The court stated that four of them had appeared. The testimony of Mrs. Grike at the preliminary left much to be explained. Her records were confused and inadequate. She was not called as a witness at the trial. Many times the court referred to the confusing state of the records and to Constantine's business methods as "slipshod" and "a mess."

If, as the People contended, Ravel took a blank copy of a receipt bearing Jean Grike's carbon signature and altered the same by inserting the amount of \$245 with the intention of using it as he later used it to prove that he had delivered the check or the money to Jean Grike he would have been guilty of forgery as charged in the fourth count of the complaint. Yet the magistrate dismissed the charge of forgery. In view of this fact it would serve no purpose to discuss the probabilities with respect to the genuineness of the receipt or to endeavor to account for the disappearance of the check.

Moreover, with relation to the charge of theft it would seem to be immaterial whether Ravel turned over the check to Mrs. Grike or carried it around in his pocket without cashing it. Defendant did not get the set; Peers got it. If defendant had had any criminal intent to benefit from the transaction he would have cashed the check. If he had none there was no reason whatever for withholding it from Constantine.

We think we have made it sufficiently clear that this controversy belonged exclusively in the civil courts. When it was determined that Constantine owed Ravel \$1,000 that should have ended the matter. We could well understand that when Constantine went to the authorities representing that Ravel had given purchase orders for television sets which he was not authorized to do, had charged them to Constantine without authority, no doubt con-

cealing from the authorities the fact that it had been a practice for Ravel to make purchases to be paid for out of his commissions, and when the further claim was made by Constantine that he owed nothing to Ravel, perhaps concealing the pendency of the civil suit, there might have been reasonable cause to believe that some crime had been committed and that criminal proceedings should be instituted. We can understand, also, the magistrate's action in holding Ravel for trial upon Constantine's undisputed testimony that Ravel had no authority to purchase on Constantine's credit and that no money was due him. Nevertheless, at the time of trial it was established that the controversy arose out of what was essentially a debtor and creditor relationship, the merits of which had been determined in Ravel's favor.

We appreciate the difficulty the trial court had in discovering the facts from the record which we have found so confusing. Unquestionably, it is a case in which the use of the preliminary transcript made it more difficult for the court to decide the factual questions. The court said: "I don't think any of us have any difficulty in concluding that the office arrangements, bookkeeping and other matters pertaining to this rather pretentious business, I would say, were far from being anything systematic. I think we have to find our way out of this morass largely by a consideration of the documentary evidence which has been introduced and by gaps where there is no documentary evidence. The only witnesses in this whole transaction which I personally observed were Mr. Ravel and his wife and the character witnesses, of course, so I have had no opportunity to size them up as we direct the jury to do as to their appearance and other characteristics, so I imagine that it may be possible in some respects they stretched the truth somewhat and perhaps lied deliberately, or perhaps are telling the truth in some respects and not in others, but we have certain documents which were made during these transactions which have been given considerable consideration." If the court had reference to the records kept by Constantine we must

say that they do not go to the merits of the case nor enlighten us thereon. It is true that when Ravel ordered the Admiral set he instructed the seller to add it to another order for an Admiral sold to one Ross, and that he neglected to enter it upon the copy which was retained in Constantine's office files. But the information would necessarily have come to Constantine from the seller in the regular course of business. Moreover, we repeat that Ravel admittedly had express authority from Constantine to buy a set for himself. Under these circumstances defendant's neglect to promptly add his own set to the office copy of the order for the Ross set does not suggest any element of criminal intent, or even of deceit. The court commented upon the "hit and miss fashion of doing things" when speaking of Constantine's methods, and again stated to counsel: "Didn't I tell you that I thought that whole system was a mess." In the argument on the motion for new trial the court inadvertently confused defendant's purchase of the Admiral set for himself and his delivery of the \$245 check in connection with Peers' purchase of the RCA set, stating that his testimony was "entirely inconsistent with his claim that he kept it for himself, in fact, he claims here that he paid for it." As we have seen, the set which defendant kept was the one upon which he had traded in his Hoffman set to Constantine, which was the subject of the accusation in count I of the complaint, which had been dismissed.

The critical question in both transactions was whether defendant acted with an intent to deprive Constantine of his property. It appears to us that the learned trial judge overlooked the established fact that there was due to defendant \$1,000. In summing up the evidence, the court said of the defendant: "He is claiming that Conlan Brothers are very much indebted to him for the services rendered and commissions earned" etc. However, as we have stated, Constantine's testimony that he owed Ravel nothing was proven to be utterly false, and this fact established beyond question that Constantine was fully protected against any possible loss in either transaction.

Since Ravel could not have avoided paying for the sets, where can be found a criminal intent?

We cannot disassociate defendant's conviction under count II with his conviction under count I. The court found defendant guilty of theft of the Admiral set which implies, of course, that he had a felonious intent in that transaction. Whether because of the confusing state of the evidence, or for some reason that is not clear to us, the trial court must have overlooked the evidence of Constantine with respect to count I, which established beyond question that Ravel had authority to do exactly what he did. The court came to the erroneous conclusion that Ravel had stolen the Admiral set and, so far as concerns the defendant's intent, if that were true it would have aroused suspicion that he also intended to steal the set which went to Peers, or the money. And yet it would have been an unfounded suspicion since it appeared without dispute that Constantine lost nothing and defendant gained nothing in the Peers transaction.

There is but one other matter to which we will refer. In the probation hearing it appeared that defendant had insisted he was innocent and that an appeal would be taken. Defendant's attorney made the statement in court that the probation officer, a deputy no doubt, had advised him that where an appeal is to be taken probation is not recommended. The court stated that it did not know of that policy, and then made the following statement which, we confess, we do not understand: "Of course, there is this basic thought in connection with probation, probation is a rehabilitation measure. When a defendant denies his guilt which he has certainly a right to do and which he should do if he is conscientious in the matter, there is no element of rehabilitation involved, nothing to rehabilitate him from. Of course, with a lot of these wishy-washy fellows around here, we do not draw the line too finely in that regard, but Mr. Ravel is not an unintelligent man." It is true that the court proceeded to state that a persistent denial of guilt should not militate against the convicted accused, yet probation was nevertheless denied and defendant, of

good repute and, so far as shown, with a clean record, was sentenced to State prison. Having in mind that in order to establish guilt it was necessary to prove that defendant did "feloniously steal [and] take" the television sets, Pen.Code, § 484, we find that he was convicted of crimes he did not commit.

The purported appeal from the order denying probation is dismissed. The judgment and order denying motion for new trial are reversed with instructions to dismiss the cause.

PARKER WOOD and VALLÉE, JJ.,
concur.



122 Cal.App.2d 237

LOS ANGELES PIE BAKERS ASS'N et al.
v.
BAKERY DRIVERS LOCAL NO. 276 et al.
Civ. 19745.

District Court of Appeal, Second District,
Division 2, California.
Dec. 22, 1953.

Action by plaintiff, an incorporated employers association, and certain of its members who produced bakery products, for damages and injunctive relief against union seeking to negotiate a contract on behalf of owner-drivers of trucks for delivery of bakery products of plaintiff companies. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered judgment from which plaintiffs appealed. The District Court of Appeal, Fox, J., held that when the owner-drivers were members of the union, contract by which union sought to fix their remuneration at designated percentage discount from retail sales price which the respective companies established for their products which the drivers delivered on routes owned by them, was within the area of a lawful labor objective, and did not amount to an attempt to make an un-

lawful price fixing agreement or agreement in restraint of trade.

Judgment affirmed.

1. Labor Relations ⚡98

A union may take into membership businessmen-workers who operate in an industry, field or trade in competition with organized workmen, and the conventional employer-employee relationship need not exist.

2. Labor Relations ⚡98

Owner-drivers of trucks for delivery of bakery products purchased at wholesale and resold by them to customers on their routes, retaining the difference between the purchase and resale prices, were substantially in competition with drivers employed by bakery companies to drive their trucks on delivery routes, and the owner-drivers could properly be taken into membership and be represented by the same union as company employed drivers. Business and Professions Code, § 16703, 16720.

3. Monopolies ⚡12(8)

The organization of individual workman, or independent non-employee workers for purposes of collective bargaining, is not a violation of the anti-trust laws. Business and Professions Code, § 16703; Labor Code, § 923.

4. Labor Relations ⚡249

Monopolies ⚡12(8)

Union's proposed contract with employers' association, having certain members who were producers of bakery goods, for purpose of fixing remuneration of owner-drivers of trucks for delivery of bakery products over trade routes owned by the drivers, at a percentage discount from retail sales prices which the respective companies established for their products, was within the area of lawful labor objective and it was not violative of statute prohibiting price fixing agreements and unlawful restraints of trade. Business and Professions Code, § 16720.

5. Labor Relations ⚡287

Union representing owner-drivers of trucks delivering bakery products of companies which were members of an em-

ployers' association, was not chargeable with a wrongful inducing of breach of contracts between certain of such companies and their owner-drivers by attempting to negotiate a contract relative to remuneration of such owner-drivers, in view of fact that proposed agreement was within the sphere of a legitimate labor objective, lawfully and peacefully pursued. Business and Professions Code, § 16720.

6. Labor Relations ⚡287

Where the inducement to the breach of a contract is ancillary to the exercise of peaceful and otherwise lawful methods directed to the purpose of attaining a legitimate labor objective, such conduct is justified and no liability attaches as between the parties to the labor controversy. Business and Professions Code § 16720.

7. Appeal and Error ⚡100(1), 870(4)

Order denying an injunction, when by minute entry prior to judgment, was not appealable, but the right to such relief was reviewable on the appeal from the judgment.

Severance & Rice, Gordon B. Severance, Los Angeles, for appellants.

Stevenson & Richman, Los Angeles, for respondents.

FOX, Justice.

A demurrer to the complaint was sustained without leave to amend. Plaintiffs appeal from the ensuing judgment.

The plaintiffs are a voluntary, unincorporated employers' association, and certain of its members, who are engaged in the production, sale and distribution of pies (and other bakery products) in Los Angeles and vicinity. They employ drivers who use company equipment to distribute their products. They also use the services of independent drivers who have their own equipment. These owner-drivers buy pies at wholesale from plaintiffs, take title to the same, and resell them to restaurants, hotels and other establishments. They are not required to sell at any fixed or established price. They retain the dif-

ference between the purchase and resale prices. These owner-drivers serve trade routes which belong to them and which they have the right to sell. The manufacturers exercise no direction or control over the means by which the pies are delivered, looking merely, as plaintiffs assert, "to the end result—efficient distribution of pies to the restaurant and hotel trade."

Both groups of drivers belong to defendant union, the owner-driver group apparently having joined in 1952. The union has been the collective bargaining agent for the employee-drivers for a number of years and has entered into collective bargaining agreements on their behalf with most of the plaintiff bakeries. The union also sought to negotiate a contract on behalf of the owner-drivers by which the remuneration for their services would be based on a designated percentage discount from the retail sales prices which the respective companies established for their products. Upon the refusal of the bakeries to enter into such an agreement the union threatened to apply economic pressure.

Plaintiffs base their complaint for damages and injunctive relief on Business and Professions Code, § 16720, generally referred to as the Cartwright Act. They insist that the proposed contract in behalf of the owner-drivers is a price fixing agreement which constitutes an unlawful restraint of trade. The defendant, on the other hand, contends that the proposed agreement does not violate the Cartwright Act since it relates essentially to the compensation to be paid the owner-drivers for their services in distributing plaintiffs' products and is therefore not within the purview of the act. The position of the defendant is well founded, consequently the judgment must be affirmed.

[1] A union may take into membership "businessmen-workers" who operate in an industry, field or trade in competition with organized workmen. *Bautista v. Jones*, 25 Cal.2d 746, 749, 155 P.2d 343; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58; *Riviello v. Journeymen Barbers etc. Union*, 88 Cal.App.2d

499, 504-506, 199 P.2d 400. From these cases it is clear that the conventional employer-employee relationship need not exist in order that the worker have union membership and representation.

[2] The nature of the work performed by the owner-drivers is substantially the same as that done by the employee-drivers. Neither maintains any stock, office or place of business. In effect, the job of each group is primarily to deliver pies from the bakeries to the hotels, restaurants and other customers. The driver-employee is paid a wage which is fixed in the collective bargaining agreement for the personal services which he renders. In making a like delivery, the owner-driver not only furnishes his personal services but also his delivery truck. For his services and that of his equipment it is proposed by the union that he receive compensation based on a designated discount from the producers' suggested retail sales price. This, in essence, is the equivalent of wages for over-all services in delivering the pies from plaintiffs' plants to the customers. It is true that the owner-driver possesses many of the characteristics of an independent contractor as distinguished from an employee. The legal capacity in which they perform their work is admittedly different from that of the company-employed drivers. Their economic function, however, is fundamentally the same, for their work too consists chiefly in sales and distribution. They are working in the same field in which the driver-employees work. There can be no doubt that they are in competition with the driver-employees. The ill effects of such competition is described by Mr. Justice Jackson in *Bakery & Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178. The competition here between the owner-drivers and the employee-drivers is as clear and direct as it was in the *Bautista* case between the milk peddlers and the employee milk deliverymen, or as it was in the *Riviello* case between the working barbershop proprietor and the employee barbers, or as it was in the *Angelos* case between the working cafe-

teria owners and the members of the culinary workers' union.

Substantially this identical situation arose in a New York case. There, also, the right of the union to represent the bakery owner-drivers in a collective bargaining agreement was challenged. There, as here, the compensation of those drivers was determined by a percentage discount from the sales price. It was held that the union could properly represent the owner-drivers and that the contract was valid since it was a lawful labor objective having some reasonable connection with wages, working conditions and the right of collective bargaining. Also, it was there held that the contract was not invalid as being in restraint of trade since the plaintiff was a bona fide labor organization and negotiating such an agreement was a legitimate labor activity which was exempt from the New York anti-trust statute just as such agreements are excluded from the provisions of the Cartwright Act in this state by the Business and Professions Code, § 1703. *Bernstein v. Madison Baking Co.*, 186 Misc. 474, 38 N.Y. S.2d 811, affirmed in 266 App.Div. 839, 43 N.Y.S.2d 517. The same principles were adhered to in *Reiner v. Sullivan*, Sup., 33 N. Y.S.2d 77, in a dispute between a union and bakery owners respecting the distribution of their products through "itinerant jobbers." Incidentally, in the *Bernstein* case the court points out that the agreement did not fix the prices at which pies would be sold. The same is true in the instant matter. The proposed agreement does, however, contain a formula by which to calculate the compensation of the owner-drivers for their services.

Substantially the same problem also arose in New York in a criminal proceeding with respect to the laundry business. Formerly the laundry companies had their bundles picked up from, and delivered back to, their customers by employee-drivers. Later some of the companies changed the status of these drivers. Under the new plan the drivers owned their laundry trucks, thereby ceasing to be employees. As owner-drivers these laundrymen picked up and marked the bundles, transported them between the cus-

tomers and the laundries and collected the charges. The laundrymen received as their compensation the difference between the amount charged by the laundry and the amount paid by the customer. These owner-drivers were organized into a union. An indictment was returned on the theory that the organization was a combination in violation of the anti-trust law since the members were independently engaged in business on their own account, and not as employees. In affirming an order dismissing the indictment the court held that these laundrymen, although not employees, were nevertheless "workingmen" and their organization was excluded from the operation of the anti-trust law. *People v. Gassman*, 295 N.Y. 254, 66 N.E.2d 705, 707, 166 A.L.R. 154. The court pointed out that the physical activities and economic function of these owner-drivers was the same as when they were employee-drivers. "True," said the court, "they have some of the marks or qualities of independent contractors, such as a measure of independence and some small investment of capital. But in common speech and common sense, they are still 'workingmen' just as are window cleaners or furnacemen who go from house to house and are not employees of any one." In the instant matter the physical activity and economic function of the owner-drivers is essentially the same as that of the employee-drivers.

[3] In this connection it should be pointed out that just as "workingmen" are permitted to organize in New York without infringing the anti-trust laws of that state, it is the legislatively declared public policy of this state that the individual "workman" shall have full freedom of organization for purposes of collective bargaining, Labor Code, § 923, and that such organization does not violate the Cartwright Act. Business and Professions Code, § 16703. The owner-drivers for the bakeries are just as truly workmen as were the owner-drivers for the laundries in the *Gassman* case, despite the fact that in a technical sense they may be styled independent contractors. That such independent nonemployee workers are entitled to

the benefits and protection of labor laws under appropriate circumstances is reflected in such cases as *Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63; *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170; *Bakery & Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178.

Plaintiffs rely principally on *Kold Kist, Inc. v. Amalgamated Meat Cutters*, 99 Cal. App.2d 191, 221 P.2d 724; *Columbia River Packers Ass'n Inc. v. Hinton*, 315 U.S. 143, 62 S.Ct. 520, 86 L.Ed. 750; *Hawaiian Tuna Packers v. International Longshoremen's and Warehousemen's Union, D.C.*, 72 F. Supp. 562; *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 65 S.Ct. 1533, 89 L. Ed. 1939; *Cleaners, Dyers Pressers Local Union No. 228, New Orleans Amalgamated Clothing Workers of America v. G. H. W. Cleaners & Dyers*, 200 La. 83, 7 So.2d 623, and *Truck Drivers' Local No. 421, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. United States*, 8 Cir., 128 F.2d 227. None of these cases are here applicable. In the *Kold Kist* case the primary purpose of the agreement was to interfere with the trade in, and to prevent the sale of, frozen meats and it had that direct effect. Consequently the agreement was in violation of the Cartwright Act. The inapplicability of the *Columbia River Packers* case is demonstrated by its characterization in a footnote in the *Allen Bradley* case as a "dispute between groups of businessmen revolving solely around the price at which one group would sell commodities to another group." [325 U.S. 797, 65 S.Ct. 1539.] The *Hawaiian Tuna Packers* case was also simply a dispute about the price of a commodity, viz., fish, and not terms or conditions of employment. The court pointed out that "the facts do not reveal that the crewmen are negotiating the subject of wages or percentage shares of the proceeds with the boatowners * * *." [72 F.Supp. 566.] Incidentally, the reference to "percentage shares of the proceeds" as a means

of compensating the crewmen is significant, since the owner-drivers in the instant matter are to be compensated on a percentage basis.

The *Allen Bradley* case presents no analogy on its facts to the instant situation. In that case the defendant union embarked on a campaign to secure a closed shop in New York City. To further this objective, they leagued themselves in a tripartite agreement with manufacturers of electrical equipment and contractors installing such equipment. Under this agreement, the manufacturers established a closed shop and agreed to restrict their sales of electrical equipment solely to contractors who also had a closed shop agreement with defendant union. The contractors, in turn, committed themselves to purchase electrical equipment only from those manufacturers who had signed up with the union. The union promised not to allow its members to work for manufacturers of electrical equipment destined for sale in New York to a contractor not covered by its closed shop contract nor would its members install such equipment unless it had been produced by a manufacturer whose employees were organized by defendant union. Competition was effectively curtailed, and the agreements were enlarged to include price and market control. So successful was this combination that manufacturers in the New York area were selling their equipment for a higher price locally than for identical equipment sold outside the city. The court held that by its concerted activity in combination with non-labor groups, the union had become involved in a conspiracy to restrain trade in interstate commerce, thus losing its immunity under the Clayton and Norris-LaGuardia Acts. In the instant case, the union is acting only with others similarly situated to achieve legitimate and recognized labor objectives relative to working conditions and wages. See *Hunt v. Crumboch*, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954.

The *Louisiana Cleaners, Dyers & Pressers* case is inapplicable here because the agreement there contained a covenant fixing the retail prices to be charged by the members of the association for cleaning

and pressing services. Here there is no attempt to prescribe, designate or maintain the price at which the bakeries or the owner-drivers will sell the pies to their customers. The prices are free to rise or fall in response to the fluctuations of the market. The bakeries are free to sell at whatever price conditions seem to them to warrant. Only the percentage of discount from the price which the bakeries decide upon for their products, is sought to be fixed as compensation to the owner-drivers for their services. The Truck Drivers' Local case involved a conspiracy wherein a union and an employers' association sought to maintain a pre-existing, fixed price for milk sold in interstate commerce. The practical effect and principal purpose of the agreement was to prevent the sale of milk at a price lower than the then established rate. This, of course, was illegal under the Sherman Act, 15 U.S.C.A. § 1 et seq. The instant situation, however, obviously does not present a comparable analogy.

[4] In view of the expressed legislative policy of the state and the decisions of both the state and United States Supreme Courts, we are impelled to hold that the proposed agreement in the instant case is within the area of a lawful labor objective since it has some reasonable relation to working conditions and the right and purposes of collective bargaining. It is therefore excluded from the purview of the Cartwright Act.

[5, 6] Plaintiffs also ask relief on the theory that defendant seeks to induce breach of existing contracts between certain of the plaintiffs and some of their owner-drivers. However, it is recognized that in a proper case, interference with the contractual right of others may be justified and therefore privileged. *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 35, 112 P.2d 631; Rest.Torts, sec. 767. Since plaintiffs' complaint discloses that the proposed agreement falls within the sphere of a legitimate labor objective, lawfully and peacefully pursued, their position cannot be sustained. Where the inducement to the breach of a contract is ancillary to the exercise of peaceful and otherwise lawful methods directed to the

purpose of attaining a legitimate labor objective, such conduct is justified and no liability attaches as between the parties to the labor controversy. *Imperial Ice Co. v. Rossier*, supra, and cases cited; *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762; *Metropolitan Life Ins. Co. v. Durkin*, 276 App. Div. 394, 94 N.Y.S.2d 865, 870-871; 30 Cal. Law Rev. 181, 185-88. See, also, *Emde v. San Joaquin County Central Labor Council*, 23 Cal.2d 146, 155, 143 P.2d 20, 150 A.L.R. 916.

[7] Plaintiffs have attempted to appeal from the order denying an injunction. That order was by minute entry prior to judgment. It is therefore not appealable. The right to such relief, however, is reviewable on the appeal from the judgment.

The purported appeal from the order is dismissed. The judgment is affirmed.

MOORE, P. J., and McCOMB and FOX, JJ., concur.



122 Cal.App.2d 253

GAGNON et al. v. ADAMSON et al.

Civ. 19512.

District Court of Appeal, Second District,
Division 1, California.

Dec. 23, 1953.

Rehearing Denied Jan. 11, 1954.

Hearing Denied Feb. 17, 1954.

Action by landowners, whose respective tracts of land lay along a horseshoe shaped road which, at its beginning and end, joined public highway, against owner of property lying at closed end of the horseshoe, in which plaintiffs claimed right of way over that portion of the road which crossed defendant's land. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Drapeau, J., held

that evidence sustained finding that plaintiffs were entitled to an implied easement for right of way over defendant's property.

Judgment affirmed.

1. Easements ⇨36(3)

In action by landowners, whose respective tracts of land lay along a horse-shoe shaped road which, at beginning and end, joined public highway, against property owner whose land lay at closed end of horseshoe, in which plaintiffs claimed a right of way over that portion of the road which crossed defendant's land, evidence sustained findings that plaintiffs had an implied easement for right of way across defendant's land.

2. Easements ⇨15

The purpose of the doctrine of implied easement is to give effect to actual intent of parties as shown by all facts and circumstances.

3. Easements ⇨15

Although prior use made of property is one of the circumstances to be considered, easements of access may be implied in situations in which there was no prior use.

4. Appeal and Error ⇨1071(1)

A judgment will not be reversed because findings are contrary to evidence if different findings will still require judgment adverse to appellant.

5. Evidence ⇨269(3)

In action by landowners, whose respective tracts of land lay along a horse-shoe shaped road which, at its beginning and end, joined public highway, against owner of property lying at closed end of horseshoe, in which plaintiffs claimed right of way over that portion of the road which crossed defendant's land, intent of the parties was an issue, and hence declarations made by agents of the parties' common grantor were admissible.

6. Easements ⇨58(3)

Court would not adjudge an easement for a right of way and then permit the

servient tenant to close that right of way with locked gates.

Trippet, Newcomer, Yoakum & Thomas, F. B. Yoakum, Jr., Los Angeles, for appellant.

Smith & Forbes, Paul R. Smith, Douglas M. Forbes, Santa Monica, for respondents.

DRAPEAU, Justice.

This case presents another chapter in the turbulent legal history of the historic old Rancho Topanga Malibu Sequit. This rancho lies north and west of Santa Monica, in southern California. Originally it contained over thirteen thousand acres of land, and fronted twenty-two miles along the Pacific Ocean.

Frederick Hastings Rindge acquired the rancho in 1890. Upon his death in 1905, his widow succeeded to the ownership. She kept the rancho for many years. And she valiantly resisted every encroachment upon or over its vast domain. It was only after extended litigation that a right of way for a road along the coast was secured. County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 200 P. 27.

Title to the rancho was put in Marblehead Land Company, a family corporation. Lapse of time, the inexorable demand for land by a population increasing at incredible speed, and the business depression beginning in 1929 accomplished what Mrs. Rindge, had feared and fought against for so long. In 1933 Marblehead Land Company found itself in financial difficulties, control of the corporation passed to a board of directors representing bondholders and creditors, and that alien management subdivided and sold a large part of the rancho. Chap. 10, United States Bankruptcy Act, 11 U.S.C.A. § 501 et seq.

Part of the property so subdivided and sold was located in Malibu Canyon. Malibu Canyon extends northerly from the ocean beach to the precipitous Santa Monica mountains. The beach here runs east-

erly and westerly. Draining the area is Malibu Creek.

As sales in the canyon progressed, parcels were conveyed by deed, with descriptions of rights of way out to the coast highway along a road on the east side of the canyon. This road has had several names: Grade Road, Homestead Road, and, more recently, Serra Road. For convenience in writing this opinion it will be called the east road.

Sales were also made along a road on the west side of Malibu canyon. These deeds described rights of way out to the coast highway along that road. It had been and still is called Cross Creek road. But for convenience it may be referred to as the west road.

At the upper end of Malibu canyon, where the water course narrows, and the more or less level land meets the precipitous hillsides, these two roads come together. Thus one may enter the east road at the Pacific Coast highway, go to the end of that road, then around the upper end, and come back down the west road to the state highway, or go the other way round.

Projected upon a map, these two roads and their meeting at the north end of Malibu canyon look like an elongated horseshoe, so the two roads and their curve together at the upper end have been often called "horseshoe road".

This case involves a right of way claimed by plaintiffs over a portion of horseshoe road where it goes through defendant's land at the head, or toe, of the horseshoe. At times that part of the horseshoe road passing through defendant's land has been referred to as the ranch road.

Defendant, Rhoda Rindge Adamson, is the daughter of Mr. and Mrs. Rindge. She purchased her property here involved from Marblehead in 1949, after plaintiffs had purchased their several parcels. Her purchase was prompted by sentiment, in some measure at least. She testified she just had to have that particular piece of land. Her father and mother lived there. In later years the rancho headquarters

were there. And the place brought back to her memories of the halcyon days of the Malibu.

But Mrs. Adamson's dreams of restoring the old headquarters were rudely disturbed when she fully understood what the horseshoe right of way would do to her property. It went right through her doorway; it cut in two the only seven acres of level land on her ranch, and it subjected her to the annoyance of a continual stream of trespassers in automobiles, raising clouds of dust and bringing hazards of fire and depredation. This was particularly serious because Mrs. Adamson paid \$27,000 for the property, and spent more than \$50,000 in improving it.

Now let us turn to the claims of the plaintiffs.

Marblehead commenced selling Malibu canyon property in 1942. As sales were made to plaintiffs, or their predecessors in interest, each buyer was given in his deed a right of way to the state highway along the coast. These rights of way were either on the east or the west roads, but not on both, and not at the head of the horseshoe. Agents of Marblehead testified that one right of way was just tacked onto the other as the deeds were made.

But the purchasers were told by real estate salesmen for Marblehead that they would have the use of the horseshoe road for its full length, on both the east and west roads, and around the turn at the head of the horseshoe. And when they were shown the property, each of them was taken around the horseshoe—in one way and out the other. And the road was there when government surveys were made in 1893 and in 1900; and it was well traveled when plaintiffs' properties were conveyed to them.

Mr. MacKenzie, one of the plaintiffs, testified:

"Q. Now, will you state what was said by Mr. Harrison at those conversations, said by Mr. Harrison and yourself? A. Well, at that time, there was water in the creek, that crossed Cross Creek Road, so I asked Mr. Harrison how we would get

out of the Canyon if the creek were impassable. Mr. Harrison told me that all of the purchasers in Malibu Canyon would give a 20-foot easement so that there would be a 40-foot easement through the complete horseshoe, and that we had a right to use Cross Creek Road or Serra road or any portions of the road. As far as we are concerned, it's all one road."

Inasmuch as one of the questions on this appeal concerns the admissibility in evidence of statements said to have been made by salesmen for Marblehead, a brief resume of the other testimony in this respect, taken from defendant's brief, follows:

Mr. Diefenderfer, a plaintiff and also a salesman, testified that Busch (the general sales agent) and Bonsall (president of Marblehead) told him that everyone "fronting on and giving an easement useable by his neighbors" would have the right to use either road; that as properties were sold buyers could go either way through the canyon, and that he told this to Mrs. Kilgour and Cummings (predecessors of Kling and Chambers) before they purchased; that Marlow, secretary of Marblehead, told him it was Marblehead policy, as properties were sold, to reserve easements and tie in the easement granted as nearly as possible with the easement to the nearest previously sold parcel.

Plaintiff Gagnon testified that Busch's salesman, Bundy, told him that each purchaser would have to buy the road fronting his property and deed back 20 feet for the use of other owners, but he was unable to recall definitely whether he was told that he would have the right to use the horseshoe road.

Plaintiff Alexander testified that after a flood which made Cross Creek impassable he was told he would have an easement over the road to the east of his premises. Mrs. Alexander testified that she was assured by Bundy that she could go either way, as the road would be an open road throughout the canyon.

Mrs. MacKenzie confirmed Mr. MacKenzie's testimony.

The salesman from whom MacKenzie purchased, testified that he told the Mac-

Kenzie that the road through the canyon was a circular drive available to everybody; initially he testified he told them they could use the road in the case of high water, but eventually he stated that he told them they could use it at any time; that the officers of Marblehead told him the road would be a circular road available to everybody, but he never mentioned this to the MacKenzies.

Plaintiff Mrs. Kilgour testified she was told that the road through Malibu canyon would be an open road. Her husband confirmed her testimony. Mr. Smith, a salesman, testified he told Mrs. Kilgour she could ride anywhere on the canyon roads.

Mr. Cummings, predecessor of plaintiffs Kling and Chambers, testified Mr. Diefenderfer told him that the canyon road was a community road and that anyone owning property in the canyon had a right to come in or out either entrance.

When Mrs. Adamson put gates at each entrance, east and west, of the horseshoe road across her property, posted no-trespass signs, and told plaintiffs that their use of that part of the horseshoe would be by sufferance only, they brought this action. After seven days' trial, the judge found that plaintiffs were entitled to a right of way, appurtenant to their respective parcels, across defendant's property, and that at the time Marblehead conveyed to them, "use of said roadway for the benefit of plaintiff's respective parcels of real property by said Marblehead Land Company, its grantees, and its guests, business visitors, and invitees, was open and obvious and known to said plaintiffs."

The judge further found that four of the plaintiffs had an easement over defendant's ranch road by adverse possession.

The judge further found that defendant could maintain gates across the right of way at its easterly and westerly entrances to her property, such gates not to be closed or locked, however, against plaintiffs, their successors, guests, business visitors, or invitees.

Defendant appeals from those portions of the judgment which carried into effect the findings stated.

Four grounds of appeal are urged:

1. The evidence is legally insufficient to establish an implied easement in favor of any respondent.

2. The evidence is legally insufficient to establish an easement by adverse possession in favor of respondents Gagnon, Alexander, MacKenzie and Kilgour.

3. The Court erred in permitting over objection oral testimony that prospective purchasers were told that they would be entitled to use the ranch road.

4. The Court erred in enjoining appellant from maintaining closed or locked gates as against respondents.

1. The law of implied easements has been exhaustively treated by our Supreme Court in two recent cases: *Owsley v. Hamner*, 36 Cal.2d 710, 227 P.2d 263, and *Fristoe v. Drapeau*, 35 Cal.2d 5, 215 P.2d 729. So there is no need to add to the length

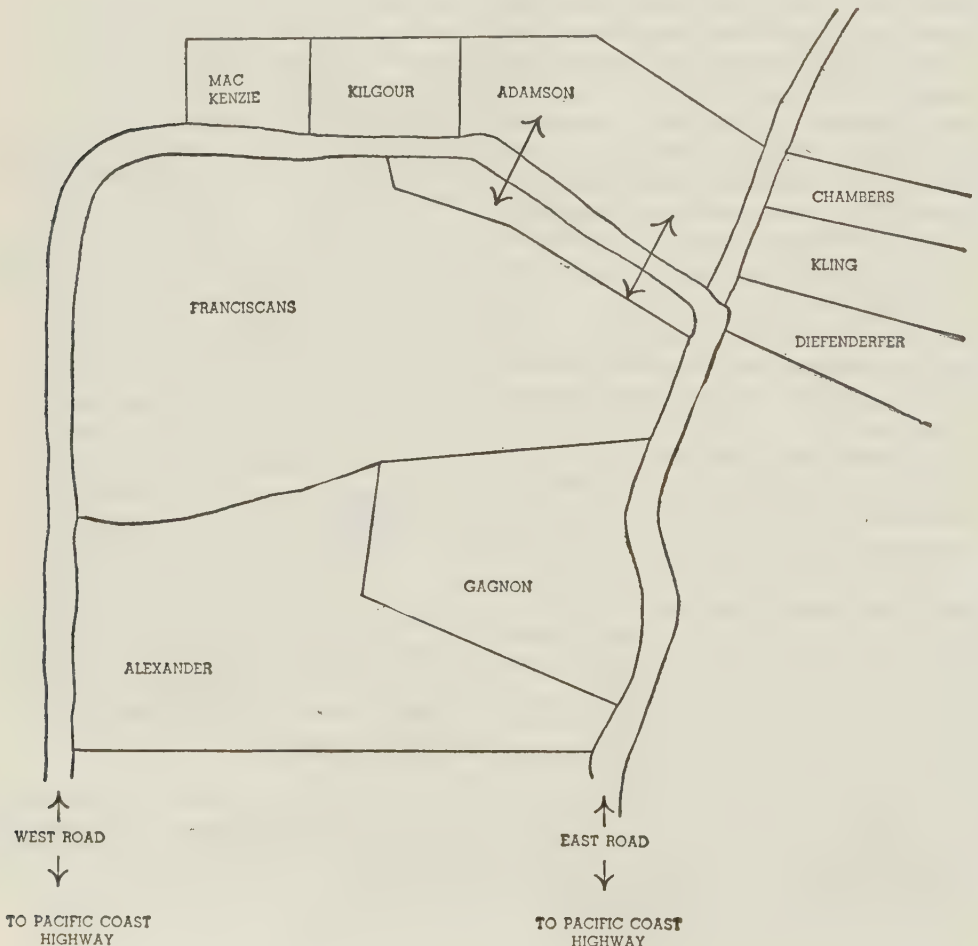
of this opinion by repeating or referring to the great number of authorities there cited and discussed.

Counsel for defendant in an excellent brief point out the essentials in implied easements, and that easements by implication are not favored by law. *Navarro v. Paulley*, 66 Cal.App.2d 827, 153 P.2d 397; *Orr v. Kirk*, 100 Cal.App.2d 678, 224 P.2d 71.

The brief concedes that plaintiffs and defendant all take their titles from a common source.

The brief stresses the fact that the easement was neither reasonably necessary nor for the benefit of the property for which it is claimed to be appurtenant.

To enable the reader to more quickly comprehend the rights asserted by the several parties, a rough sketch may be helpful.



It goes without saying that this is a lawyer's, not an engineer's drawing, and that, making no pretence of accuracy, it is for illustrative purposes only. Probably the most that can be said for it is that the road shown on the sketch looks more like a real horseshoe than the one on the engineers' maps, which, of course, goes all the way south to the state highway.

Let us look at the sketch and take an imaginary trip up the east road and around the horseshoe, and think about the rights of the plaintiffs as we pass by their places.

Mr. Gagnon comes first. So far as ingress and egress from his property to the state highway is concerned, it is apparent that Mr. Gagnon has no need to travel the whole horseshoe.

Going further up the east road it again becomes apparent that so far as ingress and egress is concerned, neither Diefenderfer, Kling nor Chambers have any need to travel the horseshoe.

These four plaintiffs may be called those in the first class.

Going further along the horseshoe and turning west and across defendant's property, we come to Kilgour and MacKenzie. In view of the fact that it is in evidence that the west road is impassable in wet weather, it seems just as clear that Kilgour and MacKenzie have reasonable need to cross defendant's property.

Going further south, down the west road, to Mr. Alexander's property, it seems that he too would find it necessary occasionally to go back up and around the horseshoe in wet weather, to get out to the highway.

The last named three plaintiffs will be called those in the second class.

[1-3] The evidence substantially supports the findings of an implied easement as to the plaintiffs in the second class.

The rights of the plaintiffs in the first class must stand upon the representations made to them when they bought their properties, and upon the fact that the horseshoe road had been and was there at the times of their several purchases. Was it the intent of all concerned that these plaintiffs should have the use of the horseshoe road as an appurtenance to their properties, whether

they had reasonable use for it for ingress and egress or not?

This question has been settled in the *Fristoe* case, 35 Cal.2d 5, 215 P.2d 729. In that case it is said at page 8 of 35 Cal.2d, at page 732 of 215 P.2d:

"The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. Although the prior use made of the property is one of the circumstances to be considered, easements of access have been implied in this state in situations in which there was no prior use."

And again from the *Fristoe* case, quoting from the Restatement at page 9 of 35 Cal. 2d, at page 732 of 215 P.2d:

"The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement. What the parties might reasonably have expected is to be ascertained from the circumstances existing at the time of the conveyance. It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement. It is not to be assumed, however, that they anticipated an abnormal development. Hence, the scope of an easement created by implication does not extend to uses required by such development.' Rest., Property, § 484, comment b."

The evidence substantially supports the finding of the trial court that plaintiffs in the first class also have an implied right of way across defendant's land. This conclusion is supported by the fact that the trial judge viewed the premises and looked over the whole situation.

[4] 2. Having come to the conclusion that the judgment of an implied easement

as to all of the plaintiffs must be sustained, it is unnecessary to give special consideration to the finding of an easement by adverse user of four of the plaintiffs. A judgment will not be reversed because the findings are contrary to the evidence if different findings will still require a judgment adverse to the appellant. 4 Cal.Jur.2d Sec. 660, p. 543; *McCreery v. Wells*, 94 Cal. 485, 29 P. 877.

The two remaining contentions of defendant may be disposed of summarily.

[5] 3. Inasmuch as the intent of the parties was an issue for the trial court, declarations made by agents of Marblehead were admissible in evidence. *Fristoe v. Drapeau*, supra.

[6] 4. So far as the gates are concerned, it would be an idle act to adjudge an easement for a right of way, and then permit the servient tenant to close that right of way with locked gates. *Fristoe v. Drapeau*, supra. In the circumstances here present when the trial judge found the easement, he did the best he could for defendant when he permitted gates, with the direction that they were not to be closed or locked so far as plaintiffs are concerned.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



122 Cal.App.2d 116

THOMASSET v. THOMASSET et al.

Civ. 19605.

District Court of Appeal, Second District,
Division 3, California.

Dec. 17, 1953.

Rehearing Denied Jan. 14, 1954.

Hearing Denied Feb. 10, 1954.

Action by wife for a divorce and division of community property, etc. The Superior Court of Los Angeles County, David Coleman, J., entered an interlocutory judgment awarding wife a divorce, part of the community property and alimony, and from parts of the judgment, plaintiff appealed and defendant husband cross-appealed.

The District Court of Appeal, Vallée, J., held that the evidence warranted conclusion that items of personal property awarded to husband were his separate property and that no abuse of discretion was shown in action of trial court in disposing of community property by awarding to wife certain furniture and furnishings and a one-half interest in realty.

Judgment affirmed.

1. Husband and Wife ⚭262(1), 264

Property acquired during marriage, title to which is taken in the name of husband, is presumed to be community property and party asserting that such property is separate property of either spouse has the burden of establishing such fact by clear and convincing evidence.

2. Appeal and Error ⚭1010(1)

If trial court finds that the evidence is sufficiently clear and convincing to establish the separate character of property acquired after marriage and such determination is supported by substantial evidence, reviewing court must accept such determination as conclusive. Code Civ.Proc. §§ 2061, subd. 5, 2103.

3. Evidence ⚭596(1)

The decision of the trier of fact must be according to the preponderance of evidence. Code Civ.Proc. §§ 2061, subd. 5, 2103.

4. Appeal and Error ⚭991

Whether the evidence adduced is sufficient to overcome the presumption that property acquired during marriage is community property is a question of fact for trial court. Code Civ.Proc. §§ 2061, subd. 5, 2103.

5. Husband and Wife ⚭259

Moneys earned by husband prior to, but collected after marriage were not community funds.

6. Husband and Wife ⚭249

Whether property acquired by husband during marriage is his separate property is determined by the time of its acquisition.

7. Husband and Wife ⚭249

If property acquired by husband during marriage was his separate property at

time of its acquisition, it remains his separate property except as to such increase thereof as may be due to the contribution of the community by virtue of capital or industry, unless by agreement of the spouses it is transmuted into community property.

8. Husband and Wife ⇨249

Separate property of husband or wife does not lose its character as such by reason of a change in form or identity.

9. Husband and Wife ⇨255

Property that is purchased with separate funds of husband or wife ordinarily continues to be separate property.

10. Divorce ⇨252

Wife, in obtaining a divorce, was entitled only to a division of such income as husband earned during marriage and any property, then remaining, into which such income had been transmuted.

11. Husband and Wife ⇨249

Where separate and community funds are commingled, the whole will be treated as community property only where such funds have been so commingled that it is impossible to trace the source of the funds.

12. Husband and Wife ⇨262(1)

The presumption that property acquired during marriage is community property is controlling only when it is impossible to trace the source of the specific property.

13. Husband and Wife ⇨249

If the exact amount of money allocable to separate property and the exact amount allocable to community property deposited in a bank account can be ascertained, the money allocable to separate property is not so commingled that all of the funds become community property.

14. Husband and Wife ⇨262(1)

It is presumed that family expenses are paid from community earnings.

15. Husband and Wife ⇨262(1)

Where husband, charged with support of family, has income derived from his separate property and income from his earnings which are community property, he may devote all that is necessary of community

earnings to family support and preserve his separate property intact, and there is no presumption that he has supported family out of separate property and preserved intact the community funds.

16. Husband and Wife ⇨265

If husband pays community indebtedness out of his separate funds at a time when community funds are exhausted, he is entitled to reimbursement when the community account is replenished.

17. Husband and Wife ⇨264

Evidence that there was no excess of community income over community expenses is effective to prove that all assets in name of husband are his separate property.

18. Husband and Wife ⇨264

In divorce action by wife, trial court was warranted in concluding that items of personal property awarded to husband were his separate property, where husband showed source of all funds deposited in bank accounts in his name, that money he had on hand at time of marriage, plus fees received after marriage for services performed before marriage and his pension were sufficient to enable him to purchase such personalty and that community expenses, not including office expense, exceeded income which originated after marriage from his law practice.

19. Husband and Wife ⇨257

Separate property of husband included a fair return during marriage on his fixed assets at time of marriage, consisting of office equipment and law library which were used by him in producing community income.

20. Husband and Wife ⇨264

In action by wife for divorce, evidence was sufficient to warrant finding that as to items of personalty decreed to be the separate property of husband, the presumption of community property had been overcome.

21. Divorce ⇨282, 286

Where exhibits, prepared by accountant, consisting of balance sheet as of date of marriage, schedule of accounts then re-

ceivable, schedule of receipts and disbursements and statements of husband's income and expenses, were introduced in evidence by husband at trial of action by wife for divorce and admitted without objection and records on which computations in such exhibits were based, were available to wife's counsel and he had ample opportunity to cross-examine accountant, wife could not complain on appeal of receipt of such exhibits in evidence and their weight and effect were for trial judge.

22. Divorce ⇨253

Findings which disposed generally of all issues made by the pleadings in action for divorce were sufficient to support interlocutory judgment disposing of separate and community property of the parties.

23. Trial ⇨395(1)

General findings in the words of pleadings constitute a sufficient compliance with requirement for making findings of fact.

24. Trial ⇨395(5)

A finding that certain property owned by a married person is separate or community property is a finding of an ultimate fact and the evidence from which such ultimate fact is determined need not be found by trial court.

25. Divorce ⇨286

In divorce action by wife, finding that except as therein found to be true, each allegation contained in specified paragraph of complaint as to monthly earnings of husband was untrue, was not prejudicial to plaintiff, in view of testimony as to defendant's earnings, uncontroverted evidence that all community earnings were exhausted in community expenses, and findings that defendant was able to pay a reasonable sum for support of plaintiff and a reasonable attorney fee and costs.

26. Divorce ⇨282

Husband and Wife ⇨263

Evidence as to secret, undisclosed intention of husband in purchasing real and personal property during marriage was inadmissible on question of separate or community character of such property in divorce action, but where such evidence was admitted without objection, objection there-

to could not be urged for the first time on appeal.

27. Appeal and Error ⇨204(1)

Objection to evidence, admitted without objection, cannot be urged for the first time on appeal.

28. Evidence ⇨177

In action by wife for divorce, record disclosed no error in admitting evidence of defendant's accountant on question of separate or community character of property.

29. Divorce ⇨249(3)

Court was without jurisdiction to award any of husband's separate property to wife in her successful action for divorce.

30. Divorce ⇨249(1), 286

Trial court in granting a divorce has a wide latitude for exercise of its judgment and discretion in assigning community property to the respective parties and it will be presumed that such discretion was properly exercised.

31. Divorce ⇨252, 286

The proportion of community property to be awarded to respective parties in granting a divorce depends upon the particular circumstances of each case, and where trial court has exercised a legal discretion, appellate court, though having power of revision, will be slow to interfere with such discretion.

32. Divorce ⇨235

The amount to be allowed wife as alimony in granting her a divorce is within the discretion of trial court, having in mind the circumstances of the parties respectively. Civ.Code, § 139.

33. Divorce ⇨235, 252

In awarding wife a divorce, trial court did not abuse its discretion in awarding to her an undivided one-half interest in title, title to which was held in joint tenancy, and furniture and furnishings found to be community property and ordering husband to pay wife \$225 per month for her support. Civ.Code, § 139.

34. Appeal and Error ⇨977(3, 5)

New Trial ⇨6

The granting or denial of a new trial rests in the discretion of trial judge and

his discretion will not be disturbed on review except on a showing of manifest and unmistakable abuse of such discretion.

35. Divorce ⇨151, 254

In action by wife for divorce, denial of plaintiff's motion for new trial and her request on hearing of such motion that trial court vacate findings and judgment, take additional evidence, and make new findings and judgment with respect to disposition of property was not abuse of discretion, though findings signed by court were prepared by defendant's counsel.

36. Appeal and Error ⇨758(1)

A point not presented in the briefs need not be considered on appeal.

37. Evidence ⇨208(1)

Where complaint in action by wife for divorce alleged that realty held by husband and wife in joint tenancy was community property and husband, in verified answer, admitted that it was community property, such admission stood as a declaration against interest, though husband later amended answer to deny that realty was community property.

38. Husband and Wife ⇨249

The form of deed is not conclusive on question of whether property is community property.

39. Husband and Wife ⇨249

The separate or community character of property may be found to be other than that indicated by deed, where there is an oral or written agreement as to ownership of the property or where such understanding may be inferred from conduct and declarations of the spouses.

40. Husband and Wife ⇨249

Whether realty held by husband and wife in joint tenancy was community property was a question of fact.

41. Husband and Wife ⇨264

In action for divorce, finding that realty held by husband and wife in joint tenancy was community property was supported by the evidence.

42. Divorce ⇨227(1)

Award of \$2,250 to wife's attorney for services resulting in an interlocutory judg-

ment, awarding wife a divorce, part of community property and alimony, was reasonable.

43. Divorce ⇨253

In action by wife for a divorce and division of community property, evidence as to salaries paid deputies in office of public defender, county counsel, district attorney, and city attorney was not material on issue of value of good will of husband's law practice at time of marriage.

Clyde C. Shoemaker, Los Angeles, for appellant.

William H. Hodges, Clarence Hansen, and Charles A. Thomasset, Los Angeles, for respondents.

VALLÉE, Justice.

Cross-appeals from particular parts of an interlocutory judgment of divorce. Plaintiff was awarded the divorce without contest. The controversy was with respect to the disposition of property.

Plaintiff appeals from those parts of the judgment which: 1. awards a half interest in certain real property to her; 2. decrees that certain property is the separate property of defendant; 3. orders defendant to pay her \$225 a month for her support; 4. terminates an order for her support pendente lite as of May 1, 1952. Defendant appeals from those parts of the judgment which: 1. decrees that certain real and personal property is community property; 2. awards plaintiff certain personal property decreed to be community property; 3. orders him to pay plaintiff \$225 a month for her support; 4. orders him to pay plaintiff's attorneys \$2,250 as fees.

The parties were married March 26, 1945. Defendant has been a practicing attorney at law continuously since 1927. The property in controversy consists of a house and lot, referred to as the Hudson Avenue property, subject to an encumbrance; an apartment building and lot, referred to as the Manhattan Beach property, subject to an encumbrance; household furniture and furnishings; money in possession of defendant; defendant's law offices and their equip-

ment; his accounts receivable; and various other items of personal property.

The court found that the Hudson Avenue and Manhattan Beach properties are community property and awarded an undivided half interest to each party. It found that certain furniture and furnishings are community property and awarded them to plaintiff. It found that the remainder of the property is the separate property of defendant and decreed that plaintiff has no interest therein.

At the date of the marriage, defendant's separate property consisted of cash on hand and in bank, \$7,388.75; accounts receivable, \$30,722.33; library, \$3,724; paintings, \$600; and office furniture and supplies, \$1,625. Total, \$44,060.08.

Prior to marriage, defendant maintained a commercial account in his name with Bank of America. In June, 1949, he opened another commercial account in his name with another branch of the same bank. He maintained these accounts during all of the time in question. During marriage, defendant deposited all cash he had on hand at the time of marriage and all moneys he received from all sources after marriage in these accounts. He testified, "Everything went into that account." The deposits during marriage included separate and community funds: cash on hand and accounts receivable at date of marriage, defendant's pension as a veteran, dividends, proceeds of sale of property, and income from his practice. After marriage, all living expenses of the parties and all funds for the purchase of the properties in controversy came from these accounts. Title to the realty was taken in joint tenancy, and title to the personalty, in the name of defendant. All properties involved on plaintiff's appeal were acquired after marriage.

Plaintiff's Appeal

Plaintiff first contends the finding that all of the property not found to be community is the separate property of defendant is without support in the evidence. She argues that property acquired by husband and wife after marriage is presumptively community property; that the evidence shows indiscriminate commingling of all the com-

munity and separate funds whereby the identity of each was lost; it became impossible to trace the same and the whole should, therefore, be treated as community property. Defendant's position is that all property purchased by him after marriage was purchased out of the money he had at the date of marriage, adding his pension money, insurance dividends, and fees which had accrued up to the time of marriage—all of which were his separate property—and that he was entitled to make the segregation by showing that at the time each item of property was purchased there were no community funds available to make the purchase, and that he traced his separate funds into the property decreed to be his separate property.

[1-4] Property acquired during marriage and taken in the name of the husband is presumed to be community property. *Fountain v. Maxim*, 210 Cal. 48, 51, 290 P. 576. The presumption is rebuttable. *Wilson v. Wilson*, 76 Cal.App.2d 119, 126, 172 P.2d 568. The burden rests on the party asserting that property acquired after marriage is separate to establish that fact. *Wilson v. Wilson*, supra, 76 Cal.App.2d at page 126, 172 P.2d at page 572. There are expressions in the decisions to the effect that the separate character of property acquired after marriage is to be established by "clear and convincing evidence," "clear and decisive proof," "clear and satisfactory proof". *Estate of Pepper*, 158 Cal. 619, 622, 112 P. 62, 64; *Estate of Rolls*, 193 Cal. 594, 597, 226 P. 608, 609. These expressions state a rule of evidence directed to the trial court; and if that court finds that the evidence meets the rule, a reviewing court must accept that determination as conclusive if there is substantial evidence to support it. *Baines v. Zuieback*, 84 Cal.App. 2d 483, 488, 191 P.2d 67. The decision of the trier of fact must be according to the preponderance of evidence. *Code Civ.Proc.* §§ 2061, subd. 5, 2103. Whether the evidence adduced to overcome the presumption of community property is sufficient for the purpose is a question of fact for the trial court. *Gudelj v. Gudelj*, 41 Cal.2d 202, 259 P.2d 656; *Wilson v. Wilson*, supra, 76 Cal. App.2d at page 126, 172 P.2d at page 572.

[5-10] Moneys earned by defendant prior to, but collected after, marriage were not community funds. *Hill v. Hill*, 82 Cal. App.2d 682, 698, 187 P.2d 28; 10 Cal. Jur.2d 674, § 10. Whether property acquired by a man during marriage is separate is determined by the time of its acquisition. If it was separate then, it remains so with the exception of such increase thereof as may have been due to the contribution of the community by virtue of capital or industry, unless by agreement of the spouses it is transmuted into community property. *Berry v. Berry*, 117 Cal. App.2d 624, 629, 256 P.2d 646; *Kenney v. Kenney*, 97 Cal. App.2d 60, 65, 217 P.2d 151. Separate property does not lose its character as such by reason of a change in form or identity. 10 Cal. Jur.2d 680, § 18. Property that is purchased with separate funds ordinarily continues to be separate property. *Huber v. Huber*, 27 Cal.2d 784, 791, 167 P.2d 708. Plaintiff was entitled only to a division of such income as defendant earned during marriage and property into which such income had been transmuted, if any remained. *Hill v. Hill*, 82 Cal. App.2d 682, 697, 187 P.2d 28.

[11-13] It appears to be plaintiff's contention that if a dollar which is separate property is deposited in a bank account in which there is a dollar which is community property, the dollar which was separate property becomes community property; and if a dollar which is community property is deposited in a bank account in which there is a dollar which is separate property, the latter dollar becomes community property; and that, in either case, all property purchased with the deposited funds is community property. That is not the law. Where separate and community funds are so commingled that it is *impossible* to trace the source of the funds, the whole will be

treated as community property. *Fountain v. Maxim*, 210 Cal. 48, 51, 290 P. 576. The presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property. *Gudelj v. Gudelj*, 41 Cal.2d 202, 259 P.2d 656. In *Estate of Lissner*, 27 Cal. App.2d 570, at page 574, 81 P.2d 448, at page 449, it is said: "The stocks are the most valuable portion of the estate, and the main question in connection with them is the character of the real property in Los Angeles from the proceeds of which the court found that the stocks were purchased. While there is evidence that these proceeds were commingled with community funds, there was likewise evidence from which the court was able, very easily, to trace them directly into the stock. * * The mere mingling of separate property of a husband or wife with community property does not change its character from separate to community property unless the property so mingled cannot be traced. *Scott v. Remley*, 119 Cal. App. 384, 6 P.2d 536." If the exact amount of money allocable to separate property and the exact amount of money allocable to community property deposited in a bank account can be ascertained, the money allocable to separate property is not so commingled that all of the funds become community property. It can be traced. *Huber v. Huber*, 27 Cal.2d 784, 792-793, 167 P.2d 708. In *Carle v. Heller*, 18 Cal. App. 577, 123 P. 815, it was held that the depositing in a bank account in the names of husband and wife of the proceeds of the sale of the wife's separate estate with the proceeds of the sale of community property did not constitute such a commingling as to render it impossible to trace and segregate the separate property from that of the community¹. In *People v. Kirkpatrick*, 77 Cal. App. 104, 246 P. 84,

1. In *Carle v. Heller*, 18 Cal. App. 577, at page 583, 123 P. 815, at page 817, the court traced the funds thus: "The price paid for the property owned by the wife was \$8,500. It increased in value rapidly, and several years after it was purchased, a small lot in the rear thereof was bought by the husband for \$1,700, making a total of \$10,200 paid for the two pieces of property. Upon no reason-

able hypothesis could the husband's share in the \$26,000, for which the two pieces were sold, have exceeded the proportion which \$1,700 bore to \$10,200, or one-sixth of the whole, amounting to \$4,333, from which, however, must be deducted the mortgage of \$500, leaving a balance of \$3,833. Add to this the additional sum of \$548, which appellant claims Charles Heller had in this deposit, and we have

it was held that money received by a husband from his wife which was her separate property did not, by the mere act of commingling it with presumably community funds in his bank account, cease to be her separate property. See, also, *Rosen v. Rosen*, 17 Cal.App.2d 601, 603, 62 P.2d 384; cf. *Berry v. Berry*, 117 Cal.App.2d 624, 256 P.2d 646.

In *Hill v. Hill*, 82 Cal.App.2d 682, at page 697, 187 P.2d 28, at page 37, a case in which an attorney at law failed to open a new account at marriage and deposited separate and community funds in the same account after marriage, the court stated:

"The fact that after the marriage respondent failed to open a new bank account but continued to deposit his community earnings in the old account, the funds in which at the date of the marriage were his separate property, and to draw checks against it furnishes no valid objection to the accounting.

"The rule relating to community funds argued by appellant is applicable where it is not possible to trace the community and separate funds and to segregate one from the other. The accountant was able to trace funds into and out of the account and to make up a statement therefrom showing the source of the funds and the purpose of the expenditures. Community indebtedness was properly charged against the community funds whether the latter were in a community account or in an account in which respondent's separate funds had been deposited prior to the marriage." The same was true in the case at bar.

[14, 15] It is presumed that expenses of the family came from community earnings. *Huber v. Huber*, 27 Cal.2d 784, 792, 167 P.2d 708; *Estate of Ades*, 81 Cal.App.2d 334, 338, 184 P.2d 1. Where the husband, charged with the support of a family, has income derived from his separate property and income from his earnings which are

community property, there is no presumption that he has supported the family out of the separate property and preserved intact the community funds. He is at perfect liberty to devote all that is necessary of the community earnings to the family support and to preserve his separate property intact. *Estate of Cudworth*, 133 Cal. 462, 468, 65 P. 1041.

[16] If a husband pays community indebtedness out of his separate funds at a time when the community funds are exhausted, he is entitled to reimbursement when the community account is replenished. *Hill v. Hill*, 82 Cal.App.2d 682, 698, 187 P.2d 28.

[17, 18] Patently, the trial court concluded by implication that the purchase price of the property decreed to be the separate property of defendant came from his separate funds. A detailed analysis of the record would serve no purpose. Suffice it to say, without setting up a debit and credit ledger account, that there was evidence from which the court could reasonably conclude that all of the items decreed to be the separate property of defendant found their source in his separate funds. There was evidence that the money defendant had on hand at the date of marriage, plus fees received after marriage for services performed before marriage, plus his pension, were sufficient to enable him to purchase the property which the court found to be his separate property. The source of every dollar deposited in the bank accounts was shown. Defendant's separate funds were traced into the items of property decreed to be his separate property. There was evidence that during the period in question defendant expended all of the income which originated after marriage from his practice in the expenses of his practice and the living expenses of the parties. There was evidence that from the date of marriage to the end of 1951 the community income was

\$4,381 to apply on the West Sixth street property purchased for \$13,000, paid out of the fund, the title to an undivided one-half interest in which, representing \$6,500, was vested in Charles Heller. It thus appears that at his death the \$12,-

000 deposit left standing in the name of Louise Heller, together with \$6,500 paid for her half interest in the West Sixth street property, constituted a sum much less than the amount received from the sale of her property."

\$50,807.57 and that the community expense, not including office expense, was \$59,160.-46, an excess of expenses over income of \$8,352.89. An accountant testified that at the time the various items adjudged to be defendant's separate property were purchased, there were no community funds available. Evidence that there was no excess of community income over community expenses is as effective to prove that all assets in the name of the defendant are separate property as a specific showing from which separate source each asset flowed. *Estate of Ades*, 81 Cal.App.2d 334, 339, 184 P.2d 1; *Logan v. Forster*, 114 Cal.App.2d 587, 602, 250 P.2d 730. On this evidence the court was warranted in concluding that the items of personal property in question are the separate property of defendant. *Huber v. Huber*, 27 Cal.2d 784, 791-792, 167 P.2d 708.

Plaintiff relies on *Truelsen v. Nelson*, 42 Cal.App.2d 750, 109 P.2d 996; *Falk v. Falk*, 48 Cal.App.2d 762, 120 P.2d 714; *Pope v. Pope*, 102 Cal.App.2d 353, 227 P.2d 867, and other cases. In *Truelsen v. Nelson*, supra, the trial court found that money in the possession of a wife at marriage and money earned by her thereafter, which had been deposited by her in one bank account, was community property. On appeal, the finding was sustained since there was no evidence as to when any particular amount was placed in the account or when any amounts were withdrawn therefrom, the wife kept no accounts, made no segregations, and the separate funds were not traced. In *Falk v. Falk*, supra, 48 Cal.App.2d 762, 120 P.2d 714, the evidence was not before the reviewing court. That court merely held that because the trial court had found that certain personalty had been purchased from commingled funds of both separate and community property so that it was impossible to trace the source from which the purchase price was derived, it erred in determining that any of such property was separate property. *Pope v. Pope*, supra, 102 Cal.App.2d 353, 227 P.2d 867, was a case in which the trial court had found that certain property was community and the husband was contending on appeal

that it was separate. The evidence did not show, as it does here, that at the time the property was purchased the community funds had been exhausted and that the community expenses required contribution from separate sources. The cases relied on by plaintiff are all cases in which the evidence did not furnish a satisfactory basis for the segregation of separate and community interests.

[19] Plaintiff asserts that defendant and the accountant charged expenses attributable to defendant's separate property to the community, and that the court accepted the resulting computations. She assigns error. After marriage, defendant received fees for services performed before marriage and his veteran's pension, and paid support money to a former wife. There was no evidence as to what, if any, expenses were incurred in collecting the fees or the pension and in depositing them in the bank account. Assuming there was some expense involved and that such expense and the support payments were properly chargeable to defendant's separate property, plaintiff was not prejudiced. The amount paid to the former wife was \$7,700. The community expense, which did not include office expense, exceeded the community income by at least \$8,352.89, for which defendant was entitled to be reimbursed. Defendant was entitled to, and the court no doubt gave him, a fair return on the fixed assets he had at the date of marriage, consisting of his office equipment and library which were used by him in producing the community income. See *Berry v. Berry*, 117 Cal.App.2d 624, 630, 256 P.2d 646. There was evidence that these assets had a value of \$5,949 at the date of marriage. The court was justified in concluding there was a community deficit which offset the support money and the expense, if any, of receiving and depositing his separate fees and pension.

[20] The record contains substantial evidence adduced by defendant from which the trial court could reasonably hold, as to the items decreed to be the separate property of defendant, that the presumption of

community property was overcome. *Huber v. Huber*, 27 Cal.2d 784, 791, 167 P.2d 708; *In re Bauer's Estate*, 79 Cal. 304, 21 P. 759; *Berry v. Berry*, 117 Cal.App.2d 624, 256 P. 2d 645; *Hill v. Hill*, 82 Cal.App.2d 682, 187 P.2d 28; *Estate of Ades*, 81 Cal.App.2d 334, 184 P.2d 1; *Estate of Lissner*, 27 Cal.App. 2d 570, 81 P.2d 448; *Estate of Tompkins*, 123 Cal.App. 670, 11 P.2d 886.

[21] Defendant introduced in evidence a number of exhibits prepared by an accountant, consisting of a balance sheet as of March 26, 1945, the date of marriage; a schedule of accounts receivable on cases commenced prior to March 26, 1945; a schedule of defendant's receipts and disbursements from March 26, 1945, to December 1, 1951; and statements of defendant's income and expenses from January 1, 1945, to December 31, 1951. Present counsel for plaintiff, who did not represent her at the trial, now severely criticizes the information contained in these exhibits. No objection was made to their receipt in evidence. In fact, as to most of them plaintiff's then counsel expressly stated he had no objection to their introduction. Further, the records on which the computations in the exhibits were based were available to plaintiff's counsel, and he had ample opportunity to cross-examine the accountant. Under such circumstances, plaintiff cannot now complain of the receipt of these exhibits in evidence. Their weight and effect was for the trial judge.

[22-24] Plaintiff says the findings are insufficient, apparently meaning insufficient to support the judgment. The point is without merit. The findings generally dispose of all the issues made by the pleadings. General findings in the words of the pleadings are a sufficient compliance with the requirement of making findings of facts. *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 543, 110 P.2d 992. A finding that certain property owned by a married person is separate or community is a finding of an ultimate fact. *Estate of Hill*, 167 Cal. 59, 63, 138 P. 690; *Tomaier v. Tomaier*, 23 Cal.2d 754, 760, 146 P.2d 905; *Caputo v. Fusco*, 54 Cal.App. 191, 192, 201 P. 604. The evidence from which this ultimate fact is determined need not be found

by the court. *Estate of Hill*, supra, 167 Cal. at page 63, 138 P. at page 692; *Estate of Ades*, 81 Cal.App.2d 334, 337, 184 P.2d 1; *Pope v. Pope*, 102 Cal.App.2d 353, 370, 227 P.2d 867.

[25] The complaint alleged (par. VIII) "that defendant earns the sum of Two Thousand Dollars (\$2,000.00), or more, each month from his profession as practicing attorney. * * *" Referring to this allegation the answer denied "generally and specifically each and every allegation therein contained and alleged." The court found "that defendant is able to pay a reasonable sum to plaintiff every month as and for alimony. That except as in this paragraph found to be true, each and every allegation contained in paragraph VIII of plaintiff's complaint is untrue." Plaintiff contends the finding is that defendant did not earn \$2,000 a month "or any other sum at all" from his profession, and that it is contrary to the evidence. It is unnecessary to determine the effect of the finding with respect to defendant's earning capacity. The issue as to his earnings was tried on the merits. If the answer is construed as a negative pregnant and as an admission that defendant earned \$1,999.99 a month, no objection was made on that ground. The subject of defendant's earnings was fully testified to, and the evidence was uncontroverted that all community earnings were exhausted in community expenses. The only purpose of a finding as to defendant's earnings in view of the findings as to the separate and community property would be to support the award for support and attorney fees. In view of the finding that defendant is able to pay a reasonable sum for the support of plaintiff, and a further finding that he is able to pay a reasonable attorney fee and costs, plaintiff has suffered no prejudice because of the finding in question. *Gudelj v. Gudelj*, 41 Cal.2d 202, 259 P.2d 656; *Logan v. Forster*, 114 Cal.App. 2d 587, 602, 250 P.2d 730; *Estate of Clausenius*, 96 Cal.App.2d 600, 606, 216 P.2d 485; *Culjak v. Better Built Homes, Inc.*, 58 Cal.App.2d 720, 725, 137 P.2d 492.

[26] Defendant testified that in purchasing the realty and in taking title there to in joint tenancy, his intention was that

it remain that way during his lifetime provided plaintiff continue to be his wife so that if she were his wife at his death, if he predeceased her, she could get the property and probate be avoided. Defendant also testified that in buying the items of personal property awarded to him, it was his intention to buy them with his separate funds. Plaintiff asserts it was error to receive the evidence of defendant's intention. Evidence of defendant's secret, undisclosed intention was not admissible. *Gudelj v. Gudelj*, 41 Cal.2d 202, 259 P.2d 656; *Miller v. Brode*, 186 Cal. 409, 412, 199 P. 531; *Irwin v. Zuver*, 107 Cal.App.2d 245, 248, 236 P.2d 834. *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708, does not hold differently. The *Huber* case held such evidence was admissible provided the husband advised his wife of his intention at the time of the purchase and she concurred therein. However, plaintiff made no objection to admission of the evidence of defendant's intention. The point may not be considered. *Thomason v. Hethcock*, 7 Cal.App.2d 634, 638, 46 P.2d 832. At the time the testimony was given, the court stated: "It doesn't make any difference what his intention was. If he bought property with community funds, it is community; if he bought it with separate funds, it is separate." No doubt if timely objection had been made the evidence would not have been admitted.

[27, 28] Plaintiff contends the court erred in admitting the evidence of defendant's accountant. Since no objection was made below, the point may not be considered on review. 3 Cal.Jur.2d 801, § 268. Notwithstanding plaintiff's failure to preserve the point, we have examined the record and find no error.

[29-31] The court awarded plaintiff a half interest in the realty, the personalty found to be community property, and \$225 a month for her support. She contends the division of the property "is unfair, unjust and impracticable," and that the award of support money "is unfair, inadequate and insufficient." The court was without jurisdiction to award any of defendant's separate property to plaintiff. *Allen v. Allen*, 159 Cal. 197, 201, 113 P. 160. It awarded

plaintiff more than half the community property. "In an action for divorce on the ground of extreme cruelty, subdivision 1 of section 146 of the Civil Code confers upon the trial court a wide latitude for the exercise of its judgment and discretion in assigning the community property to the respective parties and in every case it will be presumed that such discretion has been wisely and properly exercised, and though impliedly requiring that more than one-half of the community property shall be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award. The proportion should depend upon the particular circumstances of each case, and where the trial court has exercised a legal discretion this court, though clothed with the power of revision under the statute, will be slow to interfere with that discretion." *Crouch v. Crouch*, 63 Cal.App.2d 747, 756, 147 P.2d 678, 682.

[32, 33] Section 139 of the Civil Code provides that the court may compel the husband to make "suitable allowance" for the wife, "having regard to the circumstances of the parties respectively." Such suitable allowance is a matter for the determination of the trial court, having in mind those circumstances. *Barham v. Barham*, 33 Cal.2d 416, 431, 202 P.2d 289. The amount to be paid by the husband is within the discretion of the trial court. *Bowman v. Bowman*, 29 Cal.2d 808, 811, 178 P.2d 751. We cannot say as a matter of law that the court abused its discretion in the division of the community property or in the award for support.

[34, 35] The court denied plaintiff's motion for a new trial and her request on the hearing of the motion that the court vacate the findings and judgment, take additional evidence, and make new findings and judgment with respect to the property issues. Plaintiff assigns error. There was no error. The granting or denial of a new trial is a matter in the discretion of the trial judge, and his discretion will not be disturbed on review except on a showing of a manifest and unmistakable abuse. 20 Cal. Jur. 214, § 140. No such showing is made here. The complaint appears to be that the

court signed findings prepared by defendant's counsel. The record discloses that about thirty days after the judge announced his decision plaintiff's counsel had not prepared findings. Defendant's counsel then prepared them. Plaintiff's counsel was satisfied with those prepared by defendant's counsel. The judge did not sign them until about two weeks after they had been submitted. He signed them knowing they had been prepared by defendant's counsel. On the hearing of the motion for a new trial, the judge stated that the case had been thoroughly tried and considered and that there was no basis for reopening it.²

[36] While plaintiff appealed from that part of the judgment terminating the order for support payments pendente lite, the point is not presented in the briefs and need not be considered.

Defendant's Appeal

[37] Defendant first contends the finding that the realty is community property is not supported by the evidence. The complaint alleged that the realty is community

property. Defendant, in his verified answer, admitted it is community property, although eight months later he amended his answer to deny that it is. His admission stands as a declaration against interest. *Abel v. O'Hearn*, 97 Cal.App.2d 747, 760-761, 218 P.2d 827; *Caccamo v. Swans-ton*, 94 Cal.App.2d 957, 969, 212 P.2d 246; *Miller v. Lee*, 66 Cal.App.2d 778, 785, 153 P.2d 190; cf. *Lowmiller v. Monroe, Lyon & Miller, Inc.*, 101 Cal.App. 147, 152, 281 P. 433, 282 P. 537; *Vaughn v. Jonas*, 31 Cal.2d 586, 594-596, 191 P.2d 432; *Continental Nut Co. v. Slate*, 97 Cal.App.2d 264, 270-271, 217 P.2d 673; *Dolinar v. Pedone*, 63 Cal.App.2d 169, 176-178, 146 P.2d 237. Defendant's admission in his original verified answer constitutes a solemn confession that the realty is community property. In a cross-complaint (dismissed at trial) defendant alleged that community funds had been invested in the Hudson Avenue property. In his deposition, read to him at the trial, defendant testified he thought the Hudson Avenue property was purchased from community funds. Defendant testi-

2. The judge said: "Before hearing you on this motion, the court wishes to state that this case was thoroughly discussed, by way of argument and review, all through the course of the trial; that the case was submitted after several days of trial, with intervening periods; that full and comprehensive briefs on the law were submitted to the court, and were carefully studied.

"The court had the case under submission for a long time, gave it thorough and extensive attention, and, so that counsel may know what the situation is, does not propose to try this case all over again.

"The court has read the affidavits presented, and some of them seem to ask the court now to give \$350 a month instead of \$225 a month, and it should be definitely understood that the court didn't just, offhand and without attention, fix upon a figure which the court felt might be unjust or might be improper. * * *

"And these findings were not submitted for a considerable time. The court might, itself, had it not been involved in so many other cases in the conduct of this particular branch court, have sat down and drawn the particular findings, but the findings didn't come in.

"Then the defendant presented them, and then counsel for the plaintiff, who

had represented her throughout the trial, sent a communication to the court, in which he said he adopted those findings, and they were in accordance with his own ideas, and they were satisfactory to him; that there had been some consultation with another attorney, but he was then attorney of record.

"Then the present counsel called the court and asked the court to hold up the findings, and the matter was discussed in chambers, and the findings were gone over in the course of informal discussion. The court indicated its opinion that the findings were sufficient, that it wasn't necessary to set out the entire evidentiary record in the findings. That would require, in some instances, in making a determination as to whether something is community or separate property, the setting out of all the evidence relating to it, because there isn't any other way to determine it.

"So it was clearly indicated that the court was going to adopt these findings. There is no indication that they were submitted by the defendant to 'slip something over on the court' or to set out in the findings something that wasn't in the judgment of the court or in the court's findings."

fied he did not have any conversation with plaintiff about placing the realty in joint tenancy,—“I just went ahead and placed it in joint tenancy.” At the time the Hudson Avenue property was purchased, there were funds in the bank account attributable to defendant's earnings after marriage. Defendant referred to the time when the Hudson Avenue property was purchased as “when we bought the house.”

[38-41] In determining whether property is community property, a trial judge is not bound by the form of the deed alone. Property may be found to be other than that indicated by the deed when there is an oral or written agreement as to the ownership of the property, or where such understanding may be inferred from the conduct and declarations of the spouses. *Socol v. King*, 36 Cal.2d 342, 346, 223 P.2d 627; *Faust v. Faust*, 91 Cal.App.2d 304, 308, 204 P.2d 906. The question was one of fact. The evidence amply supports the finding that the realty is community property. *De Boer v. De Boer*, 111 Cal.App.2d 500, 244 P.2d 953; *Bales v. Farley*, 107 Cal. App.2d 642, 646, 237 P.2d 686; *Turknette v. Turknette*, 100 Cal.App.2d 271, 278, 223 P.2d 495; *Sloper v. Sloper*, 91 Cal.App.2d 238, 244, 204 P.2d 910; *Cox v. Cox*, 82 Cal. App.2d 867, 870, 187 P.2d 23; *Luminoso v. Luminoso*, 75 Cal.App.2d 472, 171 P.2d 516.

Defendant next urges that the court erred in awarding plaintiff \$225 a month for her support. It will be noted that plaintiff says \$225 a month is not enough and that defendant says it is too much. We need say no more as to defendant's contention than has been said with respect to plaintiff's contention. See *Scheibe v. Scheibe*, 57 Cal.App.2d 336, 342-344, 134 P.2d 835.

[42] The court awarded plaintiff's attorney \$2,250 as fees. Defendant says it was too much. We find no merit in the contention. A mere examination of the reporter's transcript (537 pages) is sufficient to convince us the allowance was most reasonable. See *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269.

[43] Defendant asserts the court erred in sustaining objections to evidence which he claims would have shown the value of the goodwill of his practice at the date of marriage. The evidence proffered consisted of: 1) the salaries paid deputies in the office of the public defender, county counsel, and district attorney of Los Angeles county, and the city attorney of Los Angeles; and 2) defendant's net earnings from his practice in the four years prior to marriage. We know of no theory, and counsel advances none, on which the salaries paid the public officers mentioned would have aided the court in determining the value of the goodwill of the defendant's law practice. Assuming without deciding that an unmarried lawyer engaged in practice alone with an established clientele has an asset of value called goodwill which is his separate property, and that defendant's earnings in the four years prior to marriage would have assisted the court in evaluating such goodwill, such evidence was admitted. Defendant testified his net income for the five years prior to marriage was about \$10,000 a year.

The parts of the judgment appealed from are affirmed. No costs of the appeals to defendant.

SHINN, P. J., and PARKER WOOD, J., concur.

122 Cal.App.2d 216

In re SMITH'S ESTATE.

HEUSNER v. HANSELL.

Civ. No. 15559.

District Court of Appeal, First District,
Division 2, California.

Dec. 22, 1953.

Proceeding upon administratrix's petition for settlement of her final account, wherein one of decedent's heirs filed objection to allowance of a creditor's claim on ground that claim had not been timely filed. The Superior Court, City & County of San Francisco, T. I. Fitzpatrick, J., overruled all objections and ordered the claim paid in full and the objecting heir appealed. The District Court of Appeal, Nourse, P. J., held that where notice to creditors required that claims be presented not later than January 14, 1951, and claim in dispute was not filed until July 19, 1951, more than six months too late, the allowance and approval of the claim by the administratrix and by the probate court were indefensible.

Order reversed.

1. Executors and Administrators ⇨225(1)

Where notice to creditors required that claim against decedent's estate be presented not later than January 14, 1951, and claim was not filed until July 19, 1951, more than six months too late, allowance and approval of the claim by the administratrix and by the probate court were indefensible. Probate Code, §§ 707, 708.

2. Executors and Administrators ⇨225(1, 7)

Statute providing that all claims against a decedent's estate arising upon contract must be filed or presented within time limited in notice to creditors, and that any claim not so filed or presented is barred forever, is imperative, and applies to all claims arising upon contracts, and probate court is not authorized to make an exception to relieve from hardship or to aid apparent equities. Probate Code, §§ 707, 708.

3. Executors and Administrators ⇨213

Under statute providing that all claims against a decedent's estate arising upon contract must be filed or presented in time limited in notice to creditors and that any claim not so filed or presented is barred forever, the bar imposed against a claim not duly presented cannot be waived by administratrix. Probate Code, §§ 707, 708.

4. Executors and Administrators ⇨75

Administratrix owes a fiduciary duty to the heirs to protect their legal rights in the estate.

5. Courts ⇨198

The probate court is the guardian of the estates of deceased persons.

6. Executors and Administrators ⇨213

Both administratrix and probate judge had plain duty to protect estate against collection of a debt which statutory law expressly declared to be barred forever. Probate Code, §§ 707, 708.

7. Executors and Administrators ⇨221(3)

In proceeding upon administratrix' petition for settlement of her final account, wherein one of decedent's heirs filed objections to allowance of a creditor's claim on ground that claim had not been timely filed, evidence was insufficient to sustain finding that administratrix was estopped from raising the statute of limitations.

Wilke & Fleury, Sacramento, for appellant.

John M. Hoffmann, Howard C. Erickson, Robert V. Winkler, Hoffmann & Erickson, Oakland, for respondent.

NOURSE, Presiding Justice.

On a hearing upon petition for settlement of the final account of the administratrix, Rowena Heusner, one of the heirs of the decedent, filed her objections to the allowance of a creditor's claim on the ground that the claim had not been filed within six months after publication of notice to creditors. The claim had been approved by the administratrix and by the

probate court. On the hearing the court overruled all objections and ordered the claim paid in full.

In her appeal from this order the appellant raises three grounds for a reversal: (1) That the claim was barred by the statute of limitations; (2) that the defense of estoppel is not available to respondent; (3) that the creditor was an incompetent witness under section 1880, subd. 3, of the Code of Civil Procedure.

(1) Section 707 of the Probate Code provides: "All claims arising upon contract * * * must be filed or presented within the time limited in the notice * * * and any claim not so filed or presented is barred forever". This is clear and precise language which calls for no qualification or judicial interpretation. The facts here are undisputed. The notice to creditors required that claims be presented not later than January 14, 1951. The claim in dispute was not filed until July 19, 1951—more than six months too late. Section 708 of the Probate Code provides that "[n]o claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge."

[1,2] The allowance and approval of the claim are both indefensible. In the relatively early case of *Morrow v. Barker*, 119 Cal. 65, at page 66, 51 P. 12, at page 13, the Supreme Court said: "A court is not authorized to make an exception to relieve from hardship or to aid apparent equities. *Tyman v. Walker*, 35 Cal. [634] 640 [95 Am.Dec. 152]; *Sichel v. Carrillo*, 42 Cal. [493] 499. As was said in *Estate of Hildebrandt*, 92 Cal. [433] 436, 28 P. [486] 488: 'The statute is imperative, and applies to all claims arising upon contracts. If the effect of it is to cause a loss or work a wrong in some particular case, that is a matter for the consideration of the legislature, and not the courts.'"

In 1930, speaking for this court, Justice Sturtevant (who always believed that the legislature and not the courts should be permitted to enact the law) said, in his usual terse and convincing manner in *People v. Osgood*, 104 Cal.App. 133, at

page 137, 285 P. 753, at page 755: "There is no statute which gives to the superior court sitting in probate the jurisdiction to entertain in behalf of this plaintiff or in behalf of any other litigant such a claim at such a time. Our statute commands that claims for debts '* * * due, not due, or contingent * * *' be presented. Code Civ.Proc., § 1490 et seq. If the administrator complies with the statute and gives due notice, claims not duly presented are barred. The bar cannot be waived. *Harp v. Calahan*, 46 Cal. 222, 232. If, nevertheless, a court allows the claim, its action is reversible error. *Morrow v. Barker*, 119 Cal. 65, 66, 51 P. 12. No action may be maintained. Code Civ.Proc. § 1500. Hence no court would have jurisdiction. *Modoc [Land & Live-Stock Co.] v. Superior Court*, 128 Cal. 255, 60 P. 848."

[3-6] Both of these cases follow the law as written and, as was said in the *Morrow* case, it is not for the courts "to make an exception to relieve from hardship". The rule was followed by this court in the recent case of *Estate of Erwin*, 117 Cal.App.2d 203, 255 P.2d 97, 98. That case is clearly analogous. There, as here, the administratrix sought to evade the plain terms of the code by approving a claim barred by the code. The trial court, however, insisted upon following the code section and held the claim barred. On appeal this court said: "Section 707 Probate Code states in unequivocal terms that 'any claim not so filed or presented is barred forever'. It is appellant's position that despite this clear language the administratrix may waive the failure to present the claim in the time and manner provided by the Probate Code and the probate judge must concur in her waiver. This argument overlooks the facts that the administratrix occupies a fiduciary duty to the heirs to protect their legal rights in the estate, *Larrabee v. Tracy*, 21 Cal. 2d 645, 650, 134 P.2d 265; 11A Cal. Jur., Executors and Administrators, sec. 23, p. 75, and that the probate court is the guardian of the estates of deceased persons, *County of Los Angeles v. Morrison*, 15 Cal.2d 368, 371, 101 P.2d 470, 129 A.L.R. 443; 11 Cal. Jur., Executors and Administrators,

sec. 6, p. 214. It is the plain duty of both the administratrix and the probate judge to protect the estate against the collection of a debt which the statutory law expressly declares to be 'barred forever'."

Another similarity between the two cases should be noted. In the Erwin case the administratrix succeeded to one-eighth of the estate. The remaining seven-eighths went to heirs residing in Western Germany. Here the administratrix was entitled to one-eighteenth of the estate. The remaining seventeen-eighteenths went to other heirs who would suffer the loss by her failure to properly represent them. That is not a commendable exercise of the trusteeship.

(2) Respondent assumes to answer this difficulty by arguing that the administratrix is estopped from raising the statute.

[7] Assuming the propriety of the defense of estoppel the facts here fail to prove it. The time for filing claims expired on January 14, 1951. The claim was filed six months after this expiration date. In an attempt to prove an estoppel respondent and the administratrix testified to conversations between them. The claimant's testimony fixes all of these conversations as having occurred after the time for filing claims had expired. The full extent of these conversations was that the administratrix would endeavor to overlook the statute and approve an admittedly illegal claim. The finding that there was an estoppel is not supported by evidence of any type.

The doctrine of estoppel is clearly defined in section 1962, subd. 3 of the Code of Civil Procedure, reading as follows: "Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it".

Because of the adverse finding, it is proper to cite the evidence somewhat at length. Bearing in mind that the notice to creditors was completed August 11, 1950, that the last day to file claims was January

14, 1951, and that the claim herein was filed on July 19, 1951, it becomes important to look at the evidence to see what "declaration, act, or omission" of the administratrix led the claimant to "believe a particular thing true, and to act upon such belief." Manifestly her only act upon which a plea of estoppel could be based would be one that led him to believe that he did not need to file his claim within the statutory period.

All the evidence on this subject is found in the testimony of the claimant and of the administratrix. The claimant testified:

"Q. You stated that you had conversations with Wilma Harris? A. Yes.

"Q. Have you had one conversation or several? A. Several.

"Q. Do you recall when the first conversation took place? A. I can't recall the exact time, but it was shortly after the estate was settled or passed on by the court up in Sacramento.

"Q. When you speak of the matter in Sacramento, that was a contest up there? A. Yes.

"Mr. White: I will stipulate that the judgment was entered on March 20, 1951.

"Mr. Winkler: Q. With that date in mind, can you tell the Court now about when this first conversation was with Mrs. Harris? A. I can't recall exactly; I would say probably some time—the case was up there January 9—I would say around May or June or July—I can't remember exactly * * *.

"Q. Did you ever have any other conversations with her—with Mrs. Harris? A. Later she called me on the phone and told me—

"Q. When did she call you? A. Up at the home—I can't recall the date.

"Q. Shortly after the conversation you have just related? A. Yes, a month or so.

"Q. Just after you had come back from Sacramento? A. Quite a long time after—after she told me to just wait, that I would be taken care of and the money would be paid when the estate was settled

"Q. With reference to that time when you were in Sacramento, how long was it after that time when you had this conversation with Mrs. Harris? A. As near as I can tell—I can't tell whether it was two months or three months—quite some time, a couple or three months, anyway, I would think." (N.B. It was stipulated that the Sacramento judgment was entered on March 20, 1951. The conversations which the witness testified to occurred after that date.)

The witness Harris testified as follows:

"Q. Did you ever have any conversation with Mr. Hansell about presenting these claims to the estate? A. Not until shortly before he did present it, and then I realized that it was beyond my power to do anything for him." (N.B. The claim was presented July 19, 1951.)

"Q. * * * do you recall that conversation? A. It was the day that Mr. Mundt called me and told me that we had won the case, and I called Mr. Hansell and told him that we had won the case and I hoped we would be able to pay him his money, or some money.

"Q. Do you recall when that was that Mr. Mundt called you? A. That must have been either May or June—I don't have the exact dates.

"Q. What year? A. 1951."

The same witness testified to several conversations with the claimant and some of the relatives of the deceased in which the view was expressed that the claimant should be paid something out of the estate. These conversations all occurred during the trial of a case in Sacramento. These conversations may have taken place a few days before the time for filing claims had expired. But in none of them, and in no other evidence cited by respondent, was anything said or done which would have led claimant to believe that it was not necessary for him to file the claim within the statutory time.

(3) Appellant argues that the claim is barred by the two-year statute of limitations (it is based on personal checks given the deceased over a period running from 1930 to 1947); and also that it was error

to permit the claimant to testify to the transaction because of section 1880, subd. 3 of the Code of Civil Procedure. Since the order must be reversed for the reasons stated it would serve no purpose to discuss either point.

Order reversed with costs to appellant.

GOODELL and DOOLING, JJ., concur.



GAGNE et al. v. BERTRAN et al.*

Civ. 19672.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1953.

Hearing Granted Feb. 10, 1954.

In action against test hole driller for damages in amount of extra sum plaintiffs were required to expend in order to install deeper foundation than would have been required if driller's statement as to amount of fill on property had been true, the Superior Court, Los Angeles County, J. A. Smith, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Fox, J., held that record would sustain imposition of liability on driller, either for fraud or negligence, but held that the judgment must be reversed since the trial court had applied an improper measure of damages.

Reversed with directions.

I. Sales ⇐251

Although both may develop out of single representation, "warranty" is normally part of contract of sale, while "fraudulent misrepresentation" is an antecedent statement made as an inducement to contract.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraudulent Misrepresentation" and "Warranty".

* Subsequent opinion 275 P.2d 15.

2. Contracts ⇨205**Fraud** ⇨1

There is a well established and vital distinction between a fraudulent misrepresentation and a warranty, and it is not every false affirmation or representation made by party to business transaction that will support action for breach of warranty.

3. Contracts ⇨205

Before test hole driller could be held to strict liability of warrantor it would have to appear that parties understood and intended that his statements as to amount of fill on lots tested would be construed as a warranty, or that there was either specific agreement warranting a promised result, or a consideration of such nature as would indicate an express warranty was intended to be given or received. Civ.Code, §§ 1732, 1735.

4. Contracts ⇨350(1)

In action against test hole driller for damages in amount of extra sum plaintiffs were required to expend in order to install deeper foundation than would have been required if driller's statement as to amount of fill on property had been true, record would not sustain imposition of liability on driller on theory of breach of warranty. Civ.Code, §§ 1732, 1735.

5. Fraud ⇨3

A cause of action for fraud is proven when evidence discloses (1) the making of false representation of material fact; (2) that defendant either knew statement was false, or lacked honest belief in its truth, or that statement was carelessly made, in manner not warranted by information possessed by defendant; (3) that it was made with intent to induce reliance by plaintiff; (4) that it was justifiably relied on by plaintiff; and (5) that plaintiff suffered damage thereby.

6. Fraud ⇨58(2)**Negligence** ⇨134(1)

In action against test hole driller for damages in amount of extra sum plaintiffs were required to expend in order to install deeper foundation than would have been required if driller's statement as to amount of fill on property had been true, evidence would sustain judgment for plaintiffs predi-

cated upon either fraud or negligence of defendant.

7. Fraud ⇨59(3)

Under the so-called "tort" rule, measure of damages for fraud which induces sale of real property is computed by determining difference between the consideration paid for property and actual value of property together with any additional damage arising from the particular transaction. Civ.Code, § 3343.

8. Fraud ⇨59(3)

Under the "out of pocket" loss rule which has been substituted by statute for the "benefit of the bargain" rule as exclusive measure of damages for fraud in purchase of real property, damages are to be computed as of date of fraudulent transaction. Civ.Code, § 3343.

9. Damages ⇨62(1)

It devolves upon person injured by wrongful act of another to exercise reasonable care to obviate expansion of his injury or enhancement of any damage he has sustained, since law will not countenance ballooning of costs against a tort-feasor at time when injured party is in position to mitigate further damage. Civ.Code, § 3359.

10. Negligence ⇨56(1.3)

Negligence is not actionable unless plaintiff can show detriment proximately engendered by reason of negligence. Civ. Code § 3333.

11. Fraud ⇨25

Misrepresentation without injury does not give rise to cause of action. Civ.Code, §§ 1709, 3343.

12. Damages ⇨60

Fact that, through fortuitous, external circumstances, or through his own initiative and skill, injured party has been able to secure net benefit from tortious incident will not be credited to defendant's benefit in considering question of injured party's detriment.

13. Damages ⇨62(1)

Where owners of land discovered extent of fill thereon at time when work on projected building thereon had barely been started and when further work and expendi-

tures of substantial character could have been prevented but owners nevertheless, for reasons of their own, decided to go forward and erect building as planned, owners could not recover from test hole driller who had negligently or fraudulently informed purchasers as to amount of fill, difference between what foundation would have cost if fill condition had been as stated by driller and amount actually expended for foundation. Civ.Code, § 3343.

Wallace & Cashin, Earl A. Everett, Los Angeles, for appellant.

Nicholas Ferrara, Los Angeles, for respondents.

FOX, Justice.

Defendant Bertran appeals from a judgment in the sum of \$3,093.

Plaintiffs, who are four in number, entered into an agreement for the purchase of two unimproved lots for \$8,500. The agreement recited that the deal was "subject to * * * a fill test to be made at buyers' expense." Plaintiff Joseph Billiet, acting in behalf of his coplaintiffs, thereupon telephoned defendant informing him that he wished to have test holes drilled on the two lots to ascertain whether there was fill thereon. The testimony is in sharp conflict as to the nature and extent of defendant's responsibility with respect to conduct of the said test. Billiet's testimony, which was accepted by the court, was to the effect that he employed defendant, as he had on four previous occasions between 1939 and 1942, not only to drill test holes but also to test the soil of the lots for fill. It was agreed that defendant's compensation would be at the rate of \$10 per hour.

On March 7, 1947, defendant dispatched two employees with a power-operated auger mounted on the rear of a truck to the designated property. Mr. Billiet testified that defendant's employees had already drilled about three holes on the property when he came upon the scene. Defendant arrived a short while later, following which two more holes were drilled. Billiet stated that defendant picked up in his hands samples of the soil removed from the holes, ex-

amined it, and stated to him that there was nothing to worry about, that the fill was no deeper than 12 to 16 inches below the surface. On March 17, 1947, plaintiffs paid defendant the sum of \$25 for his work, which had consumed two and one-half hours. Concurrently with this payment, plaintiffs requested that defendant provide them with a letter showing his findings on the parcel of land, since this might be required by the F.H.A. On March 20, 1947, defendant replied by letter, a part of which reads: " * * * On March 7, 1947, we drilled five 16" dia. test holes on property located at * * * the holes were drilled to a depth of 5'0 to 6'0 deep, we did not find any evidence of fill other than on the surface for about 12" to 16" * * * " Mr. Billiet testified that although he observed the manner in which defendant arrived at his finding, he believed the statements made to him and in reliance thereon he purchased the two lots for the sum of \$8,500.

Subsequent to the purchase of the lots, plaintiffs decided to erect thereon a two-story house containing 12 apartment units. Commitments for financing were obtained. A contract was made with one Paul Hammond calling for the installation of a foundation for the proposed structure at a cost of \$3,121.40, estimated on the presence of a fill no more than 16 inches deep. When the work of excavation for the foundation was begun, and a trench of between 10 and 15 feet long dug, the operator of the trenching machine discovered that his machine was sinking to a depth of about 5 feet. He called this to the attention of Mr. Billiet, who thereupon temporarily suspended work and notified Mr. Hammond, the cement contractor. It was then ascertained that the fill was of a greater depth than 16 inches below the surface, and in fact, about 5 or 6 feet deep. After this discovery by Mr. Hammond and Mr. Billiet, the trenching of the foundations was resumed. Mr. Billiet testified he summoned defendant to the site and explained the circumstances to him, whereupon defendant asserted he apparently made a mistake. Plaintiffs were required to place the foundation at a greater depth than planned in order to construct the type of building they desired to put on

the land, thus increasing their cost of installing the foundation by \$3,093.65 over the price originally contracted for with Mr. Hammond.¹

Defendant testified that he was employed by plaintiffs merely to drill the holes. He stated that for this purpose he supplied the equipment and two men, and charged \$25 for two and one-half hours' drilling work, his rate being \$10 an hour for drilling. He testified that he told Billiet he was not a geologist or soil expert, and that Billiet should get an engineer or the city inspector to check the soil accurately. He stated he could detect fill only if he noticed foreign substances, rubble, or debris in the soil upon visual inspection. He testified that in answer to Billiet's question of how the soil looked, he simply gave his honest opinion, based on what he observed by picking up the dirt unearthed from the holes, that he found no fill below 16 inches, all the while disclaiming any professional skill.

Billiet testified that plaintiffs would not have purchased the lots had they known the fill was of a much greater depth than 16 inches, nor would defendant have been employed to make a fill test had he known defendant was not skilled or qualified to do so. There was no testimony that defendant knew the purpose for which plaintiffs contemplated purchasing the lots. In fact, Mr. Billiet testified that at the time the holes were drilled he had no plans regarding the construction. He testified that the total cost of the completed building, including the lots, was about \$99,000. Defendant's attempt to place in evidence the price for which plaintiffs sold the property was rejected. Defendant thereupon made an offer to prove that plaintiffs had obtained the sum of \$106,800 from the sale of the property shortly after the completion of the building, thereby realizing a profit of about \$7,800 on the over-all transaction.

Plaintiffs' complaint prayed for damages in the amount of the extra sum required to install a deeper foundation due to the presence of fill on the property they purchased. The pleadings embrace three caus-

es of action based on the theory of defendant's liability for (1) breach of warranty, (2) fraud, and (3) negligence.

The trial court made findings fastening liability upon defendant upon each of the theories advanced by plaintiffs in their complaint. Among other things, and in addition to findings generally in accord with the testimony given by Billiet, the court found that defendant held himself out as being qualified to test soil; that defendant was informed by Billiet that he wanted to purchase certain lots on which to erect an apartment house and desired to have defendant test the soil thereon for fill; that defendant warranted and represented as a fact to plaintiffs that there was no fill below 12" to 16", which was untrue, since the depth of the fill varied from 3' to 6' deep; that plaintiffs relied on such false representation and warranty in the purchase of the lots for \$8,500; that defendant made his test for fill negligently and carelessly, and negligently represented that there was no fill below 12" to 16"; and that such representation was fraudulent and untrue since defendant had no reasonable grounds for believing the representations to be true; that plaintiffs relied upon defendant's oral and written representations and warranty as to the depth of the fill, and upon the test he negligently made, to purchase the two lots for \$8,500; that plaintiff's discovered for the first time the true depth of the fill when the foundation trenches were dug and as a direct and proximate cause of defendant's warranty, misrepresentation, and negligence were required to incur additional expenses by constructing a deeper foundation, said additional cost being \$3,093.65; that plaintiffs were not aware of the true depth of the fill until the time the trenches were dug, and had plaintiffs known the true depth of the fill they would not have purchased the lots. The court entered judgment for plaintiffs in the sum of \$3,093.65, which represented the additional cost of installing the foundation.

Defendant argues that the court erred in finding that defendant had made a war-

1. The provisions of section 91.4807, subs. (b), (c), (f), Los Angeles Municipal Code, were read into the record, which in gen-

eral require that for a two-story building, the depth of the foundation must be 18' below undisturbed natural ground surface.

ranty to plaintiffs regarding the nature of his findings with reference to the fill, or that he was guilty of fraudulent misrepresentation. He also attacks the court's findings of negligence and asserts that he was merely hired for the sum of \$25 to drill test holes and was not an insurer or warrantor of the nonexistence of fill on the lots. Finally, he contends the measure of damages applied by the court in fixing plaintiffs' recovery was erroneous.

[1-4] It is appropriate to observe at the very outset that insofar as the findings purport to fasten liability upon defendant on the theory of breach of warranty they are without substantial evidentiary support. The relationship between the parties was not that of seller and buyer, in which case defendant might be held liable regardless of any lack of intention that his statements constitute an express warranty, Civ.Code, § 1732; *Chamberlain Co. v. Allis-Chalmers Mfg. Co.*, 51 Cal.App.2d 520, 523-524, 125 P.2d 113, or to which the implied warranty of the fitness of the article sold for the purpose intended by the buyer could be applied. Civ.Code, § 1735. It was a matter of complete indifference to defendant whether plaintiffs bought the two lots or not, since he had no interest whatever in that transaction. There is a well established and vital distinction between a fraudulent misrepresentation and a warranty, *Rutherford v. Standard Engineering Corp.*, 88 Cal.App.2d 554, 565-568, 199 P.2d 354, although both may develop out of a single representation. *Caldbeck v. Simanton*, 82 Vt. 69, 71 A. 881, 20 L.R.A., N.S., 844. A warranty is normally a part of a contract of sale, while a fraudulent misrepresentation is an antecedent statement made as an inducement to the contract. *Griswold v. Morrison*, 53 Cal. App. 93, 99, 200 P. 62. It is not every false affirmation or representation made by a party to a business transaction that will support an action for breach of warranty. See *Eibel v. Von Fell*, 63 N.J.L. 3, 42 A. 754. Where, as here, there was no contract of sale between the parties to which defendant's representation could attach as a warranty, before he could be held to the strict liability of a warrantor it must appear that

the parties understood and intended that defendant's statement would be construed as a warranty, *Shattuck v. St. Francis Hotel & Apts.*, 7 Cal.2d 358, 60 P.2d 855, or that there was either a specific agreement warranting a promised result, *Crawford v. Duncan*, 61 Cal.App. 647, 215 P. 573, or a consideration of such a nature as would indicate an express warranty was intended to be given or received. There is nothing in the record before us to suggest that the transaction between defendant and plaintiffs was undertaken with the intention that defendant would guarantee the accuracy of his statements or be held strictly liable as a warrantor. Defendant's liability, if any, upon the facts before us, must rest either upon the grounds of misrepresentation or negligence.

[5, 6] A cause of action for fraud is proven where the evidence discloses (1) the making of a false representation of a material fact; (2) that defendant either knew the statement was false, or lacked an honest belief in its truth, or that the statement was carelessly made, in a manner not warranted by the information possessed by defendant; (3) that it was made with intent to induce reliance by plaintiff; (4) that it was justifiably relied on by plaintiff, and (5) plaintiff suffered damage thereby. *Wishnick v. Frye*, 111 Cal.App.2d 926, 930, 245 P.2d 532; *Podlasky v. Price*, 87 Cal.App.2d 151, 158, 196 P.2d 608. Without indulging in a circumstantial review of the evidence already alluded to, it is plain that it amply sustains the findings of the existence of actionable fraud in accordance with the elements above enumerated. *Boas v. Bank of America*, 51 Cal.App.2d 592, 125 P.2d 620; *Palladine v. Imperial Valley F. L. Ass'n*, 65 Cal. App. 727, 737-739, 744, 225 P. 291; *Blackman v. Howes*, 82 Cal.App.2d 275, 281, 185 P.2d 1019, 174 A.L.R. 1004. Similarly, if the testimony of Mr. Billiet is to be believed, it was reasonable to find that defendant was either negligent in the manner in which he conducted his soil test or was negligent in asserting as a fact that there was no more than 16 inches of fill when he should reasonably have known his representation was not warranted by the information available to him. However, de-

defendant's contention that the court erred in its application of the measure of damages is well taken.

[7-13] It is clear from the record that the trial court assessed damages by the simple expedient of awarding plaintiffs the sum they had expended on completing the foundation in excess of the price originally agreed upon with the contractor. Such was not the correct measure of damages in the circumstances here present. By virtue of the enactment of Civil Code, § 3343, the "out of pocket" loss rule was adopted in the place of the "benefit of the bargain" rule as the exclusive measure of damages for fraud in the purchase of real property. *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 759, 192 P.2d 935; *Jacobs v. Levin*, 58 Cal. App.2d Supp. 913, 916-917, 137 P.2d 500. Under this so-called "tort" rule, the measure of damages for fraud which induces the sale of real property is computed by determining the difference between the consideration paid for the property and the actual value of the property, "together with any additional damage arising from a particular transaction." *Bagdasarian v. Gragnon*, supra [31 Cal.2d 744, 192 P.2d 944]; *Rothstein v. Janss Inv. Corp.*, 45 Cal.App.2d 64, 73, 113 P.2d 465. In such cases damages are to be computed as of the date of the fraudulent transaction. *Hancock v. Williams*, 99 Cal.App.2d 80, 82, 221 P.2d 129. In the instant case, plaintiffs introduced no evidence to show that the value of the lots they purchased were not actually worth what they paid for them. The record is destitute of any evidence of the value of the lots purchased other than the price they paid. Certainly, if the lots were worth as much or more than the price expended, plaintiffs have suffered no compensable detriment.

Plaintiffs contend that in any event, by proceeding with their plans to erect an apartment building, they were required to expend \$3,093.65 more than they contemplated because of their reliance on the information furnished by defendant. The additional damages that may be recovered under Civil Code, § 3343 includes the item of actual expenditures made by the plain-

tiffs, provided they are the proximate result of the defendant's fraud. *Oliver v. Benton*, 92 Cal.App.2d 853, 855, 208 P.2d 375. As previously noted, at no time was defendant informed by plaintiffs of the type of building they planned to construct, or even that they planned to erect any building at all. Plaintiffs crystallized these particular plans only after they had purchased the lots. Thereupon they contracted to have a foundation emplaced for the sum of \$3,121.40. Plaintiffs indicate that this figure was predicated on the absence of fill below 16 inches. However, at the very commencement of the excavation, when only a single trench of about 10 to 15 feet in length had been dug, plaintiffs discovered the lots contained considerable fill. At this point, having become aware of defendant's misrepresentation and negligence, plaintiffs were in a position, had they been so inclined, to discontinue their projected building and recoup their damages from defendant under the principles declared above, plus any other damages proximately caused up to that point by defendant's conduct. Civ.Code, §§ 3343 and 1709. The contract between plaintiffs and Hammond to lay the foundation for \$3,121.40, being based on a mutual mistake of fact as to the actual depth of the fill, could have been rescinded. See *Hannah v. Steinman*, 159 Cal. 142, 112 P. 1094; *Lepper v. Ratterree*, 98 Cal.App. 245, 255, 276 P. 1037; *Forest Lawn Memorial Park Ass'n v. DeJarnette*, 79 Cal.App. 601, 604, 250 P. 581. Instead, fully cognizant of the true situation, plaintiffs chose to proceed with the work even though it entailed spending an amount almost double the original contract price to achieve the completion of the foundation. In circumstances such as these, it is manifestly unfair to impose liability for this extra amount upon defendant in the absence of any showing that it was necessary to make such an outlay to avert greater loss or damage.

It is a fundamental principle of the law of damages that an injured person shall receive compensation commensurate with his injury, and no more. *Hahn v. Wilde*, 211 Cal. 52, 55, 293 P. 30; 8 Cal.Jur. 821. Damages must, however, "be reasonable,

and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." Civ.Code, § 3359. Thus it devolves upon a person injured by the wrongful act of another to exercise reasonable care to obviate expansion of his injury or enhancement of any damage he has sustained. *Schultz v. Town of Lakeport*, 5 Cal.2d 377, 382, 54 P.2d 1110, 55 P.2d 485, 108 A.L.R. 1168; *California Cotton Co-op. Ass'n v. Byrne*, 58 Cal.App.2d 340, 345, 136 P.2d 359; 8 Cal.Jur. 782. The rationale of the rule denying recovery for losses which a party could reasonably have averted is that plaintiffs' conduct subsequent to the discovery of the injury, rather than defendant's wrong, proximately caused the damage for which compensation is sought. *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 846-847, 147 P.2d 558. In the instant case, after discovering the filled condition of the land at a time when work had barely started, when only the expenses of preparation had been incurred, and when further work and expenditures of a substantial character could have been prevented, plaintiffs nevertheless, for reasons of their own, decided to go forward and erect an apartment building on the lots. It is unnecessary for us to speculate on whether they regarded it as a profitable deal for them despite the added expense of a deeper foundation. The essential fact is that it was their own, independent choice after full knowledge, rather than defendant's antecedent fraud or negligence, which was proximately responsible for the expenditures made subsequent to their discovery of the fill on the lots. *Hickman v. Johnson*, 36 Cal.App. 342, 346, 178 P. 145. The law will not countenance the ballooning of costs against a tort-feasor at a time when the injured party is in a position to mitigate further damage. If plaintiffs' theory of recovery were to prevail, it would enable a party who had become aware of another's fraud or negligence to proceed with his own plans, however costly, in the comfortable expectation that the wrongdoer would be compelled ultimately to underwrite the added cost. It would be inconsistent with

the dictates of substantial justice to thus extend the ambit of defendant's responsibility in a situation such as is here presented.

A similar result is reached with respect to the added expense of the foundation when defendant's liability is examined from the standpoint of negligence. Unless a statute specifically provides otherwise, the proper measure of damages for the breach of an obligation not arising from contract "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ.Code, § 3333. It is axiomatic that negligence is not actionable unless plaintiff can show detriment proximately engendered by reason of the negligence. *McGregor v. Wright*, 117 Cal.App. 186, 196, 3 P.2d 624; *Prosser on Torts*, p. 177. As has been pointed out in the preceding discussion, the increased costs of the foundation cannot be deemed to have flowed proximately from defendant's negligence. To affirm the award to plaintiffs of the amount of \$3,093.65 would be, in effect, a surreptitious application of the former "benefit of the bargain" rule in place of the "out of pocket" principle, would defeat the doctrine of mitigation of damages, would ignore the elements of proximate cause in tort actions, and would impose on defendant an onerous liability not warranted by the circumstances.

There is no merit in defendant's argument that the court erred in rejecting his offer of proof that plaintiffs made an overall profit of \$7,800 on the lots and building and thus suffered no detriment in relying on his representations to purchase the lots. It is axiomatic, of course, that misrepresentation without injury does not give rise to a cause of action. *Hunter v. McKenzie*, 197 Cal. 176, 239 P. 1090; *Gaffney v. Graf*, 73 Cal.App. 622, 626, 238 P. 1054, nor is negligence actionable unless plaintiff can show actual detriment by reason of the negligence. *Prosser on Torts*, p. 177. However, the rule is clear that damages for misrepresentation are to be assessed as of the time of the fraudulent misrepresentation. *Hancock v. Williams*, 99 Cal.App.2d 80, 82, 221 P.2d 129; *Garstang v. Skinner*,

165 Cal. 721, 726, 134 P. 329. The fact that through fortuitous, external circumstances, or through his own initiative and skill, the plaintiff or injured party has been able to secure a net benefit from the tortious incident will not be credited to defendant's benefit in considering the question of plaintiff's detriment. *Leader v. Kolligian*, 262 Mass. 63, 159 N.E. 458-459; *Sacramento Suburban Fruit Lands Co. v. Leitch*, 9 Cir., 36 F.2d 949; *Rest. of Torts*, sec. 920, comment d—Illustration 9.

In view of the mistake of the trial court in the measure of damages applied, the judgment is reversed and the trial court is directed to retry only the issue of damages in accordance with the views expressed herein. See *Royer v. Carter*, 37 Cal.2d 544, 551, 233 P.2d 539. The parties are to bear their own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



122 Cal.App.2d 221

PARAMOUNT PICTURES, Inc., et al.

v.

SPARLING et al.

Civ. 15622.

District Court of Appeal, First District,
Division 2, California.

Dec. 2, 1953.

Proceeding upon motions to fix an award of reasonable attorneys' fees to plaintiffs' counsel and to order such fees paid out of funds, which, in hands of Superintendent of Banks, were available for payment of interest upon approved claims of depositors or creditors of Japanese bank. The Superior Court, in and for the City and County of San Francisco, William T. Sweigert, J., denied motions, and movants appealed. The District Court of Appeal, Dooling, J., held that, where counsel for plaintiffs rendered services which substantially benefited, as a class, all de-

positors in and creditors of bank, whose officers had been interned as alien enemies and whose license to do business had been revoked by the Federal Government, by establishing right of such depositors and creditors to receive interest on principal sums due them, and counsel did this over determined opposition of superintendent, who had been appointed liquidator and conservator of bank by United States Treasury Department, trial court had power to allow plaintiff counsel fees from such funds and should exercise its fee discretion in determining whether such allowance should be made, but allowance should not run against any interest payable to United States Attorney General pursuant to vesting of any account in him as successor to Alien Property Custodian.

Order reversed with directions.

1. Banks and Banking ⇨18

Where counsel for plaintiffs, had, over determined opposition of liquidator and conservator of bank, rendered services which substantially benefited, as a class, all depositors in and creditors of Japanese bank, whose officers had been interned as alien enemies and whose license to do business had been revoked by the Federal Government, by establishing right of such depositors and creditors to receive interest on principal sums due them, trial court had power, in its discretion, to allow plaintiff counsel fees from fund available for payment of interest. Trading with the Enemy Act, §§ 1 et seq., 5(b) (2), 7(c), 9, 50 U.S.C.A. Appendix, §§ 1 et seq., 5(b) (2), 7(c), 9.

2. War and National Defense ⇨12

Accounts of certain bank depositors which were vested by the United States Attorney General as successor to the Alien Property Custodian, became United States property, and, therefore, any claim for attorney's fees to be paid out of such vested property would have to be asserted under the Trading with the Enemy Act and could not be enforced in a state proceeding to obtain attorney's fees for plaintiffs who had rendered services substantially benefiting all depositors and creditors, as a class, by establishing their right to receive interest

on their deposits. Trading with the Enemy Act, §§ 1 et seq., 5(b) (2), 7(c), 9, 50 U.S.C.A. Appendix, §§ 1 et seq., 5(b) (2), 7(c), 9.

Homer I. Mitchell, Los Angeles, for appellant O'Melveny & Myers.

Walter S. Hilborn, Herman F. Selvin, Los Angeles, for appellant Loeb & Loeb.

Lloyd H. Burke, U. S. Atty. for Northern Dist. of Cal., Valentine C. Hammack, Sp. Asst. to Atty. Gen., Mary Eschweiler, San Francisco, John F. Cushman, Washington, D. C., Attorneys, for respondent Attorney General.

S. M. Saroyan, San Francisco, for respondent Maurice C. Sparling, etc.

DOOLING, Justice.

This is an appeal from an order denying two motions to fix and award reasonable attorneys' fees to plaintiffs' counsel and to order such fees paid out of the assets in the hands of respondent Superintendent of Banks (hereinafter called the superintendent) which are available for the payment of interest upon the approved claims of depositors or creditors of The Yokohama Specie Bank, Ltd. (hereinafter called the bank). The theory of appellants is that in the main litigation they established the right of all such creditors and depositors to interest as a class and that following the settled equitable principle an award may be made for attorneys' fees to be paid from the common fund so made available for the payment of such interest. *Adams v. California Mut. Bldg. & Loan Ass'n*, 18 Cal.2d 487, 116 P.2d 75; *Winslow v. Harold G. Ferguson Corp.*, 25 Cal.2d 274, 153 P.2d 714; *In re Estate of Marre*, 18 Cal.2d 191, 114 P.2d 591; *Ticonic Nat. Bank of Waterville, Me. v. Sprague*, 303 U.S. 406, 58 S.Ct. 612, 82 L.Ed. 926.

A brief history of the main litigation in which the services of these attorneys were rendered will be helpful to a proper disposition of the points argued on this appeal. Following the Japanese attack on Pearl Harbor the respondent superintendent assumed control of the bank and its assets and

thereafter the U. S. Treasury Department licensed the superintendent to liquidate the bank and to act as conservator. In due course appellants, who were large depositors, presented their claims to the superintendent for the principal amounts of their deposits with interest thereon. The superintendent allowed the claims as to principal but rejected them as to interest. Appellants thereupon commenced these actions seeking a determination that they were entitled to interest out of any assets remaining after the payment of principal. The Alien Property Custodian (hereinafter called the custodian), who had vested the bank's assets, intervened and opposed the payment of interest. The superintendent by answer alleged the conflicting claims of the plaintiffs and the custodian and requested the court to adjudicate their adverse claims for his protection. On the issues so made the cases went to trial and the court entered its judgments determining the plaintiffs' right to interest. The superintendent and the custodian appealed and the judgments were affirmed by this court in *Paramount Pictures, Inc. v. Sparling*, 93 Cal.App.2d 768, 209 P.2d 968. The superintendent and the custodian petitioned the Supreme Court of California for a hearing and those petitions were denied. 93 Cal.App.2d 777, 209 P.2d 968. The superintendent and the custodian then filed petitions for certiorari in the United States Supreme Court, which petitions were also denied. *McGrath v. Paramount Pictures, Inc.*, 339 U.S. 953, 70 S.Ct. 838, 94 L.Ed. 1366; *Sparling v. Paramount Pictures, Inc.*, 339 U.S. 953, 70 S.Ct. 839, 94 L.Ed. 1366.

One of the controlling issues in these cases was the claim by the custodian that under section 5(b) (2) of the Trading With The Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq., the payment of the principal of the deposits when due was excused and for this reason the plaintiffs were not entitled to interest. The portion of that section relied upon reads: "no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direc-

tion issued hereunder." 50 U.S.C.A. Appendix, § 5(b) (2).

The issue as made was whether the failure of the interned officers of the bank to apply to the Secretary of the Treasury for a special license to pay its depositors showed an absence of "good faith" within the meaning of the quoted section. After a protracted trial the superior court found (quoting from *Paramount Pictures, Inc. v. Sparling*, supra, 93 Cal.App.2d at page 773, 209 P.2d at page 972): "that there was nothing to prevent these officers from applying for a special license to pay the creditors of the Bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of 'good faith' of section 5(b) (2) of the Trading With the Enemy Act."

This is a question which the trial court could easily under the evidence have resolved the other way and if it had done so that would have been an end of the case for plaintiffs. Indeed this fact question was so close that on the main appeal the custodian and the superintendent argued with quite persuasive force that the finding and conclusion of the trial court on this issue found no support in the evidence and we sustained the finding on the narrow ground that "(t)he inferences and conclusions from the evidence are for the trial court to draw" (*Paramount Pictures, Inc. v. Sparling*, supra, 93 Cal.App.2d at page 774, 209 P.2d at page 972), a basis upon which a contrary finding would have been as well affirmed if the trial court had seen fit to make such finding.

In view of this the position taken by the superintendent before the trial court on this factual issue and thereafter consistently urged by him at every stage of the appellate proceedings is important in view of the basis of the trial court's order here under appeal and the arguments made by respondents to support it. That position is clearly stated in the superintendent's petition to the Supreme Court of the United States for a writ of certiorari to this court after we had affirmed the judgment by our opinion in *Paramount Pictures, Inc. v. Sparling*, supra, 93 Cal.App.2d 78, 209 P.2d 968. We quote from p. 11 of that petition:

"The Superintendent of Banks of the State of California, both in the trial court and in his briefs before the District Court of Appeal, and also in his petition for a hearing by the Supreme Court of the State of California, has consistently maintained that the officers of the bank, interned as they were as alien enemies, and with the bank's license to do business revoked by the United States Government, and possession of the bank seized by the Superintendent of Banks of the State of California, could not reasonably be expected to take steps to secure a license to reopen the bank and pay depositors. It is submitted that the failure of the bank's officers to apply for such a license cannot be held to constitute bad faith."

Having flatly taken this position in the trial court and maintained it at all stages of the proceedings both in that court and throughout every step of the appeal it is too clear for dispute that on this crucial issue of the case but for the interposition of appellants there would have been no one to urge upon the trial court the making of the finding that was actually made on this issue or to present the argument which was successfully made in its support by counsel for appellants when it was attacked by the superintendent and the custodian upon appeal.

This in our judgment clearly distinguishes this case from *In re Pacific Coast Bldg.-Loan Ass'n of Los Angeles*, 15 Cal.2d 155, 99 P.2d 261, upon the authority of which alone the trial court based its order denying the motions for counsel fees. In the *Pacific Coast* case the Supreme Court affirmed an order denying a motion for attorneys' fees to be paid out of the assets in the hands of the Building and Loan Commissioner as liquidator. The order there affirmed expressly determined "that this proceeding is not of the character which entitles a successful group to recover attorneys' fees from the common fund and upon that ground alone the application was denied." In *re Pacific Coast Bldg.-Loan Ass'n of Los Angeles*, supra, 15 Cal.2d at page 157, 99 P.2d at page

262. While the Supreme Court discussed other factors present in that case the determinative fact was that the commissioner himself not only took an impartial position in the proceeding but fully and fairly advised the court on the issues of fact and law. Indeed the complaint urged against the commissioner's conduct in that proceeding was that "the commissioner took a neutral position" and "did not take sides." In *re Pacific Coast Bldg.-Loan Ass'n of Los Angeles*, supra, 15 Cal.2d at page 159, 99 P.2d at page 263. The Supreme Court held that where a statutory officer in charge of a fund, without advocacy, fairly and impartially presents to the court the issues determinative of the proper disposition of the fund a claimant who intervenes on the successful side is not entitled to an award of counsel fees from the fund. The court said, 15 Cal.2d at page 160, 99 P.2d at page 263:

"Indeed, appellants must really rest upon the narrow ground that their legal presentation was more able, more convincing, and therefore more valuable, than that of the commissioner. But this cannot be a basis for the award of fees to private counsel where the services are already subject to performance by a public officer and official counsel, and these parties have properly performed their duties."

That the rule is otherwise where the public officer in charge of the fund takes a position opposed to a class of claimants is shown by *Adams v. California Mut. Bldg. & Loan Ass'n*, supra, 18 Cal.2d 487, 489, 116 P.2d 75, 76, where the court cited the *Pacific Coast* case in support of the following statement:

"Inasmuch as these are representative actions * * * any award of counsel fees should be paid out of that portion of the fund recovered by those for whose benefit these actions were brought."

We do not regard it as important that the superintendent in his answer purported to take a neutral position. On a determinative issue his position was not in fact neutral and if he had succeeded in persuading the trial court of the correctness of his position

on that issue its finding and judgment would have gone the other way. We do not question the superintendent's good faith, but if in good faith the superintendent is led to take a position in opposition to that urged by a claimant who convinces the courts, he cannot, with any show of reason, argue that the claimant's legal representation was unnecessary or that the same result would have followed his urging upon the court of the opposite position only. To be truly neutral he must present both sides and leave the free choice between them to the judgment of the court, and not as he himself stated in his petition for certiorari above quoted take an advocate's position against these claimants on a decisive question of fact and law "both in the trial court and in his briefs before the District Court of Appeal, and also in his petition for a hearing by the Supreme Court of the State of California."

Faced with the fact that he did consistently support this defense of the custodian and did place himself squarely in opposition to the plaintiffs thereon, the superintendent argues before us that the trial court did not in fact determine that the case was one in which the court was without power to award counsel fees under the authority of the *Pacific Coast* case, but rather in the exercise of its discretionary powers determined not to award such fees in view of all the facts and circumstances of the particular case. We cannot so read the record. The *Pacific Coast* case was not concerned with the free play of discretionary power. It plainly held as a matter of law that the court is without power to award such fees where a public official in charge of a fund submits to the court the conflicting claims upon the fund and takes a neutral position at the same time adequately presenting the issues and the law applicable thereto. The controlling factor in this holding appears in the following quotation from the opinion in that case:

"It is quite obvious that he had to take an impartial position, seeking that form of distribution which was in accord with legal and equitable principles. And there is nothing in the

record to show that the court was not fully advised on the law by counsel for the commissioner, despite the fact that they did not appear as advocates of either group of claimants."

It is thus obvious that the trial court was in error in the basis upon which it grounded its order (we quote from the order here appealed from): "by reason of the law applicable herein the Court concludes that its power and discretion to award attorneys' fees herein should be guided by the principles declared in [In] re Pacific Coast Building & Loan Ass'n [of Los Angeles], 15 Cal. 2d 155 [99 P.2d 261], and applied to a *substantially similar situation*." (Emphasis ours.) That the situation was not substantially similar appears from our previous discussion. In the controlling feature of impartiality of the custodian of the fund the situations could not have been more dissimilar. Feeling himself controlled by the rule of the Pacific Coast case it is clear that the trial judge did not and could not exercise a free discretion in determining whether or not counsel fees should be awarded.

We are not impressed by the contention that the commencing and prosecution of these actions was not necessary to establish the rights of depositors and creditors as a class to receive interest. It is true that before these actions were filed the attorney for the superintendent in a letter stated: "In the remote possibility that a surplus should exist after payment of all creditors in full, proper proceedings will be instituted, *after consent and approval is first had and obtained from the Alien Property Custodian*, for the purpose of obtaining a judicial determination on the question of interest." (Emphasis ours.) The emphasized condition was one upon which the claimants could not safely rely. There was no assurance that the custodian, under whose license the superintendent was acting, would ever give his consent or approval to such a proceeding in view of his continued and vigorous assertion that none of the depositors was entitled to the payment of interest, and if such consent was not given it is not disputed that an action by these claimants upon their rejected claims for interest would have been barred by the statute of

limitations which had only a short time to run when their actions were filed.

[1, 2] On the whole case it is clear that counsel for the plaintiffs rendered services which substantially benefited all the depositors and creditors as a class by establishing their right to receive interest, that they did this over the determined opposition of the superintendent on at least one issue decisive of that right, that left to representation by the superintendent alone that issue would almost certainly have been decided the other way, and that the case is therefore one in which the court has the power to allow counsel fees from the fund available for the payment of interest, and the court should exercise its free discretion in determining that question.

The Attorney General of the United States as successor to the custodian, who vested the claims of certain depositors, argues that as against those vested accounts the court is without power to make an award for counsel fees. These accounts upon vesting became the property of the United States of America. *Cummings v. Deutsche Bank*, 300 U.S. 115, 120-121, 57 S.Ct. 359, 81 L.Ed. 545. Under the Trading With the Enemy Act all proceedings to enforce payments out of vested property must be brought under that act. 50 U.S.C.A. Appendix, §§ 7(c), 9. Any claim for attorneys' fees to be paid out of vested property must be asserted under the Trading With the Enemy Act and cannot be enforced in a proceeding of this character. *Todeva v. Oliver Iron Mining Co.*, 232 Minn. 422, 45 N.W.2d 782; *In re Eckes' Estate*, 162 Minn. 226, 202 N.W. 492; *In re Miller's Estate*, 183 Or. 452, 193 P.2d 539; *In re Mangels' Will*, Sur., 68 N.Y.S.2d 80; *Blank v. Clark D.C.*, 79 F.Supp. 373.

The order is reversed with directions to the court to hear and determine the motions on their merits, and that if an award be made it shall not run against any interest payable to the Attorney General of the United States pursuant to the vesting of any account in him as successor to the Alien Property Custodian.

NOURSE, P. J., and GOODELL, J., concur.

122 Cal.App.2d 82

LEHMAN et al.

v.

ROBERTSON TRUCK-A-WAY et al.

Civ. 8266.

District Court of Appeal, Third District,
California.

Dec. 16, 1953.

Action was brought to recover for injuries sustained in collision. The Superior Court, Placer County, Lowell L. Sparks, J., entered judgment of nonsuit, in favor of one of the defendants, and the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that where common carrier by motor vehicle licensed under the Interstate Commerce Act entered into contract with owners of tractor whereby tractor was leased to common carrier to transport motor vehicles, and, while tractor and semitrailer, which was owned by common carrier were being returned empty, by employee of owners of tractor after trip transporting motor vehicles for common carrier, tractor and semitrailer collided with automobile, common carrier could not escape liability for injuries sustained by occupants of automobile because of alleged fact that owners of tractor were independent contractors, though owners of tractors had an Interstate Commerce Commission permit and a Public Utilities Commission permit.

Judgment reversed.

1. Master and Servant ☞317

One carrying on activity, which can be lawfully carried on only under a franchise, granted by public authority, and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm, caused to such others by negligence of contractor employed to do work in carrying on the activity.

2. Automobiles ☞194(1)

Where common carrier by motor vehicle licensed under the Interstate Commerce Act entered into contract with owners of tractor whereby tractor was leased to common carrier to transport motor vehicles, and while tractor and semitrailer, which was owned by common carrier, were being

returned empty, by employee of owners of tractor after trip transporting motor vehicles for common carrier, tractor and semitrailer collided with automobile, common carrier could not escape liability for injuries sustained by occupants of automobile because of alleged fact that owners of tractor were independent contractors, though owners of tractors had an Interstate Commerce Commission permit and a Public Utilities Commission permit. Interstate Commerce Act, 49 U.S.C.A. § 1 et seq.

Mancuso, Herron & Winn, San Francisco, for appellants.

Theodore Tamba, San Francisco, for respondent.

SCHOTTKY, Justice.

Defendant Robertson Truck-A-Way, hereinafter referred to as "Robertson," was a common carrier by motor vehicle licensed under the Interstate Commerce Act, and was engaged in the transportation of motor vehicles by means of trucks and trailers or semitrailers. Defendants Harmon and Delaney, hereinafter referred to as "defendants," were the owners of a three-ton Dodge tractor. By an agreement dated November 1, 1950, the defendants Robertson, and Harmon and Delaney entered into a contract whereby this Dodge tractor was leased to Robertson to transport motor vehicles. A trailer owned by Robertson was to be hooked to the Dodge tractor, upon which trailer the vehicles to be hauled would be placed. The trailer was of such a nature that the Dodge tractor had to be specially fitted to accommodate it.

The agreement provided that it was to last for a term of one year, to continue thereafter until termination by either party by the giving of 30 days' notice to the other; that the Dodge tractor was to be used by defendants Harmon and Delaney exclusively to transport motor vehicles for Robertson; that said defendants were to maintain the tractor in first-class operating condition at all times; that the defendants were either to drive the tractor themselves or employ a qualified driver; that logs or records were to be kept by defendants on

their transportation activities for Robertson; that defendants were to carry Workmen's Compensation at their own expense; that Public Liability and Property Damage insurance was to be placed on the Dodge tractor and trailer by Robertson, but to be charged to and paid for by defendants; that defendants were to be fully responsible for all vehicles placed with them for transportation; that Robertson was to pay the 3% gross receipts tax, but same was to be deducted by it from the rental paid to defendants; that defendants were to be independent contractors and not agents or employees of Robertson.

Pursuant to the agreement defendants Harmon and Delaney undertook to transport vehicles for Robertson as directed by it. On the morning of February 17, 1951, the Dodge tractor and semitrailer were being operated in a westerly direction on U. S. Highway No. 40, approximately five miles east of Colfax, California, by one E. H. Lemond, a defendant herein, and admittedly an employee of defendants Harmon and Delaney. The unit was being returned empty by Lemond from a trip transporting vehicles to Idaho for Robertson. Plaintiffs were also traveling upon said highway in an easterly direction in an automobile driven by plaintiff Harold R. Hall. A collision occurred between the two vehicles whereby all of the plaintiffs sustained injuries.

By a complaint alleging the negligence of the defendants, plaintiffs instituted suit against Robertson, Delaney, Harmon, Lemond and various Does for damages.

The action was tried before a jury. A motion for a nonsuit by defendant Robertson was granted. The jury returned a verdict in favor of plaintiffs in varying amounts against defendants Harmon and Delaney. Plaintiffs have appealed from the judgment of nonsuit in favor of defendant Robertson Truck-A-Way and against all plaintiffs.

1. "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to

Two main questions are presented upon this appeal: (1) Were Harmon and Delaney agents and employees of Robertson, or were they independent contractors? (2) If Harmon and Delaney were independent contractors was the activity carried on by Robertson one which it could delegate?

Appellants have pointed to a number of parts of the record which they argue made the question of whether defendants Harmon and Delaney were agents and employees or independent contractors one for the jury to determine. However we deem it unnecessary to discuss these contentions because we have concluded that the duties arising from the activity in which Robertson was engaged were duties which could not be delegated and it therefore becomes immaterial so far as this appeal is concerned, whether the relationship was that of agency, employment, or independent contractor.

[1] Since the instant case was tried the case of *Eli v. Murphy*, 39 Cal.2d 598, 248 P.2d 756, has been decided by our Supreme Court. The court said at page 599, of 39 Cal.2d, at page 757 of 248 P.2d:

"C.M.T. contends that under the terms of its contract with Leo J. Murphy, the latter was an independent contractor, and that it is therefore not liable for the negligence of Murphy's employee. Plaintiffs, on the other hand, contend that under both the common law and certain regulations of the Public Utilities Commission, C.M.T., as a highway common carrier, could not delegate its duties to an independent contractor so as to escape liability for their negligent performance.

"The common law principle upon which plaintiffs rely has been enunciated in section 428 of the Restatement of Torts,¹ and has frequently been applied to impose liability upon franchised common carriers who have en-

others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

gaged independent contractors to transport goods over the public highways. *Venuto v. Robinson*, 3 Cir., 118 F.2d 679, 682-683; *War Emergency Co-op. Ass'n v. Widenhouse*, 4 Cir., 169 F.2d 403, 406-407; *Cotton v. Ship-By-Truck Co.*, 337 Mo. 270, 85 S.W.2d 80, 84; see also, *Brown v. L. H. Bottoms Truck Lines, Inc.*, 227 N.C. 299, 42 S.E.2d 71, 76; *Costello v. Smith*, 2 Cir., 179 F.2d 715, 717; *Anno.*, 16 A.L.R.2d 960, 961, note 2; *Restatement in the Courts, Torts*, § 428. We have concluded that it is applicable here.

"C.M.T., operating as a highway common carrier, is engaged in a 'business attended with very considerable risk', *Venuto v. Robinson*, *supra*; *Barry v. Keeler*, 322 Mass. 114, 76 N.E. 2d 158, 164; *Hodges v. Johnson, D.C. [Va.]*, 52 F.Supp. 488, 490, and the Legislature has subjected it and similar carriers to the full regulatory power of the Public Utilities Commission to protect the safety of the general public. *Pub. Utilities Code*, §§ 213, 761, 762, 768, 1062. The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who had been granted the privilege of conducting their business over the public highways. Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable. *Liberty Highway Co. v. Callahan*, 24 Ohio App. 374, 157 N.E. 708, 711; *Stickel v. Erie Motor Freight, Inc.*, 54 Ohio App. 74, 6 N.E.2d 15, 17; see also, *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 604-605, 110 P.2d 1044, and cases cited."

[2] While in the instant case appellant Robertson was a common carrier licensed under the Interstate Commerce Act, 49 U.S. C.A. § 1 et seq., instead of under California law, the rule stated in *Restatement* and in *Eli v. Murphy* is nevertheless applicable. At least three cases have applied the restatement rule to holders of permits as common carriers in interstate commerce. These cases are almost factually alike to the instant case. They are *Venuto v. Robinson*, 3 Cir., 118 F.2d 679; *Hodges v. Johnson, D.C.Va.*, 52 F.Supp. 488; *War Emergency Co-op. Ass'n v. Widenhouse*, 4 Cir., 169 F.2d 403. In these three cases it was held that the duties of one holding a permit to engage as a common carrier in interstate commerce were nondelegable, and that liability for the negligence of an independent contractor could be imposed upon the holder of the permit. Thus in the instant case, while factually *Harmon* and *Delaney* may have been independent contractors, still the duty which Robertson attempted to delegate to them was one which could not be delegated. Robertson was engaged in an activity only by virtue of the permit it held from the Federal Interstate Commerce Commission. The activity was one which involved an unreasonable risk of harm to others. *Eli v. Murphy*, *supra*; *Venuto v. Robinson*, *supra*; *Hodges v. Johnson*, *supra*; *War Emergency Co-op Ass'n v. Widenhouse*, *supra*.

Respondent contends that appellants can find no comfort in the case of *Eli v. Murphy* because there was evidence that *Harmon* and *Delaney* were operating their truck under a license from the Interstate Commerce Commission. Respondent quotes from page 600 of 39 Cal.2d, from page 757 of 248 P.2d, as follows:

"C.M.T. contends, however, that *Gaskill v. Calaveras Cement Co.*, 102 Cal.App.2d 120, 226 P.2d 633, establishes the rule in this state that a carrier is not liable for the conduct of an independent contractor engaged to transport freight over the highways. In that case, however, both the defendant and the independent contractor stood on an equal footing as

contract carriers operating under permits from the Public Utilities Commission. Such carriers are not required to secure certificates of public convenience and necessity and they are not subject to the safety regulations the commission may establish for highway common carriers. They are entitled to permits as a matter of right on complying with the statutory provisions. Pub. Utilities Code, § 3572. Thus the carriers in that case were engaged in a business open to all, and accordingly, the principle enunciated in section 428 of the Restatement of Torts was inapplicable."

Respondent then argues that respondent and its co-defendants stood on an equal footing as both had Interstate Commerce Commission permits and the co-defendants a Public Utilities Commission permit, and that co-defendants Harmon and Delaney were independent contractors over whom the Interstate Commerce Commission and the Public Utilities Commission exercised control, thus taking the instant case out of the rule of *Eli v. Murphy*.

This argument is ingenious but unconvincing. Respondent Robertson was a common carrier and defendants Harmon and Delaney were transporting vehicles for Robertson. Even though Harmon and Delaney were independent contractors and were licensed by the Interstate Commerce Commission and the Public Utilities Commission, this would not allow respondent Robertson to escape liability for the negligent conduct of its contractors for the reasons stated in *Eli v. Murphy*, supra. The duties of respondent Robertson as a common carrier were non-delegable, and being non-delegable they could not be delegated to Harmon and Delaney even though said co-defendants were licensed by the Interstate Commerce Commission and the Public Utilities Commission.

It follows from the foregoing that the court erred in granting a nonsuit as to respondent Robertson.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

PEOPLE v. SEVERINO.

Cr. No. 5040.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1953.

As Amended Jan. 11, 1954.

Defendant was convicted in the Superior Court of Ventura County, Walter J. Fourn, J., of conspiracy to solicit for a prostitute, and of soliciting for a prostitute, and he appealed. The District Court of Appeal, White, P. J., held that information was sufficient to apprise defendant of the offenses with which he was charged, and that the evidence sustained conviction.

Judgments affirmed.

1. Criminal Law ☞1144(13)

On appeal following a guilty verdict in a criminal case, the appellate court is required to view the facts elicited at the trial in a light most favorable to the prosecution.

2. Indictment and Information ☞108

An information is not required to name the statute which the accused is charged with violating, but it is enough that he be advised of the act which he is charged with having committed, and consequently fact that specific statute which act violated was designated in information by its unofficial, rather than its official citation, did not render information defective. Pen.Code, §§ 182, 951, 952; Gen.Laws, Act 1907, § 1.

3. Conspiracy ☞43(6)

Prostitution ☞3

Information charging defendant in first count with crime of conspiracy to solicit for a prostitute and in second count with offense of soliciting for a prostitute, was not defective because of failure to specify that defendant was a male, since the matter was peculiarly within defendant's own knowledge and could not have been prejudicial to him, and a female could, under certain conditions, have been guilty of the crimes charged in the information. Pen.Code, §§ 182, 951, 952; Gen.Laws, Act 1907, § 1.

4. Conspiracy ⚭43(6)

Prostitution ⚭3

Information charging defendant with conspiracy to solicit for a prostitute, and with offense of soliciting for a prostitute, was not defective because of failure to allege that the named prostitute was a female, since the very term prostitute contemplates a female who offers herself indiscriminately to sexual intercourse for hire.

5. Prostitution ⚭1

"Prostitution" is the common, indiscriminate, illicit intercourse of a woman for hire. Pen.Code, §§ 182, 951, 952; Gen. Laws, Act 1907, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Prostitution".

6. Conspiracy ⚭43(6)

Prostitution ⚭3

Information charging defendant with conspiracy to solicit for a prostitute, and with offense of soliciting for a prostitute, was not defective because of failure to designate that the acts were done "wilfully, maliciously, and feloniously" since an unlawful act is presumed to have been done with intent to violate the law.

7. Criminal Law ⚭24

An unlawful act is presumed to have been done with intent to violate the law.

8. Indictment and Information ⚭59

Information charging defendant with conspiracy to solicit for a prostitute, and with soliciting for a prostitute, was not defective because of failure to designate the crimes as felonies. Pen.Code, § 182; Gen. Laws, Act 1907, § 1.

9. Indictment and Information ⚭71

An accusatory pleading is sufficient if it is so worded as to give the defendant notice of the offenses with which he is charged. Pen.Code, §§ 7, 21, 952.

10. Indictment and Information ⚭71

Information charging defendant with conspiracy to solicit for a prostitute, and in a second count with offense of soliciting for a prostitute, and reciting the overt acts relative to each of such counts, was

sufficient to give defendant notice of the offenses with which he was charged. Pen. Code, §§ 7, 21, 952.

11. Criminal Law ⚭617

As a general rule, an accused in a criminal case may waive his statutory rights, including the right to statutory period to prepare for trial, by failing to enter a timely objection. Pen.Code, §§ 1009, 1049.

12. Criminal Law ⚭617

Where trial of defendant on criminal charge was set for second day after arraignment on an amended information, pursuant to request of defendant, concurred in by his counsel, after court had offered a reasonable continuance, defendant's rights, if any, under statute, to a continuance to prepare for trial, were waived. Pen.Code, §§ 1009, 1049.

13. Prostitution ⚭1

A defendant could be convicted of soliciting for a prostitute even though the negotiations therefor were carried on through a third person because of defendant's inability to speak the language of the person solicited. Pen.Code, § 182; Gen. Laws, Act 1907, § 1.

14. Prostitution ⚭4

Evidence sustained conviction of defendant for soliciting for a prostitute. Pen.Code, § 182; Gen.Laws, Act 1907, § 1.

15. Criminal Law ⚭1171(1)

In prosecution of defendant for conspiracy to solicit for a prostitute, and for soliciting for a prostitute, record disclosed no prejudicial misconduct of prosecutor in his argument to the jury.

16. Conspiracy ⚭28

Under provision of Penal Code making a conspiracy to commit any crime punishable, the term "any crime" embraces all crimes known to the law of the state, whether defined or made punishable by the Penal Code or by any other law or statute. Pen.Code, § 182.

17. Criminal Law ⚭161

A defendant who has been tried but once cannot successfully plead double jeopardy.

18. Criminal Law ◀1209

The crime of conspiracy is a distinct offense from the commission of the crime forming the object of the conspiracy, and thus the sentencing of defendant for the crime of conspiracy to solicit for a prostitute, and also for the crime of soliciting for a prostitute does not amount to double punishment for the same crime. Pen.Code, §§ 182, 654; Gen.Laws, Act 1907, § 1.

19. Criminal Law ◀29

When two separate offenses arise out of the same transaction, and when each offense is stated as a separate count, and when the two offenses differ in their elements, and one is not included in the other, the accused may be convicted of the two offenses, and the test is identity of the offenses as distinguished from the identity of the transactions from which they arise.

Arnold Severino, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura County, Albert J. Holzhauer, Jr., Dep. Dist. Atty., Ventura County, Ventura, for respondent.

WHITE, Presiding Justice.

In an amended information filed by the District Attorney of Ventura County defendant was charged in Count I with the crime of conspiracy to solicit for a prostitute and in Count II with the offense of soliciting for a prostitute.

Following the entry of not guilty pleas as to both counts, the cause proceeded to trial before a jury which returned verdicts finding defendant guilty on both counts. Probation was denied and defendant was sentenced to state prison. This appeal is from the judgments of conviction.

[1] Viewing the facts elicited at the trial in a light most favorable to the prosecution, as we are required to do following a guilty verdict, we find in the record evidence that on January 31, 1953, while visiting a house of prostitution known as the "Casa Blanca Bungalows", in Ensenada, Mexico, defendant met Richard Hocking and his wife, Bettina Hocking. Mr. Hock-

ing was employed as night manager and Mrs. Hocking worked as a prostitute for the house of prostitution. Defendant and Richard Hocking talked of several "deals" including running guns from the United States into Mexico; selling defendant's automobile, which was registered to defendant but legally owned by a finance company, in Mexico and then reporting it stolen upon defendant's return to the United States so that defendant "could pick up payment off it"; and whether Hocking knew where defendant and a companion of his could "pick up marijuana". Hocking offered to assist defendant in selling his automobile. Defendant, a member of the United States Air Force and stationed at the Oxnard Air Force Base, Oxnard, California, told Hocking that he would return to Ensenada on Monday night and that he would try to sell his car in Mexico and return to Oxnard by bus. Defendant then drove to his base in Oxnard, arriving there about two o'clock Monday morning, February 2.

About ten o'clock that same morning defendant prepared to return to Mexico. An Air Force acquaintance, Donald S. Hamilton, agreed to share expenses with defendant and accompany him to Mexico. They drove to Ensenada, Mexico, arriving at the "Casa Blanca Bungalows" at about 9:30 o'clock Monday evening. They were met at the motel by Richard Hocking who stated that it was getting "too hot" for him in Ensenada and that he wanted to get a ride back "across the line" with defendant in his car. Defendant and Richard Hocking held a conversation in Hocking's room at the motel. Mrs. Hocking was in the room for a few minutes until her husband asked her to leave. Donald Hamilton was present and overheard a portion of the conversation but did not participate in it. Defendant discussed the possibilities of opening a house of prostitution in Oxnard, California, how many servicemen were there and how easy it would be to make money in Oxnard by opening such a house. Hocking appeared to be in agreement with what defendant had to say. Defendant stated that he would transport Hocking to Oxnard for the purpose of set-

ting up a house of prostitution. Donald Hamilton left the room and defendant and Hocking continued with their conversation. Defendant agreed to take Mrs. Hocking along with them to Oxnard. Mrs. Hocking packed her clothes. Defendant had an act of sexual intercourse with Mrs. Hocking and paid her \$3.

Defendant, Hamilton, and the Hockings left Ensenada, and defendant drove the automobile. During the trip the subject of conversation between defendant and Hocking was prostitution and how to operate it successfully. Hamilton never entered into or participated in this discussion.

On the way to Tijuana, defendant and Hocking talked about opening a house of prostitution in Oxnard. In Tijuana, defendant and Mr. and Mrs. Hocking made an unsuccessful search to find girls to take to Oxnard for the purpose of prostitution. After defendant crossed the border at Tijuana, he suggested that Mrs. Hocking could be used for the purpose of prostitution in connection with their plans if other girls couldn't be found. Although there was no specific plan agreed upon as to how they were to operate upon arrival in Oxnard, defendant and the Hockings continued to express their ideas on the subject of prostitution with a view toward its successful exploitation in Oxnard.

At Malibu Beach, at defendant's request, Hamilton changed places with him and drove the car to Oxnard. When they arrived at Oxnard, defendant was awakened. He directed Hamilton to the Sequoia Hotel. Mr. and Mrs. Hocking registered at the Sequoia Hotel at about 1:30 p.m., Tuesday, February 3, 1953. Hamilton and the defendant returned to the Air Force Base at Oxnard. Hamilton parked the car at the front gate. Defendant remained in the car asleep. Hamilton went on the base in search of his automobile. Four or five hours later Hamilton awakened defendant, who was still asleep in his parked automobile, and asked if he could use defendant's car to locate Hamilton's automobile. Hamilton and defendant went to Camarillo looking for the latter's automobile. They were unsuccessful and defendant requested that Hamilton drive to the Sequoia Hotel.

Just before they reached the city limits of Oxnard defendant told Hamilton that he and the Hockings were going to split the money that they made three ways. Defendant offered Hamilton a share of defendant's split if Hamilton would get customers for him. Hamilton replied that defendant "was crazy to think he could get away with such an idea" and drove defendant to the Sequoia Hotel.

Mr. and Mrs. Hocking got into the automobile and defendant drove around Oxnard. He pointed out several night spots in Oxnard and explained that servicemen frequented those places and that they could go into the bars before closing time, pick out the customers and take them up to the room. As they departed from Oxnard by way of East Fifth Street, defendant pointed to the Pacific Labor Camp and explained that if they couldn't pick up servicemen in Oxnard, they could "work" the camps until they "got set on their feet". As they drove past Rose Road, defendant indicated that Rose Road would be a safe place to work because the police never patrolled that area. Defendant pointed to a six or eight room house near the Air Force Base that would be ideal for a house of prostitution since it was close to the base and the servicemen wouldn't have any great distance to walk.

As they passed the Air Force Base they observed a house trailer. Defendant commented that perhaps they could rent such a trailer, operate out of it and move it from camp to camp. They arrived in Camarillo where Hamilton got out of the defendant's automobile and went away with some friends. This was the last time that Mr. and Mrs. Hocking saw Hamilton. Defendant then returned the Hockings to Oxnard.

The next evening, defendant and Mr. and Mrs. Hocking looked at a house near the Air Force Base that "looked suitable" for a house of prostitution. Defendant inquired of a lady living adjacent to it and was told that a road was going through and that all the houses along that road were to be moved. That evening definite plans were made to go out the following night to the labor camps. It was agreed between defendant and Hocking that they would go out to the Mexican labor camps and pick

up the men from the camps, taking them two at a time. Defendant stated that they could park on Rose Road and use the car to prostitute Mrs. Hocking. The price was to be set at five or ten dollars. If they couldn't get ten dollars, they would take five dollars. Defendant demanded a fifty per cent split of the proceeds of the prostitution because his car was to be used and because his risk was greater due to his being a member of the Air Force.

On Thursday evening, February 5, 1953 a little after eight o'clock, defendant transported Mr. and Mrs. Hocking to the Pacific Labor Camp on East Fifth Street, in Oxnard. Three or four men were standing in front of the gate. Defendant's car was parked across the road from the camp. As three of the men crossed over to defendant's automobile, defendant reminded Mrs. Hocking to charge five dollars and to collect in advance. Speaking in Spanish, Mr. Hocking inquired of the men whether they wanted a girl and told them it would cost five dollars. After a short discussion among themselves, three of the men said they "wanted to go". Defendant stated that they could take two of them, bring them back and take some more. Two of the men got into defendant's automobile. Ramon Castillo was seated in the rear seat with Mrs. Hocking and Raimundo Vasquez was seated in the front, next to Mr. Hocking. Defendant started his car, turned around and proceeded east on East Fifth Street. Turning north on Rose Road, defendant parked his car on the left hand side of the road about 150 yards north of East Fifth Street, behind a hedge of trees.

It was dark. Defendant, Hocking and Vasquez got out of the car and walked across the road. Mrs. Hocking asked Castillo for the money and the latter handed her a ten dollar bill. Mrs. Hocking called for change. Defendant walked close to the car and Mrs. Hocking handed the ten dollar bill to defendant who removed his wallet from his pocket and handed the change back to Mrs. Hocking. Mrs. Hocking handed Castillo five dollars change. Mrs. Hocking removed her skirt and panties and placed them on the front seat. Castillo

removed his trousers and attempted to have an act of sexual intercourse with Mrs. Hocking. They were unsuccessful and Castillo asked Mrs. Hocking to go outside with him. Mrs. Hocking, carrying a blanket, left the car with Castillo and went into the trees, to the left of the car. Mrs. Hocking was in the process of spreading the blanket when the police arrived.

Police officers White and Hubbard had been patrolling on Rose Road in a police car. When they noticed defendant's unattended automobile parked on the wrong side of the road, they stopped to investigate. The officers first noticed defendant and questioned him. Defendant claimed that he had "stopped for a latrine break" and argued that the Mexican nationals were not with him. When the officers found the woman's panties and skirt in the front seat of defendant's car, the officers asked defendant where the woman was. Defendant stated: "there isn't any woman around here. The skirt and pants belong to my wife." Officer Hubbard took defendant and Vasquez to the police station in defendant's automobile. Castillo and Mr. Hocking got into the patrol car with Officer White. On the way to the police station, Hocking asked Officer White to return to get his wife. Turning back, Officer White found Mrs. Hocking walking out from behind the trees with a brown blanket wrapped around her. At the police station defendant and Mr. and Mrs. Hocking were searched. Defendant was the only person searched who had a ten dollar bill in his possession.

Appellant first attacks the sufficiency of the amended complaint. The substantive part thereof reads as follows:

"Count I

"The District Attorney of the County of Ventura hereby accuses Arnold Severino of the crime of violation of Section 182 of the Penal Code (conspiracy to violate Sec. 1 of Act 1907 of Deering's General Laws) in that on or about February 2, 1953, in the County of Ventura, State of California, he did unlawfully agree and conspire with Richard Edgar Hocking to solicit or re-

ceive compensation for soliciting for a prostitute, Bettina Hocking, knowing the said Bettina Hocking to be a prostitute.

"Overt Act No. 1

"That pursuant to said agreement and conspiracy, and to carry out the objects and purposes of the same, the said Arnold Severino together with Richard Edgar Hocking, transported Bettina Hocking in the automobile driven by Arnold Severino to East 5th Street and Rose Road in Oxnard, California, on or about February 5, 1953, for the purpose of having sexual intercourse with Ramon Ornelas Castillo and Raimundo Vasquez.

"Count II

"For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, and connected in its commission, the said Arnold Severino is further accused by the District Attorney as follows:

"That Arnold Severino committed the crime of violation of Section 1 of Act 1907 of Deering's General Laws in that on or about February 5, 1953, in the County of Ventura, State of California, knowing Bettina Hocking to be a prostitute, he did solicit or receive compensation for soliciting for such prostitute."

Appellant's claim that the acts described in the information do not constitute crimes under any California law is answered by the fact that the allegations of Count I constitute a crime under the provisions of Statutes of 1911, Chapter 15, page 10, as amended by Statutes of 1921, Chapter 100, page 96, and in said count defendant was accused of conspiring with another to commit the acts which constitute a crime under the aforesaid statutes. And, conspiring "to commit any crime" is made a criminal offense under Sec. 182 of the Penal Code. In Count II, defendant was charged with having solicited or received compensation for soliciting for a named person whom he knew to be a prostitute. This is denounced as a crime by the aforesaid Statutes of 1911, as amended by the Statutes of 1921.

[2] Appellant urges that he was and is thoroughly confused by the fact that in referring to the foregoing statutory law, the amended information designated it by its unofficial citation, that is, "Act 1907, Deering's General Laws". There is no requirement or procedure that requires the information to name the statute which the accused is charged with violating. It is enough that he be advised of the act which he is charged with having committed, (together with the particulars required by Penal Code sections 951, 952). In the case now engaging our attention, there was compliance with the code sections just cited. It was, therefore, immaterial that the law was designated in the information by its unofficial, rather than its official citation. In numerous cases, the unofficial citation has been accepted by the courts without question. See, *People v. Giambone*, 119 Cal.App.2d 338, 259 P.2d 10; *People v. Israel*, 91 Cal.App.2d 773, 776, 206 P.2d 62.

[3] Appellant next contends that the amended information is defective because it fails to specify therein that he was a male. As contended by appellant, one of the elements or conditions that must exist to constitute the offense is that the accused must be a male person. But in the case at bar the allegation that the appellant is a male person would be of no aid to him, since that is a matter peculiarly within his own knowledge, and, whether guilty or innocent, he is equally apprised of his sex. No showing of prejudice to appellant is shown. And, appellant's premise that only a male can commit the crime charged is erroneous because a female may, under certain conditions, be found guilty of the crimes charged in the amended information, *People v. Young*, 132 Cal.App. 770, 771, 772, 23 P.2d 524.

[4,5] We find no merit in appellant's contention that the amended information is defective because it fails to allege that the named prostitute is a female. Prostitution has been justifiably defined as the common, indiscriminate, illicit intercourse of a *woman* for hire. *People v. Mitchell*, 1949, 91 Cal.App.2d 214, 217, 205 P.2d 101; *People*

v. Marron, 1934, 140 Cal.App. 432, 434, 35 P.2d 610. A prostitute is "*a woman who offers herself indiscriminately to sexual intercourse for hire.*" *People v. Phillips*, 1945, 70 Cal.App.2d 449, 452, 160 P.2d 872, 874; Webster's New International Dictionary (2d Edition). Therefore, the designation of Bettina Hocking as a prostitute sufficiently identifies her as a female person within the meaning of the statutes. *People v. Anonymous*, 161 Misc. 379, 292 N.Y. S. 282; *Cole v. State*, 1922, 156 Ark. 9, 245 S.W. 303.

[6, 7] Equally without merit is appellant's claim that the failure to designate in the amended information that the acts charged were done "wilfully, maliciously, and feloniously" invalidated the pleading. An unlawful act is presumed to have been done with the intent to violate the law. *People v. Murphy*, 1936, 17 Cal.App.2d 575, 585, 62 P.2d 592; *People v. Harris*, 1866, 29 Cal. 678; *People v. Montgomery*, 1941, 47 Cal.App.2d 1, 117 P.2d 437; Penal Code, sections 7 and 21.

The amended information did allege the only specific mental element necessary in the crimes charged—that appellant had knowledge that the person for whom he was soliciting was a prostitute.

[8] Appellant's contention that the amended information is deficient because it failed to designate the crimes as felonies was rejected in *People v. Smith*, 215 Cal. 749, 751, 12 P.2d 945.

[9, 10] The accusatory pleading in the instant case is so worded as to give appellant notice of the offenses with which he is charged. That is all the law requires, Penal Code, section 952; *People v. Roberts*, 40 Cal.2d 483, 486, 254 P.2d 501; *People v. Pierce*, 14 Cal.2d 639, 644, 96 P.2d 784; *People v. Longo*, 119 Cal.App.2d 416, 259 P.2d 53; *People v. Benenato*, 77 Cal. App.2d 350, 362, 175 P.2d 296. At no time during the trial did appellant or his counsel assert that either of them were unaware of the charges made against the former. Finally, as to all the criticisms of the information, the suggestion may be made that any defect therein was rendered innocuous and is shown to have been with-

out prejudice by the evidence at the trial.

Relying on section 1049 of the Penal Code which provides that a defendant, upon entering his plea, is entitled to at least five days within which to prepare for trial, appellant insists that since his plea to the amended information was entered only two days before trial, he was deprived of his legal rights, and "did not have sufficient time to prepare for trial".

In advancing this claim appellant overlooks the provisions of section 1009 of the Penal Code which provides, in part, that when an information is amended "* * * the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. * * *

[11] A complete answer is found to appellant's claim in this regard under the rule that, generally speaking, an accused may waive his statutory rights by merely failing to enter a timely objection, *People v. Suesser*, 142 Cal. 354, 357, 75 P. 1093; *People v. Rodley*, 131 Cal. 240, 63 P. 351; *People v. Lightner*, 49 Cal. 226; *People v. Flores*, 37 Cal.App.2d 282, 99 P.2d 326; *People v. Brown*, 83 Cal.App. 236, 256 P. 569.

In the instant case there was a specific and direct waiver by appellant of any rights inuring to him under section 1049 of the Penal Code.

On March 24, 1953, when appellant was arraigned upon the amended information, the following occurred:

"The Court: Well, you have a right to be represented by an attorney and you are represented by Mr. Fay, is that right?"

"The Defendant: Yes, your Honor."

"The Court: You have a right to a jury trial, to the process of the Court for the purpose of bringing in witnesses to testify in your behalf, and you have a right to a reasonable continuance. What do you want to do now? (Emphasis added.)"

"The Defendant: I want to go to trial Thursday (March 26, 1953) like it is already set up."

"The Court: What?

"Mr. Fay (Counsel for Defendant): He wants to go to trial Thursday on both counts, your Honor."

[12] It was at the request of appellant, concurred in by his counsel, after the court had offered a reasonable continuance, that the cause was set for trial on the second day after arraignment on the amended information. Appellant, therefore, cannot now be heard to complain.

While appellant does not attack the sufficiency of the evidence to support the conviction of conspiracy as charged in Count I, he does challenge the sufficiency of the evidence to sustain the conviction under Count II wherein he was charged with soliciting for, or receiving money for soliciting for, a prostitute. This contention he predicates on the claim that Richard Hocking was the one who actually made the offer to the Mexican laborers to have sexual intercourse with Bettina Hocking. Appellant urges that this is true because he could not speak Spanish and the Mexican laborers could not speak English.

[13] However, the record in the present case reflects that the negotiations were carried on by appellant asking Hocking (who spoke both English and Spanish) to inform the Mexican laborers that a girl was available; to inform the Mexican laborers that only one of them could come in the automobile at one time. Appellant also told Hocking to inform the Mexican laborers that the price was \$5.00. It was appellant who made change for the money offered during the transaction. Hocking, who understood English, followed the directions given him by appellant. The latter is not any the less guilty when he carried on the foregoing and other negotiations in furtherance of his design and plan, through a third person. *People v. Torres*, 193 Cal. 730, 733, 227 P. 177.

[14] Even though it be conceded that appellant did not personally conduct the solicitations, nevertheless, he could be prosecuted as a principal because he aided and abetted Richard Hocking in the latter's

activities. Penal Code, section 31. Evidently unaware of the code provision just cited, appellant recognizes that he extended aid and abetted Hocking because, in his opening brief he says: "that a prosecution surrounding 'aiding and abetting' would have been more applicable in the premises". We regard the evidence as amply sufficient to uphold the conviction on Count II.

It is next contended by appellant that the District Attorney was guilty of prejudicial misconduct during his argument to the jury. It is urged by appellant that his credibility was "unfairly impeached by the over-reaching of the prosecutor's summation speech to the jury".

When appellant was preparing, and at the time he filed his opening brief, he did not have that portion of the Reporter's Transcript containing the argument of the District Attorney to the jury. Consequently, he was unable to point out in what respect he believed the argument to be unfair and prejudicial. However, on July 16, 1953, the County Clerk of Ventura County, forwarded to appellant, via U. S. Mail Service, Reporter's Supplemental Transcript, which contained the argument of the prosecutor. In his reply brief, filed October 26, 1953, after he was in possession of a copy of the District Attorney's argument to the jury, appellant did not direct our attention to any portion of the argument in question which he claimed was in violation of his rights and prejudicial to him.

[15] We have, however, read the argument of the prosecutor to the jury and nowhere therein do we find anything that constitutes prejudicial misconduct.

Appellant next urges that the crime of soliciting for a prostitute is not contained in the Penal Code and that the judgment under Count I is invalid because section 182 of the Penal Code prescribes punishment for conspiracy to commit only those crimes which are denounced in the Penal Code.

[16] Prior to the amendment of Penal Code, section 182 in 1943, the language thereof may have been ambiguous to a degree that would warrant such a claim.

However, the section now provides: "If two or more persons conspire:

"1. To commit any crime;

* * * * *

"They are punishable as follows:

"When they conspire to commit any felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony."

But, prior to the 1943 amendment it was held, contrary to appellant's claim, that the words "any crime" as used in the first paragraph of section 182 included all crimes known to the law of this state, whether defined or made punishable by the Penal Code or by any other law or statute of the state, *Doble v. Superior Court*, 197 Cal. 556, 565, 241 P. 852.

[17] Appellant's claim that the "information charges double jeopardy" is without merit. Since he was tried but once no plea of twice in jeopardy can be made, *People v. Chessman*, 38 Cal.2d 166, 193, 238 P.2d 1001; *People v. Amick*, 20 Cal.2d 247, 251, 125 P.2d 25.

[18, 19] Appellant's contention that punishing him separately for the violation of section 182 of the Penal Code (conspiracy) and for violation of section 1 of Act 1907 of Deering's General Laws (soliciting or receiving compensation for soliciting for a prostitute) amounted to double punishment which is forbidden by section 654 of the Penal Code, cannot be sustained. The crime of conspiracy is a distinct offense from the commission of the crime forming the object of the conspiracy. Under the circumstances here one is not an essential part of the other. The crimes charged against appellant were separate and distinct offenses under the law, and the proof supporting convictions of both crimes was different as to each offense, *People v. Martin*, 114 Cal.App. 392, 396, 300 P. 130; *People v. Gordon*, 71 Cal.App. 2d 606, 628, 163 P.2d 110. When two separate offenses arise out of the same transaction and when each offense is stated as a separate count and when the two offenses differ in their elements, and one is not included in the other, an accused may be

convicted of the two offenses. As was said in the case of *People v. Chait*, 69 Cal.App. 2d 503, 518, 159 P.2d 445, 454, quoting from *People v. Hoyt*, 20 Cal.2d 306, 317, 125 P.2d 29, "The test is the identity of the offenses as distinguished from the identity of the transactions from which they arise." See, also, *People v. Roberts*, supra, 40 Cal. 2d at page 491, 254 P.2d at page 505.

For the foregoing reasons, the judgments are, and each of them is affirmed.

DORAN and DRAPEAU, JJ., concur.



122 Cal.App.2d 244

PEOPLE v. BENNETT,¹

Cr. 944.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1953.

Hearing Denied Jan. 20, 1954.

Salesman, who sold stamp vending machines to customers by allegedly misrepresenting that each customer would have exclusive territory in same county, and that average income from each machine would be \$8 a month, was convicted of grand theft on two counts. The Superior Court, of Riverside County, O. K. Morton, J., entered judgment on verdict and an order denying motion for new trial, and salesman appealed. The District Court of Appeal, Griffin, P. J., held that evidence sustained verdict.

Judgment and order affirmed.

1. False Pretenses $\S$ 49(1)

In a grand theft prosecution of salesman, who sold stamp vending machines to customers by allegedly misrepresenting that each customer would have exclusive territory in same county, and that average income from each machine would be \$8 a month, evidence was sufficient to show that each customer was defrauded out of an amount in excess of \$200.

2. False Pretenses $\S$ 22

In a grand theft prosecution of salesman, who sold stamp vending machines to customers by allegedly misrepresenting that each customer would have exclusive territory in same county, and that average income from each machine would be \$8 a month, doctrine of caveat emptor had no application.

3. False Pretenses $\S$ 38

In a grand theft prosecution of salesman, who sold stamp vending machines to customers by allegedly misrepresenting that each customer would have exclusive territory in same county and that average income from each machine would be \$8 a month, it was not necessary for the prosecution to show that complaining witnesses paid any extra consideration for exclusive territory or for minimum guaranteed earnings per machine.

4. Criminal Law $\S$ 447

In grand theft prosecution of salesman, who sold stamp vending machines to customers by allegedly misrepresenting that each customer would have exclusive territory in same county, and that average income from each machine would be \$8 a month, evidence concerning alleged oral misrepresentations was admissible, though agreements between salesman and customers had been reduced to writing and had been signed by the parties, since the prosecution was not a party to the agreements and was not bound by them. Code Civ. Proc. $\S$ 1856, 1860.

False Pretenses $\S$ 49(4)

In grand theft prosecution of salesman, who sold stamp vending machines to customer by allegedly misrepresenting that each customer would have exclusive territory in same county, and that average income from each machine would be \$8 a month, newspaper advertisement stating that exclusive right to operate machines in area was to be given to "one man or woman" and that the area would then be closed at once, sufficiently corroborated evidence concerning alleged misrepresentations. Pen.Code, $\S$ 1110, 1111.

6. False Pretenses $\S$ 49(1)

In grand theft prosecution of salesman, who sold stamp vending machines to customers through alleged misrepresentations, evidence that salesman represented that each of the customers was to receive an exclusive territory in the area and that the machines would earn a minimum of \$8 a month per machine, was sufficient to support jury's verdict of guilty.

7. Criminal Law $\S$ 778(11)

In grand theft prosecution, evidence authorized the giving of instruction on flight. Pen.Code, $\S$ 1127c.

Everett H. Smith, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Dep. Atty. Gen., William O. Mackey, Dist. Atty., W. B. Gustaveson, Dep. Dist. Atty., Riverside, for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was charged in an indictment with grand theft. In one count it is charged that on November 21, 1951, he took more than \$200 from Clemens Hinke, and in another count that on November 23, 1951, he took more than \$200 from Mrs. Esther J. Evenson. The charges and convictions on each count were based upon claimed false representations made in the sale of stamp-vending machines as a business to be conducted in Riverside County. Defendant, who lived in Los Angeles, was a distributor of the machines for the Federal Dispenser Corporation. The evidence shows that the corporation never authorized the distributor defendant to guarantee any certain profit or income from such machines when making sales thereof, and never authorized him to grant exclusive areas to any individual purchaser.

On November 19, 1951, defendant ran and paid for an advertisement in the Riverside newspaper which advertisement had been composed by the corporation. It reads in part:

"* * * Factory Distributor will select one Man or Woman to independently Own and Operate a route of

"U. S. Postage Stamp Dispensers
"In Riverside and Vicinity

"This Adv. Will Appear Today Only!
If you are a Reliable, Responsible person, this is an opportunity to become associated with Uncle Sam's largest industry that will give you a Steady, Profitable income for the rest of your life.

"This Is Not A 'Get Rich
Quick' Business

* * * Distributor will make all necessary arrangements and assist the person selected in becoming established * * * please don't waste your time or ours, as we are going to close this area at once * * *."

In response to the advertisement Clemens Hinke, a retired farmer, was interviewed by defendant. According to his testimony, defendant was first asked if he was representing the Government, selling postage stamps, and defendant replied: "It is a whole lot better deal than if you were working for the Government. It will make you more money". Hinke then testified that he then expressed disinterest in the deal and the defendant explained the operation of the machine by a personal demonstration and said: "If you work it good and tend to them weekly as you should, they will average \$8.00 per month * * * each * * * profit"; that Hinke replied: "If 20 machines make me \$50.00 per month I will be satisfied", and defendant replied: "You will be surprised. They will pay for themselves in six months if you stay by it and attend to business"; that he then told defendant he would try ten of them but defendant refused and said since Hinke was "the only one selected for this county" he sold them only in lots of 20 at a time, but if, after he got started, he wanted another county, he could have San Bernardino County too, and he could then purchase any additional machines in lots of five; that defendant then told the complaining witness that defendant's brother

had about 400 machines operating back East in Indiana and he "made a killing off these machines"; that he then told the complaining witness that he had others ready to sign up for the machines in that county and suggested that Hinke sign up immediately. He did so and defendant was given a check for \$1,031.34, covering the cost of the project. The machines arrived a few days later and defendant came out to assist in securing locations for them and putting up brackets in which to place the machines in oil stations, garages, stores, etc. After locating about seven places defendant went back to Los Angeles and said he would return the next day. The complaining witness called him when he failed to return, and defendant then sent some other person to assist in securing locations. He arranged for these places but the complaining witness was compelled to put up the brackets and place the machines in operation. It was discovered that the complaining witness had to secure a license and pay a tax for this operation in Riverside, and paid the fee of \$22. He was compelled to take some of the machines down because the proprietors of the premises wanted a commission on the sales. He thereafter discovered that there were many similar machines in operation throughout the city. He kept a record of the income from the machines he had out, and for the months they were out he found that the net profit per machine was only 29¢ instead of approximately \$8 per month, as represented by defendant. He testified he endeavored, during this period, to contact defendant by phone and by letter to the company, but he was unable to do so; that he, in July, 1952, finally took the machines down and sold them for \$200; that when he invested his money in purchasing them and the route he relied on the representations of defendant that he would have the exclusive right to sell the stamps and operate the machines in Riverside County and that he also relied upon the representation that these twenty machines would make a net profit of about \$8 per month each.

The second count involved Mrs. Even-son and her blind husband. They answered

the advertisement and were visited by defendant only a few days after the Hinke sale. Their story of defendant's representations is quite similar to those made to the Hinkes. Defendant represented to them that they would be the only operators of these machines in Riverside County; that the closest machines were in Pomona, in Los Angeles County; that they, therefore, must take at least 20 machines, and if they wanted to buy more they could have San Bernardino County; that he explained the operation of the machines; that the nickel slot gave the customer 4¢ in stamps, with 20 per cent profit to the owner, and the ten-cent slot gave 9 cents in stamps, with 10 per cent profit to him; that since more nickels would be deposited than dimes, the average profit would be 17 per cent; that his brother in Indiana had 100 machines and was averaging \$10 per machine per month; that the machines would make \$8 profit per machine per month for them if cared for properly, even if located on a tree, and if moved to better locations they would make at least \$10 per month per machine.

A contract was then signed for 20 machines and \$1,031.34 was paid. Defendant agreed to locate the machines but they never saw him after the sale. After considerable effort defendant was located, and he sent out his agent to assist in locating places for the machines. This agent located only two places the first day because the complaining witness said at nearly every place they went there was a similar machine located. The agent left because of a claimed appointment. Before leaving he asked the Evensons to sign a list of some prospective locations where they thought they could themselves locate some machines. They did this and the agent then informed them that even though these locations might be fictitious he wanted them to sign the listing because he would then be able to collect \$3 per location from defendant.

Thereafter, the Evensons put up five machines at some of the best locations, and after four months they were taken down. A recapitulation of the gross income there-

from was \$22.35, and the average gross profit per machine was 18¢ per month.

To prove the falsity of defendant's representations as to the net income of similar machines, an independent operator of 55 such machines in the territory, who had been in business for five years, showed that his average net profit per machine per month in 1949 was 35¢ and in 1952 it was 90¢.

At the trial, defendant testified that when he contacted the Evensons on November 21st, he had already made the sale to the Hinkes a few hours earlier; that he did not tell them about the Hinke sale. He denied making any statement about Riverside being given as an exclusive territory to either of them. He stated that he had been such a salesman for only six weeks and did not make any independent investigation as to what income these machines would bring, but took it from the company's brochure that it was possible to obtain from \$4 to \$8 profit per month from each machine. He denied generally making the statements referred to by the witnesses, although he testified at the time he made the sale to the Evensons he did not think they had any business handling these machines because Mr. Evenson was blind, but since Evenson thought he could, he did not oppose his suggestion. Defendant relied upon the written agreement signed by the parties as constituting the entire transaction between them.

It appears that the Federal Dispenser Corporation "folded up" a few months after these sales, and defendant left Los Angeles. The complaining witnesses were unable to contact defendant or anyone in regard to the machines. An indictment was returned by the grand jury in March, 1952. Defendant stated he left in his trailer for the East with his family around February or March of that year. He was notified in St. Louis about the charges made by Evenson and Hinke but did not return to California until a month later, and lived in an auto court in Los Angeles. He was later found and arrested in November, 1952, and claimed he did not surrender himself when

he learned of the charges because he did not have any money.

It is his contention on appeal that the evidence is insufficient to support the judgment for the reasons: (a) that there is no evidence to support the finding that the stamp-vending machines purchased by either of the alleged victims were not worth the full amount paid per machine; (b) that neither of the complaining witnesses paid any extra consideration for the alleged exclusive territory or for the alleged minimum guaranteed earnings per machine; (c) that the evidence is insufficient to support the finding that defendant made any false statement, pretense or representation of either a past or existing fact as an inducement to either complaining witness to purchase the vending machines in question; (d) that the court committed prejudicial error in instructing the jury in reference to flight, and (e) in denying defendant's motion for a new trial.

[1,2] The evidence shows that defendant made a considerable profit on the sales of these machines. About 20 of them were sold by the Hinkes for \$200. It was not the intrinsic value of the machines for which the complaining witnesses were negotiating. They were purchasing an exclusive business or route with the intention of making a profit from each machine as an integral part of such business, and if kept inactive, their intrinsic value, out of location, would not be the true value of the enterprise. The complaining witnesses paid a price of over \$1,000 for this going business which it was represented would produce a net profit of about \$8 per month per machine, and it does affirmatively appear that the complaining witnesses did not receive what they bargained for, as neither had received an exclusive business within the county, and neither party was able to realize any profit worth mentioning. Accordingly, there was sufficient evidence to show that each was defrauded out of an amount in excess of \$200. This conclusion is supported by the decisions in *People v. Helmlinger*, 69 Cal.App. 139, 230 P. 675; and *People v. Raines*, 66 Cal.App.2d 960, 962, 153 P.2d 424. It is upon this theory that the

prosecution based their case. The doctrine of *caveat emptor* has no application to a criminal charge based on false representations. *People v. Bellew*, 90 Cal.App.2d 801, 802, 203 P.2d 822.

[3] It is not necessary for the prosecution to show that either of the complaining witnesses paid any extra consideration for the exclusive territory or for the minimum guaranteed earnings per machine, as contended. That was supposed to be included in the sales price. Without the misrepresentations claimed, it is apparent that the sales would not have been consummated.

[4] Some contention is made that under sections 1856 and 1860 of the Code of Civil Procedure, no evidence of any other agreement was admissible, since the agreement was reduced to writing and signed by the parties to be charged, citing *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, 141 P. 917. A similar contention was made in *People v. Frankfort*, 114 Cal.App.2d 680, at page 700, 251 P.2d 401, at page 414, where it is said:

"The simple answer to this argument is that 'The people prosecuting for a crime committed in relation to a contract are not parties to the contract and are not bound by it. They are at liberty in such a prosecution to show the true nature of the transaction.'" (Citing several California cases.) See, also, *People v. Chait*, 69 Cal. App.2d 503, 519, 159 P.2d 445.

[5] It is likewise argued that there was no sufficient corroboration of the false representations under sections 1110 and 1111 of the Penal Code. It affirmatively appears that the false representations relied upon were corroborated by the husband and the wife of the respective complaining witnesses, as well as by the nature of the advertisement inserted in the paper indicating that an exclusive right to operate in Riverside and vicinity was to be given to "One Man or Woman" and that "this area" would then be closed at once. We see no merit to this contention. *People v. Helmlinger*, 69 Cal.App. 139, 230 P. 675; *People v. Chait*, supra; *People v. Frankfort*, supra, and cases cited.

There are cases cited by defendant which in effect hold that the criminal charge of obtaining money by false pretenses is not committed when the inducement is a promise to perform some act in the future, or is not predicated upon a false or fraudulent representation of a present existing fact or of a past fact. The cases cited are *People v. Daniels*, 25 Cal.App.2d 64, 76 P.2d 556; *People v. Kahler*, 26 Cal.App. 449, 147 P. 228; and *People v. Beilfuss*, 59 Cal.App. 2d 83, 138 P.2d 332.

In this connection it is also argued that there is no evidence that defendant represented that the machines in question were in fact, at the time of signing the contracts, actually earning any specified sum per month per machine; that the only statement accredited to him was that in the future they were capable of earning \$8 per month each if handled properly and placed in the right locations, citing *People v. Jackson*, 24 Cal.App.2d 182, 74 P.2d 1085; and *People v. Walker*, 76 Cal.App. 192, 244 P. 94.

[6] The prosecution here relied on two representations made by defendant: (1) that each of the purchasers was receiving as exclusive territory, the County of Riverside; and (2) that the machines would earn a minimum of \$8 per month per machine. The evidence shows that in connection with their contract they were then and there receiving an exclusive right to operate the machines in Riverside County. This representation, in and of itself, if relied upon by the parties, was sufficient to support the jury's verdict. In *People v. Cravens*, 79 Cal. App.2d 658, at page 664, 180 P.2d 453, at page 457, it was said:

"It is sufficient to prove any single false representation on which the victim relied * * * and the fact that false promises were likewise made is not important if there were also false representations of present or past fact which materially contributed to the victim's parting with his property or money." (Citing cases.)

The evidence is sufficient to show that the parties relied upon this false representation and also that they relied upon the represen-

tation that the machines would make \$8 per month per machine. There is authority to the effect that where defendant's opinions were given concomitantly with his statements of fact, which gave material support to his opinions and expressed to men who were ignorant of the true facts, there was actionable fraud, citing cases. See, also, *People v. Davis*, 112 Cal.App.2d 286, 298, 246 P.2d 160; *People v. Jones*, 36 Cal.2d 373, 377, 224 P.2d 353; *People v. Mason*, 86 Cal.App.2d 445, 449, 195 P.2d 60; and *People v. Gordon*, 71 Cal.App.2d 606, 624, 163 P.2d 110.

Here, defendant represented as a fact that his brother had operated 100 or more similar machines and was averaging \$10 per month per machine. The jury was authorized to believe this testimony. Defendant testified at the trial, however, that his brother did not have that number of machines and had not operated them long enough for him to obtain any knowledge of their income. The victims had the right to believe that defendant had information as to the income of the machines in the past and that his statement as to their earning ability was as represented. Under these circumstances the cases above cited are applicable.

[7] The instruction given on flight in the language of section 1127c of the Penal Code was properly submitted to the jury under the evidence. It shows that defendant departed from the state a short time after the commission of the crime, and remained away until about the time he was apprehended. His contention is that he left because of his business and was seeking employment in the East. The weight and credence to be given his testimony in reference to his departure and the claimed reasons therefor were questions for the jury to determine. *People v. Pianezzi*, 42 Cal.App. 2d 270, 280, 108 P.2d 685; *People v. Gregoris*, 70 Cal.App.2d 716, 720, 161 P.2d 568; *People v. Leach*, 90 Cal.App.2d 667, 203 P. 2d 544. No different questions were raised on the motion for new trial. The order denying it was proper.

Judgment and order affirmed.

MUSSELL, J., concurs.

122 Cal.App.2d 309

CANDELARIA v. SCHWARTZ.

Civ. 19679.

District Court of Appeal, Second District,
Division 3, California.

Dec. 28, 1953.

Rehearing Denied Jan. 18, 1954.

Hearing Denied Feb. 24, 1954.

Action by motorcycle driver against motorist for damages resulting from intersectional collision. The Superior Court, Los Angeles County, Henry M. Willis, J., rendered judgment for motorcycle driver but granted motorist's motion for new trial. Motorcycle driver appealed. The District Court of Appeal, Parker Wood, J., held that where there was a substantial conflict in the evidence on question of visibility at time of accident and court gave instruction at request of motorcycle rider which instruction was erroneous because it did not advise jury that motorcycle should be equipped with lighted lamps at any time when there was not sufficient light to render clearly discernible any person or vehicle on highway at distance of 200 feet and such instruction was in conflict with instruction given at request of motorist, granting of motorist's motion for new trial was not abuse of discretion.

Order affirmed.

1. Automobiles ⇨245(16)

In action by motorcycle driver against motorist for damages resulting from intersectional collision, question of visibility at time of accident was for jury.

2. New Trial ⇨39

Where there was a substantial conflict in evidence on question of visibility in action by motorcycle driver against motorist for damages arising out of intersectional collision and instruction was given at request of plaintiff which instruction was erroneous because it did not advise jury to effect that motorcycle should be equipped with lighted lamps at any time there was not sufficient light to render clearly discernible any person or vehicle on highway at a distance of 200 feet and such instruction was in conflict with instruction given at request of motorist,

granting of motion for new trial was not abuse of discretion. Vehicle Code, § 618.

Joseph W. Fairfield, Alfred S. Gainsley, Ethelyn F. Black, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, and A. P. G. Steffes, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff, who obtained a judgment for damages for personal injuries, appeals from an order granting defendant's motion for a new trial. The motion was granted upon the ground that an erroneous instruction was given.

[1, 2] On March 31, 1951, between 6:30 p. m. and 7:00 p. m., plaintiff was operating a motorcycle in an easterly direction on First Street in Los Angeles. Defendant, who had been driving an automobile in a westerly direction on that street, was making a left turn at the intersection of that street and Chicago Street. The vehicles collided within that intersection. There was no headlight or headlighting device on the motorcycle. Defendant did not see plaintiff before the collision occurred. On said day the sun set at 6:13 p. m.

At the request of plaintiff, the court gave the following instruction: "The law does not require that the motorcycle which the plaintiff was riding should be equipped with lighting devices prior to one-half hour after sunset. On March 31st, 1951, sunset occurred at 6:13 P.M. and so consequently, if you find that the accident occurred prior to 6:43 P.M. on that day you must likewise find that the mere fact that the plaintiff's motorcycle was not equipped with lights does not constitute negligence." (That instruction is referred to as plaintiff's instruction No. 1.)

At the request of defendant, the court read section 618 of the Vehicle Code as one of its instructions. A part of that section is as follows: "(a) Every vehicle upon a highway at any time from a half hour

after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of two hundred feet shall be equipped with lighted lamps and lighting devices * * *.” (This instruction is referred to as defendant’s instruction No. 1.)

In granting the motion for a new trial, the judge stated in substance that it was prejudicial error to give plaintiff’s instruction No. 1 because it “overlooks all reference to that portion of Section 18[618] of the Vehicle Code which relates to equipment of lighted lamps on motorcycles ‘at any other time when there is not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of 200 feet.’”

Appellant argues that his instruction No. 1 was correct; that all the testimony of all witnesses was to the effect that visibility was good, and consequently it would have been error to ask the jury to determine as a matter of fact whether there was sufficient light to render clearly discernible any person or vehicle within 200 feet; and that the question of visibility was one of law.

Prior to the accident, the defendant had traveled from a place on First Street which was about 200 feet west of the intersection. Three boys, who were at said place with plaintiff, testified that it was still light when plaintiff left the place. Each boy also testified that he saw plaintiff reach the intersection. Plaintiff testified that the light was good when he left said place, and that he was pretty sure the street lights were not on. Defendant testified that it was dark when he reached the intersection; and that the lights on his automobile, and on other automobiles, were on. Mr. Chase, who was driving an automobile directly behind defendant, testified that it was just dusk when the accident occurred. There was a substantial conflict in the evidence on the question of visibility. The question was one of fact for the jury. As above shown, plaintiff’s instruction No. 1 advised the jury to the effect that if the accident occurred prior to 6:43 p. m., it was not necessary that the motorcycle be equipped

with lights. That instruction was erroneous because it did not advise the jury further to the effect that the motorcycle should be equipped with lighted lamps at any time when there was not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of 200 feet. That instruction and defendant’s instruction No. 1 (all of section 618 of the Vehicle Code) were conflicting. “[T]he granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears.” *Mazzotta v. Los Angeles Ry. Corporation*, 25 Cal.2d 165, 169, 153 P.2d 338, 340. The trial judge did not abuse his discretion.

The order granting a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



122 Cal.App.2d 235

PEOPLE v. MASSIE et al.

Cr. 5076.

District Court of Appeal, Second District,
Division 1, California.

Dec. 22, 1953.

Defendant was convicted of the crime denounced by Pen.Code, § 288a. The Superior Court of Los Angeles County, Percy Hight, J., rendered judgment sentencing defendant to the state prison and he appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported a conviction.

Judgment affirmed.

I. Sodomy ☞6

In prosecution under Penal Code, § 288a, police officers’ testimony that they saw defendant commit act charged supported conviction. Pen.Code, § 288a.

2. Criminal Law Ⓒ742(1)

In prosecution under Penal Code, § 288a, it was jury's province to believe or disbelieve defendant's denial that he committed act charged and codefendant's testimony that he did not know what was going on because of his befuddled condition from drink and lack of sleep. Pen.Code, § 288a.

3. Criminal Law Ⓒ31

The fact that certain defendants may escape conviction for their crimes is no legal or logical reason why another defendant whose conviction of crime is sustained by substantial evidence should be exonerated and permitted to escape punishment.

Albert C. S. Ramsey, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant Massie was convicted by a jury of the crime denounced by Section 288a of the Penal Code. He appeals from the judgment sending him to state prison. He contends that the evidence was insufficient to support the verdict, and that the verdict was inconsistent and erroneous.

[1] Police officers who arrested said defendant and a male companion testified that they actually saw defendant commit the act of which he was convicted.

Defendant and his companion were tried together. The jury acquitted one and convicted the other.

The evidence supports the verdict and the judgment.

[2] It was the province of the jury to believe or to disbelieve the defendant's denial that he committed the act. It was likewise the province of the jury to believe or to disbelieve the testimony of the codefendant that due to his befuddled condition from drink and lack of sleep and rest he didn't know what was going on.

[3] "The fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defendant, where substantial evidence has

been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime." *People v. Taylor*, 88 Cal.App.2d 983, 987, 199 P.2d 751, 754.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



120 Cal.App.2d Supp. 923

PEOPLE v. GARNER.

Cr. A. 15.

Appellate Department, Superior Court,
San Bernardino County, California.

Oct. 23, 1953.

Criminal proceeding. The Justice Court entered judgment, and defendant appealed. The Superior Court, Coughlin, P. J., held that where the docket maintained by judge of justice court established without conflict that defendant was not informed of his civil rights, judgment would be reversed and action remanded for further proceedings.

Reversed and action remanded for further proceedings.

Criminal Law Ⓒ260(12)

Where docket maintained by judge of justice court which tried case established without conflict that defendant was not informed of his civil rights, judgment would be reversed and action remanded for further proceedings.

Robert Glenn Garner pro se.

Lowell E. Lathrop, Dist. Atty., San Bernardino County, San Bernardino, for the People.

COUGHLIN, Presiding Judge.

The docket maintained by the Judge of the Justice Court which tried this case establishes without conflict that the defendant was not informed of his civil rights. This was error. The judgment is reversed and the action remanded for further proceedings.

HENDERSON v. DRAKE.
S. F. 18871.

Supreme Court of California.
In Bank.
Dec. 31, 1953.

Rehearing Denied Jan. 27, 1954.

Action wherein writ of attachment was levied on personal property of defendant and judgment subsequently entered for defendant. The Superior Court, San Francisco County, William T. Sweigert, J., entered an order denying motion to dissolve attachment, and defendant appealed. The Supreme Court, Schauer, J., held that notice of motion by plaintiff for new trial did not waive his right to receive written notice of entry of judgment for defendant in order to start the running of statutory five-day period within which plaintiff could save his attachment by perfecting an appeal.

Order affirmed.

Carter and Traynor, JJ., dissented.

Prior opinion, 255 P.2d 875.

1. Attachment ⇨270

An attachment may be preserved by taking an appeal from judgment for defendant and attachment remains effective after rendition of such judgment until right to appeal expires, unless written notice of entry of judgment is given, in which event appeal must be perfected within five days after such notice or attachment becomes subject to discharge. Code Civ.Proc. §§ 553, 946.

2. Appeal and Error ⇨345(1), 428(2)

Under Rules on Appeal, plaintiff had 60 days from entry of judgment for defendant in which to file notice of appeal, and when he served and filed timely notice of intention to move for a new trial, the time for appeal was extended. Rules on Appeal, rules 2(a), 3(a).

3. Attachment ⇨270

Where plaintiff had not been given written notice of entry of judgment for defendant on November 26, 1951, and plaintiff's motion for new trial had been granted on January 28, 1952, defendant's motion to dissolve attachment was properly denied on February 6, 1952, since, regardless of effect

on attachment of order granting a new trial, time for appeal by defendant from such order had not expired, and had defendant taken such appeal, plaintiff could have appealed from the judgment. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. §§ 553, 946.

4. Judgment ⇨276

Written notice of entry of judgment may be waived.

5. Estoppel ⇨52

"Waiver" is the intentional relinquishment of a known right.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

6. Attachment ⇨270

Notice of motion by plaintiff for new trial, thereby evidencing his actual knowledge of entry of judgment for defendant, did not "waive" his right to receive written notice thereof for purpose of starting the running of statutory five-day period within which plaintiff could save his attachment by perfecting an appeal. Code Civ.Proc. §§ 553, 946.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

7. Attachment ⇨270

Service and filing of notice of motion by defendant to dissolve attachment did not constitute sufficient compliance with statutory requirement that plaintiff be given written notice of entry of judgment in order to start the running of five-day period within which plaintiff could save his attachment by perfecting an appeal. Code Civ. Proc. §§ 553, 946.

Erskine, Erskine & Tulley, J. Oscar Goldstein, San Francisco, for appellant.

H. W. Glensor, San Francisco, for respondent.

SCHAUER, Justice.

Defendant appeals from an order denying her motion to dissolve an attachment. The only ground of the motion was "that judgment had been rendered in favor of

the defendant and no notice of appeal or undertaking on appeal had been filed within five days from and after the entry of said judgment." The sole question for decision is the correctness of the order denying such motion. We have concluded that under sections 553 and 946 of the Code of Civil Procedure, upon which the motion was based, the trial court was required to deny it.

In this action against defendant plaintiff attached certain shares of corporate stock owned by defendant. Thereafter, on November 26, 1951, judgment for defendant was entered in that action. No formal written notice of entry of judgment was given to plaintiff. No appeal was taken but on December 4, 1951, plaintiff served and filed notice of intention to move for a new trial. On January 3, 1952, defendant served and filed notice of motion to dissolve the attachment. On January 28, 1952, plaintiff's motion for a new trial was granted. On February 6, 1952, defendant's motion to dissolve the attachment was denied; on this date neither the time for an appeal by defendant from the order granting the new trial nor, in the event defendant took such appeal, for a cross-appeal by plaintiff from the judgment, had expired.

Section 553 of the Code of Civil Procedure provides in material part, "If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section 946 of this code, * * * all the property attached * * * must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom." Section 946 provides in material part, "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant * * * and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected."

[1] Under the wording of those sections it is clear that an attachment may be preserved by taking an appeal and that an attachment remains effective after rendition of judgment for defendant until there is no longer a right to appeal, unless written notice of entry of judgment is given,

in which event the appeal must be perfected within five days after such notice or the attachment becomes subject to discharge. Section 553 states that if defendant recovers judgment *and* no appeal is taken and no undertaking filed, then the "order of attachment [must] be discharged." This necessarily implies that if an appeal is perfected and an undertaking filed, then the attachment should not be discharged. Similarly, section 946 states that an appeal does not "continue in force an attachment, unless an undertaking" is filed and, "unless, within five days after written notice of the entry of the order appealed from," the appeal is perfected. This necessarily implies that the filing of the undertaking and the perfection of the appeal will keep the attachment alive. The only reference to time contained in the sections is the requirement of section 946 that the appeal be perfected "within five days after written notice of the entry of the order appealed from." It is reasonable, therefore, to conclude that the attachment remains effective as long as an appeal may be taken unless written notice of entry of judgment is given, in which event the attachment perdures for only five days after such notice unless an appeal is perfected within that time. If sections 553 and 946 were not so construed, plaintiff would have to file his undertaking and perfect his appeal at the same time the judgment for defendant was entered, or the mere entry of judgment for defendant would discharge the attachment.

As is held in *Primm v. Superior Court* (1906), 3 Cal.App. 208, 211, 212, 84 P. 786, an attachment is not "finally and irrevocably dissolved the moment a judgment for defendant is entered. * * * A fair, reasonable, unstrained construction [of sections 553 and 946] leads to the conclusion that the dissolvent force of a judgment is neutralized by a perfected appeal, provided the additional undertaking is filed and the appeal perfected within the specified time. This construction gives harmonious effect to both sections and does not nullify any part of either." (See also *Morneault v. National Surety Co.*, (1918), 37 Cal.App. 285, 286, 174 P. 81; *Clark v. Superior Court* (1918), 37 Cal.App. 732, 734, 174 P. 681;

Albertsworth v. Glens Falls Indem. Co. (1948), 84 Cal.App.2d 816, 819, 192 P.2d 66; Davis v. Fidelity & Deposit Co. (1949), 93 Cal.App.2d 13, 16, 208 P.2d 414.)

[2, 3] The time to appeal had not expired when the notice of motion to dissolve the attachment was filed on January 3, 1952, or when the trial court denied such motion on February 6, 1952. Plaintiff had sixty days from the entry of judgment (i. e., from November 26, 1951) in which to file notice of appeal (Rules on Appeal, Rule 2(a)), and when he served and filed his notice of intention to move for a new trial the time for appeal was extended (Rules on Appeal, Rule 3(a)). When the trial court denied the motion to dissolve the attachment, plaintiff's motion for a new trial had been granted. Regardless of the effect or lack of effect on the attachment of the order granting a new trial, defendant at the time of the denial of her motion to dissolve the attachment could have appealed from the order granting the new trial and, had she done so, plaintiff could have appealed from the judgment (Rules on Appeal, Rule 3(a)). Therefore, on February 6, 1952, there was still an opportunity for plaintiff to perfect an appeal, file an undertaking, and in that manner keep alive the attachment, and the trial court correctly refused to order that the attachment be dissolved.

[4-7] Since no written notice of entry of the judgment of November 26, 1951, was given, the five days referred to in section 946 did not run. Defendant urges that although she did not give formal notice of entry of judgment and thus start the running of the five-day period, there was substantial compliance with the requirement of section 946 that "written notice" be given. She says that her notice of motion to dissolve the attachment was, in effect, a notice of entry of judgment, and that plaintiff's notice of motion for a new trial constituted a waiver of written notice of entry of judgment. It is true that a statutory requirement of "written notice" of entry of judgment can be waived, and that in some circumstances it has been held that the filing, by the party entitled to such written notice, of a document disclosing his actual knowledge of the entry of judgment shows waiver

of the written notice. (Prothero v. Superior Court (1925), 196 Cal. 439, 441, 444, 238 P. 357.) But waiver is the *intentional* relinquishment of a known right. (Roesch v. De Mota (1944), 24 Cal.2d 563, 572, 150 P.2d 422.) The fact that plaintiff here evidenced his actual knowledge of the entry of judgment does not show that he intended to waive his right to receive written notice thereof for the purpose of starting the running of the five-day period within which he could save his attachment. (See Hughes Mfg. etc. Co. v. Elliott (1914), 167 Cal. 494, 496, 140 P. 17.) And the fact that defendant incidentally indicated to plaintiff, by serving and filing her notice of motion to dissolve the attachment, that judgment had been entered is not sufficient compliance with the statutory requirement that written notice be given to start the running of the five-day period. (See Byrne v. Hudson (1899), 127 Cal. 254, 257, 59 P. 597.)

For the reasons above stated the order appealed from is affirmed.

GIBSON, C. J., and SHENK, ED-MONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

By a skillful process of legal legerdemain the majority opinion attempts to bring to life an attachment which died a natural death on January 28, 1952, when plaintiff's motion for a new trial was granted by the trial court.

It is conceded by the majority that pursuant to sections 553 and 946 of the Code of Civil Procedure an attachment is dissolved when judgment is rendered in favor of the defendant unless he perfects an appeal and gives an undertaking within five days after receiving notice of entry of judgment, and that it is not kept alive by proceedings on motion for a new trial.

In the light of this concession let us examine the record:

(1) November 26, 1951. Judgment for defendant entered.

(2) December 4, 1951. Plaintiff served and filed notice of intention to move for a new trial on all statutory grounds.

(3) January 3, 1952. Defendant served and filed notice to dissolve attachment.

(4) January 28, 1952. Motion for new trial granted.

(5) February 6, 1952. Motion to dissolve attachment denied.

(6) The agreed statement on appeal states: "No appeal has ever been taken by [defendant] Henry K. Henderson from said judgment. No undertaking on appeal was filed by Henry K. Henderson within five days after the entry of said judgment or at any other time."

It is true that no *formal notice of entry of judgment* was given by defendant, but both plaintiff's notice of intention to move for a new trial and defendant's notice of motion to dissolve the attachment refer to "*the judgment heretofore made and entered in the above entitled action.*" It seems to me that it is stretching legalism to the breaking point to say, *in view of this record*, that plaintiff did not have adequate notice of entry of judgment. But conceding that he did not, and that his time to perfect an appeal from the judgment and give an undertaking did not expire until five days after such notice was given, or his time for appeal had expired, or he had lost his right to appeal, there can be no question that the latter event occurred on January 28, 1952, when his motion for a new trial was granted. This event terminated his right to appeal, as it is well settled that an appeal does not lie from an unconditional order or judgment in favor of the appellant and such an appeal must be dismissed. 3 Cal.Jur.2d § 110, p. 566. The fact that plaintiff could have cross appealed from the judgment if defendant had appealed from the order granting the new trial, is beside the question as defendant did not appeal and the order granting plaintiff's motion for a new trial has become final. There can be no question that plaintiff's right to appeal from the judgment was lost when his motion for a new trial was granted. Conceding that plaintiff would have had a right to cross appeal from the judgment if defendant had appealed from the order granting the new trial, since defendant did not appeal from said order, plaintiff's right to cross appeal never came into existence.

The order denying defendant's motion to dissolve the attachment was entered February 6, 1952, nine days after the motion for a new trial was granted. At that time plaintiff had not and could not comply with the requirements of sections 553 and 946 of the Code of Civil Procedure and the motion to dissolve the attachment should, therefore, have been granted.

Even accepting the unsound reasoning of the majority, that at the time defendant's motion to dissolve the attachment was denied, plaintiff's time to appeal had not expired, because he had the right to cross appeal if defendant appealed from the order granting the new trial, and, therefore, the motion was properly denied, it will avail plaintiff nothing, as the attachment must now be dissolved because of plaintiff's non-compliance with the provisions of sections 553 and 946 of the Code of Civil Procedure.

The last cited code sections and decisions construing them make it clear that the pendency of a motion for a new trial or the granting of that motion does not operate to stay the extinguishment of an attachment, or that an attachment continues in force until the motion is determined. While the Legislature saw fit to provide for keeping the attachment alive in event of an appeal by plaintiff, and there appears to be no reason why they did not make a similar provision in case of a pending motion for a new trial, the fact remains that section 553, *supra*, requires without limitation (except in the case of appeal) that when defendant recovers judgment the attachment must be discharged. Nothing is said about a motion for new trial and I know of no other statute which makes the pendency of such a motion operate to keep the attachment alive. There is no provision for giving an undertaking to keep the attachment in force when a motion for a new trial is made as there is when an appeal is taken. The undertaking in the case of an appeal is to give protection to the defendant in addition to that afforded by the undertaking to obtain the attachment. *Albertsworth v. Glens Falls Indem. Co.*, 84 Cal.App.2d 816, 192 P.2d 66. The absence of a provision for such added protection pending the disposition of a motion for a

new trial indicates that the pendency of such a motion does not keep the attachment alive. It has been held that a motion for a new trial does not in itself stay the *execution* of the judgment by the prevailing party. *People ex rel. Carpentier v. Loucks*, 28 Cal. 68; *Jones v. Spears*, 56 Cal. 163; *Harris v. Barnhart*, 97 Cal. 546, 32 P. 589; *Kokole v. Superior Court*, 17 Cal.App. 454, 120 P. 67; *Knowles v. Thompson*, 133 Cal. 245, 247, 65 P. 468; 121 A.L.R. 686. Before it was amended in 1907 and 1909, Stats.1907, p. 708, 1909, p. 967, section 553 did not contain the provision for keeping the attachment alive by perfecting an appeal, and it was held that an appeal by plaintiff from the judgment and a reversal thereof did not stay the discharge of the attachment or revive it. *Loveland v. Alvord C. Q. Mining Co.*, 76 Cal. 562, 18 P. 682; *Hamilton v. Bell*, 123 Cal. 93, 55 P. 758; *contra*: cases collected 115 A.L.R. 598. And under the prior law the lack of finality of the judgment with regard to appeal did not prevent the discharge of the attachment. *Aiegeltinger v. Whelan*, 133 Cal. 110, 65 P. 125. Indeed, since the amendment to 553, the making in the trial court and granting of a motion to vacate a judgment for defendant does not preserve the attachment. *Clark v. Superior Court*, 37 Cal.App. 732, 174 P. 681. Under a statute similar to ours the same result has been reached in regard to a pending motion for a new trial, *Ranft v. Young*, 21 Nev. 401, 32 P. 490. It is clear therefore that the Legislature has not made either the pendency or granting of a motion for a new trial after judgment for defendant effective to keep alive or revive an attachment.

Notwithstanding the foregoing the majority affirms an order which is obviously invalid and which must be vacated by the trial court when this decision becomes final. This, however, will necessitate further proceedings in the trial court and another appeal if the losing party sees fit to thus prolong the litigation.

This is unfortunate in view of the overcrowded condition of our court calendars. It also violates the policy of our courts to decide cases so as to terminate litigation wherever possible in the interests of justice.

For the foregoing reasons, I would reverse the order.

TRAYNOR, Justice.

I dissent.

It is my opinion that plaintiff had written notice of the entry of judgment within the meaning of section 946 of the Code of Civil Procedure and that his right to preserve the attachment by taking an appeal was therefore lost five days after the service of the notice.

Judgment for defendant was entered on November 26, 1951. On December 4, 1951, plaintiff served and filed notice of intention to move for a new trial, and on January 3, 1952, defendant served and filed notice of motion to vacate the attachment on the ground that "judgment had been rendered in favor of the defendant and no notice of appeal or undertaking on appeal had been filed within five days from and after the entry of said judgment." At no time thereafter did plaintiff perfect an appeal from the judgment. Defendant's motion was denied on February 6, 1952, after plaintiff's motion for a new trial had been granted. Section 946 of the Code of Civil Procedure provides that an attachment may be continued in force if an appeal is perfected "within five days after written notice of the entry of the order appealed from". Whether or not plaintiff's notice of motion for a new trial constituted a waiver of the right to written notice, see *Prothero v. Superior Court*, 196 Cal. 439, 444, 238 P. 357, defendant's notice of motion to vacate the attachment, which recited that "judgment had been rendered in favor of defendant," constituted written notice of the entry of the judgment within the meaning of section 946. The right to preserve the attachment by taking an appeal was therefore lost five days after the service of the notice on January 3, 1952.

Section 946 assures the plaintiff knowledge of the entry of judgment and fixes the date for the commencement of the running of the five-day period. These purposes were accomplished when defendant served and filed her notice of motion to vacate the attachment. The only other possible purpose for the notice of the entry of judgment

ment is to bring home to the plaintiff that the defendant is asserting his right to have the attachment dissolved if an appeal is not perfected in five days. See *Byrne v. Hudson*, 127 Cal. 254, 257, 59 P. 597. Since defendant's notice expressly called plaintiff's attention to the fact that defendant was relying on the entry of judgment to establish her right to dissolution of the attachment, it could not have subverted this purpose better. The majority opinion states, however, that "the fact that defendant incidentally indicated to plaintiff, by serving and filing her notice of motion to dissolve the attachment, that judgment had been entered is not sufficient compliance with the statutory requirement that written notice be given to start the running of the five-day period. See *Byrne v. Hudson* (1899), 127 Cal. 254, 257, 59 P. 597." In the *Byrne* case the judgment provided that if plaintiff did not pay defendant a certain sum of money within twenty days of written notice of entry of judgment she would lose her equity of redemption. Defendant served on plaintiff a notice of intention to move for a new trial reciting that the judgment had been entered. The court held that this notice of motion was not sufficient to start the running of the twenty-day period. "The question arose out of the express terms of the judgment, which required 'written notice of the entry of this judgment.' We think, therefore, that as appellant's right in the premises depended upon the commencement of the running of a certain period of time mentioned in the judgment, and as her title was to be forfeited unless a certain act was done within that period of time, she was entitled to a notice expressly intended for the purpose of starting the period of time mentioned in the judgment, and that a mere incidental recital in a notice of a motion for a new trial, given for an entirely different purpose, was not a sufficient compliance with the terms of the judgment." 127 Cal. at page 257, 59 P. at page 598. In the present case, however, defendant's notice of motion was not given for a purpose foreign to the attachment, but was related directly to the effect of the entry of judgment on its continuance. The fact that judgment had been entered was not recited merely incidental-

ly, but as the very basis for the intended motion. Defendant may have been premature in noticing her motion to dissolve the attachment, but by doing so she gave plaintiff all the notice of the entry of judgment to which he was entitled. When he failed within five days to perfect an appeal from the judgment, defendant was entitled to have the attachment dissolved.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.



41 Cal.2d 869

PHILLIPS v. PHILLIPS.

Sac. 6130.

Supreme Court of California.

In Bank.

Dec. 24, 1953.

Divorce proceeding by wife, wherein husband cross-complained for annulment or for divorce. The Superior Court, Placer County, James Snell, J., entered judgment, and both parties appealed. The Supreme Court, Traynor, J., held that record was not such that it would warrant denial of divorce on ground of recrimination.

Judgment reversed.

Edmonds, Shenk, and Spence, JJ., dissented.

Prior opinion 236 P.2d 816.

1. Judgment ⇐210

Where findings of fact are required and have not been waived, judgment is not rendered until findings have been signed by trial judge and filed with clerk.

2. Judgment ⇐271

Once a judgment has been rendered, clerk of court has duty to enter judgment in judgment book.

3. Judgment ⇐297

A judgment, until entered, is not effectual for any purpose, and, at any time before entry, the court may change its conclusions of law and enter judgment different from that first announced. Code Civ.Proc. § 664.

4. Appeal and Error ⇐22

Fact that defendant, clerk of court, and trial court accepted trial court's memorandum as a judgment would not preclude questioning of judgment's validity in the Supreme Court. Code Civ.Proc. §§ 632, 664; Rules on Appeal, rule 2(c).

5. Appeal and Error ⇐22, 337(1)

The want of jurisdiction in the Supreme Court over premature appeal is absolute, and the defect cannot be waived since consent cannot confer jurisdiction. Rules on Appeal, rule 2(c).

6. Appeal and Error ⇐460(2)

Where trial court's memorandum did not constitute judgment in the case, premature notice of appeal therefrom did not stay further proceedings in trial court. Code Civ.Proc. §§ 632, 664.

7. Appeal and Error ⇐452

An appeal taken before entry of judgment does not confer jurisdiction upon the appellate court jurisdiction which will divest trial court of authority to take further proceedings. Code Civ.Proc. § 664.

8. Appeal and Error ⇐452

Acts of trial court after premature notice of appeal but before entry of judgment are valid. Code Civ.Proc. § 664.

9. Judgment ⇐301

Where trial court's 1949 memorandum, which was signed by trial judge, filed with clerk, and entered in clerk's minutes and contained findings of facts and conclusions of law separately stated, was not entered as a final judgment, trial judge had power to substitute new findings of fact and conclusions of law and to enter a new judgment, even though filing of memorandum had met requirements for rendition of a judgment, and therefore only judgment in case was judgment thereafter entered by trial court in 1952. Code Civ.Proc. §§ 632, 664; Rules on Appeal, rule 2(c).

10. Appeal and Error ⇐347(3)

Even if judgment is entered nunc pro tunc, a party's right to an appeal cannot be cut off by antedating entry of judgment from which such party desires to appeal.

11. Judgment ⇐273(1)

Courts have inherent power to enter a judgment nunc pro tunc and thereby make judgment relate back to time when judgment should have been entered, but courts will do so only to avoid injustice.

12. Divorce ⇐162, 181

Where, in divorce proceeding, trial court's memorandum had been entered on October 4, 1949, while judgment had been entered on October 14, 1952, and husband had been apparently satisfied with purported 1949 judgment and allowed several parts thereof not appealed from by wife to become final, allowing husband to show that adverse 1952 judgment was erroneous would not give husband an unfair advantage requiring that 1952 judgment be entered nunc pro tunc as of 1949, thereby making husband's notice of appeal be not timely filed.

13. Appeal and Error ⇐878(1)

Generally, a party who has not appealed may not complain of errors.

14. Divorce ⇐181

Where, in divorce proceeding, wife, who filed her notice of appeal on December 22, 1949, did not file second notice of appeal after judgment was entered on October 14, 1952, wife's notice of appeal would be deemed to have been timely filed immediately after entry of judgment. Rules on Appeal, rule 2(c); Code Civ.Proc. § 632.

15. Divorce ⇐53

Doctrine of recrimination is an equitable principle to be applied according to the circumstances of each case and with proper respect for paramount interest of community at large and therefore may not be mechanically applied by a trial judge.

16. Divorce ⇐53

In applying doctrine of recrimination, the trial court necessarily has a broad discretion but it must give consideration to prospects of reconciliation, effect of marital conflict upon husband, wife, and third parties, and comparative fault of husband and wife.

17. Divorce ⇐54

In divorce proceeding, record was not such that it would warrant denial of divorce

on ground of recrimination, Civ.Code, § 122.

18. Divorce *§ 184(1)*

Where no appeal was taken from order, in divorce proceeding, fixing amount of alimony pendente lite to be paid pending appeal, the Supreme Court was without jurisdiction to review such order.

Athearn, Chandler, Hoffman & Angell, Reginald G. Hearn and Angell, Hearn & Adams, San Francisco, for plaintiff-appellant.

Chamberlain & Chamberlain, T. L. Chamberlain and F. L. Sinclair, Auburn, for defendant-appellant.

TRAYNOR, Justice.

Plaintiff Rosemond M. Phillips and defendant George W. Phillips were married in Mexico in 1934. On their first wedding anniversary, they had another ceremony in California to allay any question as to the validity of the marriage. In 1945 Rosemond secured an interlocutory decree of divorce on the ground of extreme cruelty, and a final decree was entered in 1946. A reconciliation followed, and the parties were remarried in May of that year. In July, 1948, they again separated, and Rosemond brought this action for divorce, alleging extreme cruelty. George denied the allegations of cruelty and filed a cross-complaint in which he prayed in the alternative for an annulment on the ground of fraud or for a divorce on the ground of extreme cruelty. Both parties alleged that reconciliation was impossible.

The trial court restrained George from disposing of the assets alleged to be community property and ordered him to pay stated amounts for Rosemond's costs and attorney fees and \$300 per month alimony pendente lite. A few days later, this order was changed to provide for \$350 per month alimony pendente lite and to restrain Rosemond from living in the family residence. Subsequently, the alimony was reduced to \$150 per month.

Following a trial, the court filed the following memorandum on October 4, 1949:

"The Court finds from the evidence introduced in this case;—

"1. That the defendant and cross-complainant has wrongfully inflicted upon the plaintiff and cross-defendant grievous mental suffering.

"2. That the plaintiff and cross-defendant has wrongfully inflicted upon the defendant and cross-complainant grievous mental suffering.

"It therefore follows that neither party is entitled to a divorce from the other.

"It is ordered that each party to this action be, and that they are hereby denied a divorce from the other.

"James Snell"

The memorandum was entered in the clerk's minutes but was not entered in the judgment book. Rosemond moved for a new trial and her motion was denied on November 26, 1949. On December 22, 1949, she filed a notice of appeal "from that certain part of the judgment in said action rendered on the 4th day of October, 1949, whereby the plaintiff is denied a divorce from the defendant." The District Court of Appeal affirmed the "judgment", Phillips v. Phillips, Cal.App., 236 P.2d 816, 817, and this court granted a hearing. It was thereafter ascertained that a judgment had never been entered. After communication by the clerk of this court with counsel and the trial court, new findings of fact and conclusions of law were signed by the trial judge and judgment was entered on October 14, 1952. The judgment denied each party a divorce on the same ground as did the memorandum of October 4, 1949. George filed a notice of appeal therefrom on December 12, 1952. Rosemond did not file a second notice of appeal.

Rosemond contends that George's appeal must be dismissed, on the grounds that the only valid judgment herein was the one that was rendered on October 4, 1949, and that George's notice of appeal, which was not filed until December 3, 1952, was filed too late.

Rosemond previously sought a writ of mandamus to compel the clerk of the Superior Court of Placer County to enter the memorandum of October 4, 1949, as a

judgment. The petition was denied by this court without opinion. *Phillips v. Superior Court*, Sac. 6345, December 4, 1952. That decision does not bar consideration here of Rosemond's contentions. See, *Funeral Directors Ass'n v. Board of Funeral Directors*, 22 Cal.2d 104, 110, 136 P.2d 785.

In support of her motion to dismiss the appeal, Rosemond contends that the written memorandum, signed and filed by the trial judge, constituted and was intended by the court to be a valid judgment disposing of the case. She states that it was the ministerial duty of the clerk to enter the judgment immediately and that the clerk's dereliction cannot impair the finality of the judgment to her prejudice. She also argues that the clerk of the trial court and George have accepted the memorandum as a judgment and George cannot now question it. Finally, she contends that the perfection of her appeal stayed all further proceedings in the trial court.

[1,2] When, as here, findings of fact are required, *LaMar v. LaMar*, 30 Cal.2d 898, 900, 186 P.2d 678, and have not been waived, judgment is not rendered until the findings have been signed by the trial judge and filed with the clerk. *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 347, 182 P.2d 182; *Supple v. Luckenbach*, 12 Cal.2d 319, 323, 84 P.2d 52; *In re Estate of Dodds*, 52 Cal.App.2d 287, 289, 126 P.2d 150; *Easterly v. Cook*, 140 Cal. App. 115, 123, 35 P.2d 164; see, 29 Cal.L. Rev. 635, 637. Once the judgment has been rendered it is the duty of the clerk to enter the judgment in the judgment book. Code Civ.Proc. § 632; *Baker v. Brickell*, 102 Cal. 620, 623, 36 P. 950; *LaMar v. Superior Court*, 87 Cal.App.2d 126, 130, 196 P.2d 98; *Hoover v. Lester*, 16 Cal.App. 151, 153, 116 P. 382. The memorandum that was signed by the trial judge, filed with the clerk, and entered in the clerk's minutes, contained findings of fact and conclusions of law separately stated and complied with section 632 of the Code of Civil Procedure. See, *In re Estate of Janes*, 18 Cal.2d 512, 514, 116 P.2d 438; *In re Estate of Exterstein*, 2 Cal.2d 13, 15-16, 38 P.2d 151; *Consolidated Irr. Dist. v. Crawshaw*, 130 Cal. App. 455, 462, 20 P.2d 119. The filing of

the memorandum, therefore, met the requirements for rendition of a judgment.

[3] It does not follow, however, that the memorandum is the judgment. Until a judgment is entered, it is not effectual for any purpose, Code Civ.Proc. § 664, and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. *Brownell v. Superior Court*, 157 Cal. 703, 708, 109 P. 91; *Crim v. Kessing*, 89 Cal. 478, 489, 26 P. 1074; *Lind v. Baker*, 48 Cal.App.2d 234, 244, 119 P.2d 806; *Tilden Lumber, etc., Co. v. Bacon Land Co.*, 116 Cal.App. 689, 694, 3 P.2d 350. Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his findings of fact. *Reimer v. Firpo*, 94 Cal.App.2d 798, 800-801, 212 P.2d 23; *Magarian v. Moser*, 5 Cal.App.2d 208, 210, 42 P.2d 385.

[4,5] There is no merit to Rosemond's contention that since George, the clerk, and the trial court accepted the memorandum as a judgment, its validity cannot now be questioned. As this court stated in *Spencer v. Troutt*, 133 Cal. 605, 65 P. 1083, "the want of jurisdiction in this court over a premature appeal is absolute, and, as consent cannot confer jurisdiction, the defect cannot be waived." 133 Cal. at page 609, 65 P. at page 1084; see, *Fong Chuck v. Chin Po Foon*, 29 Cal.2d 552, 554, 176 P.2d 705; cf. Rules on Appeal, Rule 2(c).

[6-8] The premature notice of appeal did not stay further proceedings in the trial court, since an appeal taken before entry of judgment does not confer jurisdiction upon the appellate court so as to divest the trial court of authority to take further proceedings. *Spencer v. Troutt*, supra, 133 Cal. 605, 608-609, 65 P. 1083; *Brady v. Burke*, 90 Cal. 1, 5, 27 P. 52. "Acts of the trial court after the premature notice but before entry of judgment are valid." *Witkin*, New California Rules on Appeal, 17 So.Cal.L.Rev. 79, 88.

[9] Since the 1949 memorandum was not entered as a judgment, the trial judge had the power to substitute new findings of fact and conclusions of law, and to enter a new judgment. The only judgment in this

case is the judgment entered on October 14, 1952, and all issues in this case must be resolved on the basis of that judgment.

Rosemond contends that even if the memorandum is not the judgment herein, the judgment entered on October 14, 1952, should have been entered *nunc pro tunc* as of October 4, 1949, and for that reason also George's notice of appeal was filed too late. Since George was apparently satisfied with the purported judgment of October 4, 1949, and was willing to allow severable parts thereof not appealed from by her to become final and *res judicata*, she continues, it would give him an unfair advantage to allow him to appeal from the judgment subsequently entered.

[10-12] The contention is wholly without merit. Even if the judgment were entered *nunc pro tunc*, a party's right to an appeal cannot be cut off by antedating the entry of the judgment from which he desires to appeal. *Spencer v. Troutt*, *supra*, 133 Cal. 605, 607, 65 P. 1083; *Bryant v. Superior Court*, 16 Cal.App.2d 556, 561, 61 P.2d 483; see, 30 Cal.L.Rev. 433, 449. In any event, no reason has been shown why the judgment should be entered as of 1949. Courts have inherent power to enter judgments *nunc pro tunc* so as to relate back to the time when they should have been entered, but will do so only to avoid injustice. *Norton v. City of Pomona*, 5 Cal.2d 54, 62, 53 P.2d 952; *Scoville v. Kegl*, 29 Cal.App. 2d 66, 68, 84 P.2d 212; see, *Mather v. Mather*, 22 Cal.2d 713, 719, 140 P.2d 808. In the present case, no "unfair advantage" will be allowed George if he is permitted to show that an adverse judgment is erroneous; he could change his mind and decide to appeal after judgment was entered in the case.

[13, 14] George has made a timely appeal from the judgment as a whole and this court has thereby obtained jurisdiction to review the entire judgment. It is necessary, however, to determine whether Rosemond has also appealed from the judgment, since it is the general rule that a party who has not appealed may not complain of errors. *Mott v. Horstmann*, 36 Cal.2d 388, 393, 224 P.2d 11; *Salter v. Ulrich*, 22 Cal.2d 263,

268, 138 P.2d 7, 146 A.L.R. 1344. Rosemond filed her notice of appeal on December 22, 1949. The judgment was not entered until October 14, 1952, and she did not file a second notice of appeal. Rule 2(c) of the Rules on Appeal, as it read before the 1951 amendment thereto, provided: "A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry." As we have previously pointed out, the memorandum complied with section 632 of the Code of Civil Procedure and constituted a "rendition" of judgment. Accordingly, Rosemond's notice of appeal must be deemed to have been filed immediately after entry of judgment.

[15, 16] The trial court found that each party had a cause of action of divorce against the other on the ground of extreme cruelty and denied each a divorce on the ground of recrimination. Civ.Code, § 122. The doctrine of recrimination may not be mechanically applied by a trial judge, but is an equitable principle to be followed according to the circumstances of each case and with a proper respect for the paramount interests of the community at large. *De Burgh v. De Burgh*, 39 Cal.2d 858, 870, 250 P.2d 598. The trial court necessarily has a broad discretion. It must, however, give consideration to the prospects of reconciliation, the effect of the marital conflict upon the husband, wife, and third parties, and the comparative fault of the parties. *De Burgh v. De Burgh*, *supra*, 39 Cal. 2d at page 873, 250 P.2d at page 606.

We have concluded that the doctrine of recrimination does not apply here. Both parties agreed that a reconciliation was impossible. The trial judge himself alluded to the "matrimonial wreck," observed that "I don't think it will be pleasant for them both to live in the same house," and by court order restrained Rosemond from staying at the family residence. The trial court made detailed findings concerning numerous acts of cruelty alleged in the complaint and in the answer and cross-complaint. It found that George frequently swore at and cursed Rosemond, that he became angry and objected to her course of conduct on numerous occasions, that he frequently expressed

dissatisfaction with and belittled her in the presence of guests and friends, and that when Rosemond insisted that the family car have new tires before making a proposed trip to Oakland, George became angry and told her, "I hope you break your God damn neck." It found that after the second marriage Rosemond made statements to friends indicating that she had agreed to the reconciliation only because she hoped thereby to get most of George's money and property; that Rosemond took large sums of money from the place of business George operated at Lake Tahoe without his consent; that she carried on a course of conduct designed to irritate and provoke him; that she was discourteous and disrespectful to patrons and guests at the place of business at Lake Tahoe, causing such patrons and guests to state to George that they would take their business elsewhere; that she criticized and embarrassed George in the presence of friends; and that she told their friends on many occasions that he was crazy. The findings are supported by substantial evidence.

This marriage is the second between the parties that has failed. The seriousness and frequency of their misconduct and the nature of the charges made at the trial, including the many unfounded accusations that were made by both parties and found to be false by the trial judge, indicate that there is little possibility that they will ever be able to overcome their differences and live together harmoniously. The marital conflict has a serious effect upon the parties. George suffers from a heart condition, for which he receives disability compensation, and continued discord may have harmful results. Financial considerations may not be entirely ignored, and it appears that the conduct of the parties may destroy the business of the resort and their livelihood.

[17] It is clear from the evidence and the findings that the legitimate objects of the marriage have been destroyed. No public policy would be served by denying a divorce because each party was guilty of extreme cruelty toward the other. It is a degradation of marriage and a frustration of its purposes to use it as a means of punish-

ing the parties to the divorce action. In our opinion, the trial judge should not have denied the parties a divorce on the ground that recrimination had been shown. The judgment must therefore be reversed. On retrial, the court may determine whether one or both parties shall receive the divorce. *De Burgh v. De Burgh*, supra, 39 Cal.2d 858, 873, 250 P.2d 598.

George contends that the trial court should be directed to enter judgment that a certain purported agreement between him and Rosemond is void and that there is no community property. Rosemond contends that the trial court should be directed to enter judgment that the agreement is valid and that all their property is community. These questions were put in issue by the pleadings, but since the trial court denied both parties a divorce, it did not resolve them. Since the judgment must be reversed, these issues will be decided on the retrial of the cause.

[18] Rosemond contends that the trial court abused its discretion by reducing alimony pendente lite from \$350 per month during the trial to \$150 per month on appeal. Since no appeal was taken from the order fixing the amount to be paid pending appeal, we are without jurisdiction to review that order.

The motion to dismiss the appeal is denied. The judgment is reversed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

I would affirm the judgment for the reasons stated by me in *De Burgh v. De Burgh*, 39 Cal.2d 858, 874, 250 P.2d 598.

SPENCE, J., concurs.

SHENK, Justice.

I dissent. However desirable a change in the public policy of this state on the subject of recrimination may be thought to be, I feel impelled to adhere to the views stated by me in *De Burgh v. De Burgh*, 39 Cal.2d 858, 882, 250 P.2d 598. The legislature established the state policy in 1872 by the

enactment of section 111 of the Civil Code where it is provided that: "Divorces must be denied upon showing * * * 4. Recrimination". That policy continued until 1952 when this court in the De Burgh case ruled otherwise. The legislature has the first right to establish the public policy of the state. When it has spoken on a subject so peculiarly within its dominion and in no uncertain terms it is incompetent for the court to declare otherwise.



41 Cal.2d 879

McCARTHY et al.

v.

CITY OF MANHATTAN BEACH.

L. A. 22507.

Supreme Court of California.

In Bank.

Dec. 30, 1953.

Rehearing Denied Jan. 27, 1954.

In suit for judgment declaring void ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, the Superior Court, Los Angeles County, Arnold Praeger, J., rendered judgment in favor of defendant, and plaintiffs appealed. The Supreme Court, Spence, J., held, *inter alia*, that it would be presumed that city could perform its duty in affording police protection to safeguard plaintiffs' property, and that hence public destruction of fence plaintiffs had placed around their property while it was still zoned for residential use would not be germane to issue of reasonable zoning under present ordinance.

Affirmed.

Schauer and Shenk, JJ., dissented.

Prior opinion, 257 P.2d 679.

1. Municipal Corporations ⇨601(7)

A zoning ordinance enacted pursuant to comprehensive plan of community development, when reasonable in object and not arbitrary, will be sustained as proper exercise of police power.

2. Municipal Corporations ⇨63(1), 122(2)

Every intendment is in favor of validity of zoning ordinance, and court will not, except when limitation is clearly arbitrary, interfere with legislative discretion.

3. Municipal Corporations ⇨122(2)

It is presumed that zoning ordinance is adapted to promote public health, safety, morals and general welfare.

4. Municipal Corporations ⇨63(1)

A court may differ with legislative body as to propriety of enacting ordinance, but if question is one upon which reasonable minds might differ, court will not interfere with legislative body's determination of policy.

5. Trial ⇨375

Trial judge's view of plaintiffs' property with consent of counsel is evidence in case and may be used alone or with other evidence to support findings.

6. Evidence ⇨570

Expert testimony is to be given weight to which it appears in each case to be justly entitled.

7. Evidence ⇨574

In event of conflict, law ordinarily makes no distinction between expert testimony and evidence of other character, and either may be accepted by trier of fact as basis for findings on disputed factual issues.

8. Municipal Corporations ⇨63(1)

Where substantial reason exists to support determination of city council in matters of opinion or policy affecting zoning plans, and propriety of districting classification is fairly debatable in furtherance of community development, courts will not substitute their judgment for that of municipal authority.

9. Municipal Corporations ⇨122(4)

In suit for judgment declaring void ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, evidence sustained trial court's conclusion that zoning restrictions constituted a legitimate exercise of city's police power in interests of public health, safety, morals and general welfare.

10. Municipal Corporations ⇨601(12)

Mere fact that plaintiffs, whose beach land had been zoned for recreational purposes only might suffer some financial detriment did not require invalidation of zoning restriction.

11. Constitutional Law ⇨81

It is implicit in theory of police power that individual cannot complain of incidental injury, if power is exercised for proper purposes of public health, safety, morals and general welfare, and if there is no arbitrary and unreasonable application in particular case.

12. Eminent Domain ⇨2(1)

Landowner required in purported exercise of police power to make improvements on his own property for public benefit is entitled to compensation.

13. Municipal Corporations ⇨601(7)

Physical facts and surrounding circumstances, not possible action of unidentified third persons, provide test for determining validity of zoning regulations. Government Code, §§ 50140, 50141.

14. Evidence ⇨83(2)

Municipal Corporations ⇨625

In suit for judgment declaring void an ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, it would be presumed that city could perform its duty in affording police protection to safeguard plaintiffs' property; and hence public destruction of fence plaintiffs had placed around their property while it was still zoned for residential use would not be germane to issue of reasonable zoning under present ordinance.

15. Municipal Corporations ⇨63(1)

In suit for judgment declaring void ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, trial court properly disregarded plaintiffs' contention that zoning restriction had not been made in good faith but rather had been designed to depress value of plaintiffs' property so that it could eventually be acquired by public authorities at lowest price possible.

16. Municipal Corporations ⇨63(2)

Purpose or motive of city officials in passing ordinance is irrelevant to any inquiry considering reasonableness of ordinance; and if conditions justify enactment of ordinance, motives prompting its enactment are of no consequence.

17. Appeal and Error ⇨1058(1)

Error, if any, in rejecting cumulative evidence was not prejudicial.

18. Constitutional Law ⇨278(1)

Municipal Corporations ⇨625

On record, ordinance permitting only recreational activities on ocean beach land on which plaintiffs had intended to construct houses on pilings was a fair, just and reasonable regulation for general welfare of city as whole, and was not so burdensome as to contravene constitutional guarantees in protection of property rights. U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 13.

Cosgrove, Cramer, Diether & Rindge, John N. Cramer, Leonard A. Diether and J. D. Barnum, Jr., Los Angeles, for appellants.

Clyde Woodworth, City Atty., Inglewood, Dunlap, Holmes, Ross & Woodson, Pasadena, for respondent.

SPENCE, Justice.

Plaintiffs sought a judgment declaring that a certain zoning ordinance restricting the use of their ocean-front property to beach recreational purposes is "null and void" as applied to them. In the first cause of action they challenged the constitutionality of the zoning restriction insofar as it affects their land, claiming that it violates the due process and equal protection clauses of both the federal and state constitutions and results in a taking of their property for public use without compensation. U.S.C.A. Const. Amend. XIV, § 1; Cal.Const. Art. I, § 13. They also alleged that the restrictive use is unreasonable, arbitrary, and discriminatory, and is an abuse of legislative discretion. In their second cause of action they challenged the validity of the zoning restriction on the ground that it was not passed in good faith but was adopted pur-

suant to a scheme, conceived by the mayor and members of the city council, to depress the value of plaintiffs' property so that it could be acquired for public park purposes at the lowest possible price. The trial court decided in favor of the city; and settled legal principles sustain the propriety of its judgment.

Plaintiffs are the owners of approximately three-fifths of a mile of sandy beach frontage in the city of Manhattan Beach. The property extends from 1st Street, which is the south boundary of the city adjoining Hermosa Beach, to 13th Street. It is a strip of land varying in width from 174 to 186 feet and having an average slope of 1 to 2 feet vertical in 10 feet horizontal. It is bounded on the west by the Pacific Ocean and on the east by a state park, which was formerly a 50-foot right of way belonging to the Pacific Electric Railway Company. To the east of this former right of way and extending along the city's entire ocean frontage is a cement walk, 15 feet wide, and called "The Strand." Back therefrom are residential and business houses. As it parallels plaintiffs' property running from south to north, the strand varies in elevation from 2 to 15 feet above the Pacific Electric's former right of way, which in time of storm and on other occasions has been covered with water.

In 1924 the city brought a quiet title action with respect to the property now owned by plaintiffs, upon the claim of the subdividers' dedication of the land for public use according to certain recorded maps. The action, tried in 1935, resulted in a judgment against the city and title was quieted in plaintiffs' predecessors in interest. The judgment was affirmed on February 15, 1938. *City of Manhattan Beach v. Cortel-you*, 10 Cal.2d 653, 76 P.2d 483. Since at least 1900 the property has been continuously used for public beach purposes. 10 Cal. 2d at page 665, 76 P.2d 483. In 1929 it was classified under the city's ordinance (No. 337) into a single-family residence district. Following the final judgment in the quiet title action and over a period of several years, plaintiffs and the city cooperated in various unsuccessful efforts to cause the property to be acquired through sale or

lease by the public authorities. Resolutions were passed by the city from time to time declaring its present lack of funds for acquisition of the property but recommending that the county or state allocate money so that continued "use of the property as a public beach" could be preserved. In discussion of the matter with plaintiff Neil S. McCarthy, both the mayor and city attorney expressed their hope that the property would not be sold or improved so as to increase the cost of its acquisition by the public authorities.

On June 24, 1940, Mr. McCarthy advised the mayor by letter that upon assurance from the city officials that arrangements were being made to acquire the property, he had delayed putting it on the market during the main selling season; and that in the hope then of deriving some revenue from the property, he was arranging to enclose it and charge admission for its use. An emergency ordinance passed by the city on July 1, 1940, prohibited the erection of any barbed wire fence in the city without first obtaining a written permit from the city council. McCarthy secured such a permit and immediately began construction of the desired fence. It was never fully completed, as parts of it were destroyed by the public at various times during its building and finally it became necessary to remove the fence entirely. On July 30, 1940, McCarthy by letter notified the city council of these difficulties, demanded police protection, and stated his intention of holding the city responsible for all damages suffered.

By letter of August 12, 1940, McCarthy advised the city council of his belief that the property could not be sold or subdivided for residential purposes and requested a rezoning of the property for business purposes. Pursuant to the recommendation of the city planning commission after a public hearing, the city council on August 22, 1940, denied the request. Then on June 26, 1941, the city council adopted the zoning ordinance in question (No. 502), whereby under section 10 plaintiffs' property could be used only for beach recreational activities and for the operation of beach facilities for such activities for an admission fee; and the only structures permitted

thereon were lifeguard towers, open smooth wire fences and small signs. Meanwhile the city was still interested in plaintiffs' property for a public park and carried on negotiations with the state looking toward its acquisition. In 1948 the state commenced an action to condemn the property for park purposes but it has not yet been brought to trial.

Plaintiffs made no use of their property as permitted by the 1941 zoning ordinance nor did they receive any income therefrom. In 1950 they applied to the city for a modification of the ordinance so as to change the classification of their property from "Beach Recreational District" to "Single Family Residence District." Plaintiffs had paid taxes on their property ranging from approximately \$4,200 in 1940 to approximately \$9,000 in 1950. The rezoning application was referred to the city planning commission and, after public hearings, was denied on January 10, 1951. The city council denied the application on March 6, 1951. Plaintiffs thereupon brought this action for declaratory relief.

The trial court found, in part, that plaintiffs' property is, from time to time, subject to erosion and replacement by reason of storms and wave action of the Pacific Ocean; that any residences which could be constructed upon the property would necessarily be erected on pilings, and reasonable minds might differ as to the safety of residence properties so constructed; that such construction might also create police problems by reason of possible uses of the areas underneath the residences for immoral purposes; that one of the principal characteristics of the city is its beach advantage bordering upon the Pacific Ocean; that at all times since adoption of the 1941 ordinance, plaintiffs' property has been suitable for use and has been used by the city and visitors thereto for beach recreational purposes; that it is not true that the city, through its mayor and councilmen, or otherwise, conceived any scheme designed to accomplish the keeping of the property unimproved so it could be used as a public beach recreational area or to depreciate the value of the property so as to enable the public authorities to acquire it at the low-

est possible price. The court also found that "reasonable minds might reasonably differ and might have in the year 1941 reasonably differed" as to the following matters: whether the property is or was suitable for residential or commercial development; whether the city would be subjected to liability by reason of the necessity of employing lifeguards, wrecking crews and salvage employees to protect the property and installations thereon from the ravages of high tides and frequent storms; the propriety of the enactment of the zoning restriction declared in section 10 of the 1941 ordinance; and the proper classification of the property as being within a beach recreational district. Upon such findings the court concluded that the zoning restriction is a valid enactment within the city's police power; that it does not deprive plaintiffs of their property without due process of law or deny them the equal protection of the laws; that it has a foundation in reason and is not a mere arbitrary or irrational exercise of power; and that the scheme of classification and districting followed in the ordinance "has been applied fairly and impartially in the instance of plaintiffs' property." The appeal is from the judgment entered in substantially this same language.

[1-4] As stated in *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 222 P.2d 439, 441, a zoning ordinance enacted pursuant to a comprehensive plan of community development, "when reasonable in object and not arbitrary in operation," will be sustained as a proper exercise of the police power; every intendment is in favor of its validity, and a court will not, "except in a clear case of oppressive and arbitrary limitation," interfere with the legislative discretion; it is presumed to be adapted to promotion of the public health, safety, morals and general welfare; and though the court may differ with the zoning authorities as to the "necessity or propriety" of the regulation so long as it remains a "question upon which reasonable minds might differ," there will be no judicial interference with the municipality's determination of policy.

Ordinance 502 comprehends a city-wide zoning plan. It provides for 10 zoning districts in the city. Only four districts are

material here: R-2 for two-family residences; R-3, for limited multiple-family residences; B-1, a beach recreational district; and C-1, for retail commercial purposes. The property west of the strand is in zone B-1. That property consists of plaintiffs' land, the beach frontage adjoining on the north thereof, and the Pacific Electric's former right of way. Prior to the passage of this ordinance, the beach frontage north of plaintiffs' land was acquired by the state for state park purposes, and some years thereafter (1948) the mentioned right of way was similarly acquired for park purposes. Accordingly, when plaintiffs commenced this action, theirs was the only privately owned property in zone B-1.

Section 1 of ordinance 502 declares: "In order to provide the economic and social advantages resulting from an orderly planned use of land resources and to conserve and promote the public health, safety and general welfare, there is hereby adopted and established an Official Land Use Plan for the City of Manhattan Beach * * *." A planning consultant who had assisted in drafting the zoning ordinance testified that the intent of the district classifications was to "produce a plan meeting all of the various zoning needs of the city * * * a balanced plan * * * including, among other things, one section * * * eminently suited * * * for beach recreation." He further stated that in his opinion the cost of home-building would be relatively high on the beach frontage and therefore inclusion of that beach area in zone R-1 might be deemed "unreasonable zoning"; that home-building in that area might also destroy certain values which residential sections developed just back of the strand had long enjoyed; and that he therefore had recommended to the city planning commission the creation of the "beach recreation zone which would give the owners of the property the right to derive an income from it." Another expert witness on zoning problems testified that the ordinance properly provided for a beach recreational area to "take advantage" of the city's natural resource or asset," its "ocean frontage," which

accounted for its original development as a community.

The secretary of the planning commission, who had been an employee of the city since 1937 and its building inspector for the past nine years, testified that there had been some heavy storms at the beach; that barge boats and barge tenders had drifted onto the beach; that in a heavy storm he had seen the breakers come over the Pacific Electric's former right of way—splash over it. The city's chief of police for the past seventeen years testified that on two or three occasions he had seen water against the westerly edge of the right of way—in the areas near 1st, 5th and 9th Streets; that one of the occasions was some seventeen years ago, when a barge was washed ashore on 1st Street.

In support of their claim that their property was suitable for residential development, plaintiffs called as a witness Colonel Leeds, a qualified civil and consulting engineer. He testified that any residence construction on plaintiffs' property would have to be on pilings; that he would place the structure on concrete or steel piles, the top of which would be at an elevation of approximately 20 feet above mean low water; that he had prepared a diagram, admitted in evidence as plaintiffs' Exhibit 62, showing residential development of plaintiffs' property, allowing 35 feet west of the Pacific Electric's former right of way (the state park strip) for a public roadway and the next 75 feet oceanward for the construction of houses on pilings; that in his opinion houses so erected would be safe from damage from the ocean. On cross-examination, he testified that he did not know that on occasion the Pacific Electric's former right of way at Manhattan Beach had been under water; that he did not know that heavy sea and storm water had come up over the strand in 1938 and caused severe damage; that he had not made any investigation as to whether the city would approve a 35-foot roadway; that he had seen no subdivision plan for this beach area; that in forming his opinion as to the safety of constructing houses on plaintiffs' property, he had considered the presence

of houses at Hermosa Beach, adjoining plaintiffs' property on the south, and that the front of the houses built on plaintiffs' property would be westerly of the front of the houses on Hermosa Beach; that the height to which water is projected shoreward depends upon wave and wind action—ground swells are a form of wave; that damage to piers and structures on beaches is usually caused by ground swells, which are produced by distant storms or submarine earthquakes—in other words, there may be heavy ground swells along a beach on a perfectly calm day; that he would construct the houses on pilings driven about 10 feet below low water, so that if an unanticipated storm should occur, it could gouge out several feet of the beach and the house would still stand and be safe. He was then asked the following question: "Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62?" He replied: "Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible." Plaintiffs argue that such admission was limited to the proposed residential plan of Colonel Leeds and did not signify that engineers would differ in opinion as to the safety of houses built in accordance with other plans, such as higher, stronger or differently arranged pilings. This may be true as an abstract proposition, but there was no testimony to that effect. Obviously, as the city concedes, many structures are apparently safely erected many miles out in the ocean, such as offshore oil drilling and pumping derricks, and undoubtedly it would be possible at considerable expense to have safe residential construction on plaintiffs' property if the pilings were driven deeply enough and the houses built high enough to eliminate threatening ocean tide and wave action. However, the question is not whether it may be humanly possible to build houses on plaintiffs' property which would be safe

in times of storms, high tides and ground swells, but whether such beach property is suitable for residential development pursuant to some representative plan such as that proposed by Colonel Leeds and as to which he himself admitted there could be a difference of opinion in regard to the safety factor.

It was stipulated that the judge might view the property and that he might consider as evidence everything that he saw in making such inspection. The visit was made in the company of an attorney for plaintiffs, an attorney for the city, and the clerk of the court. Thereafter the judge made a statement in open court regarding his observations. Among other things, he noted that the westerly side of the proposed 35-foot roadway was at least 12 feet lower than the general level of the Pacific Electric's former right of way; that the westerly side of the proposed roadway was beach that was obviously subject to flooding at extremely high tides or during storms; that if the proposed houses were built on plaintiffs' property westerly of the proposed 35-foot roadway, they would be right on the beach and unless they were protected by an adequate sea wall, they would be subject to a constant hazard of destruction by the sea. After stating that counsel during the visit to the premises had expressed no difference of opinion with his observations, the judge made the further remark that his view of plaintiffs' property demonstrated to him that the safety of the proposed construction of houses thereon was "a question upon which reasonable minds might differ."

[5-7] The trial judge's view of plaintiffs' property with the consent of counsel is evidence in the case and "may be used alone or with other evidence to support the findings." *Noble v. Kertz & Sons Feed etc. Co.*, 72 Cal.App.2d 153, 159, 164 P.2d 257, 260; see, also, *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 348, 175 P.2d 542; *Safeway Stores v. City Council, San Mateo*, 86 Cal.App.2d 277, 284, 194 P.2d 720; *Wheeler v. Gregg*, 90 Cal.App.2d 348, 366, 203 P.2d 37; *Sindell v. Smutz*, 100 Cal. App.2d 10, 15-16, 222 P.2d 903.

Plaintiffs argue that the trial judge's observations are not evidence because he did not view the premises under storm conditions. They cite on this point *Fendley v. City of Anaheim*, 110 Cal.App. 731, 294 P. 769. The plaintiffs there claimed that defendant's operation of a power plant jarred their residence and caused damage. The evidence established that most of the discomforts occurred at nighttime. There was no evidence to the contrary and in such circumstances, the trial court's inspection of the premises in the daytime was an insufficient basis to sustain its finding that the operation of the plant caused no discomfort to plaintiffs. Here, however, neither the expert witness, Colonel Leeds, nor the trial judge purported to recite existing conditions and physical facts observed on a visit to plaintiffs' property during time of storm. There was, moreover, undisputed evidence that in stormy weather sea water had extended further landward than plaintiffs' property. The trial judge merely applied such uncontradicted evidence to his own observations of the physical topography of the premises in determining the safety of residential development on piling construction along the beach frontage. Expert testimony is to be given the weight to which it appears in each case to be justly entitled. In the event of conflict, the law ordinarily makes no distinction between expert testimony and evidence of other character; either may be accepted by the trier of fact as the basis for findings on disputed factual issues. *Arais v. Kalensnikoff*, 10 Cal. 2d 428, 432, 74 P.2d 1043, 115 A.L.R. 163; *Liberty Mut. Ins. Co. v. Industrial Acc. Comm.*, 33 Cal.2d 89, 94, 199 P.2d 302; see, also, *Gibson Properties Co. v. City of Oakland*, 12 Cal.2d 291, 297-298, 83 P.2d 942.

[8,9] In addition, the court found, upon the testimony of the city's chief of police, that the construction of houses on pilings might create police problems by reason of the possible use of the areas under the residences for immoral purposes. Municipal ordinances tending to minimize opportunity for immoral practices in relation to other types of construction such

as billboards have been held within the police power. *Cusack Co. v. City of Chicago*, 242 U.S. 526, 529, 37 S.Ct. 190, 61 L.Ed. 472. In the light of these considerations, the zoning restriction of plaintiffs' property for beach recreational purposes appears to be a legitimate exercise of the city's police power in the interests of public health, safety, morals and general welfare. Where substantial reason exists to support the determination of the city council in matters of opinion or policy affecting zoning plans and the propriety of the districting classification is "fairly debatable" in furtherance of the community development, courts will not substitute their judgment for that of the municipal authority. *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 462, 202 P.2d 38, 7 A.L.R.2d 990.

[10,11] The fact that plaintiffs, may suffer some financial detriment does not require invalidation of the zoning restriction, for "every exercise of the police power is apt to affect adversely the property interest of somebody." *Zahn v. Board of Public Works*, 195 Cal. 497, 512, 234 P. 388, 394. As was said in *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d 332, at page 338, 175 P.2d 542, at page 547, "It is implicit in the theory of police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals and general welfare, and if there is no arbitrary and unreasonable application in the particular case." While plaintiffs recognize that some values incident to property must yield to the police power, they argue that the zoning restriction as applied to their beach land goes beyond mere regulation and constitutes an unwarranted interference with the use of their property so as to exceed the scope of permissible zoning. They cite in particular the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322. But as there stated, "the question depends upon the particular facts." That was an action between two private parties, the statute involved admittedly destroyed previously existing rights of property and contract as reserved

between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community. In those circumstances application of the statute to the property was held to effect such diminution in its value as to be unconstitutional and beyond the legitimate scope of the police power.

[12] Factually dissimilar cases cannot avail plaintiffs in their attack upon the zoning restriction upon due process grounds. Typical of such cited cases is *Panhandle Eastern Pipe Line Co. v. State Highway Com.*, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090, where the state in the purported exercise of its police power attempted to have a private property owner make at its own expense changes in structural improvements for public safety in travel upon the highway. It was held that such changes could be required of the property owner only upon the payment of compensation—a principle of decision well recognized in relation to the exercise of the police power within constitutional limits. *City of Oakland v. Schenck*, 197 Cal. 456, 461, 241 P. 545.

Here plaintiffs produced no evidence of value relative to the use of their property either before or after passage of the 1941 ordinance. Admittedly they have been paying substantial taxes on their property. Prior to the 1941 ordinance and while the property was zoned for residential use, plaintiffs claimed that it could not be so utilized profitably and they then unsuccessfully sought a rezoning for business purposes. Since 1941, with the zoning limitation upon their property as a beach district and subject to commercial operation for beach recreational purposes, plaintiffs have still made no use of their property as authorized but seek its return to residential classification, a districting which they had previously deemed undesirable. Now they maintain that the 1941 restriction effects a confiscatory taking of their property but they have made no showing that their beach frontage could not be put

to beneficial use in conformity with the zoning limitation. The city's planning expert expressly testified that plaintiffs' property was zoned for beach instead of residential use so as to give "the owners * * * the right to derive an income" therefrom. So distinguishable are cases cited by plaintiffs where the relative values in respective uses of the zoned property were shown, e. g. *Long v. City of Highland Park*, 329 Mich. 146, 45 N.W.2d 10, 12; *State ex. rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317, 320; where changed conditions rendered previous zoning limitations unsuitable, e. g. *Arverne Bay Const. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587, 591-592, 117 A.L.R. 1110; *Skalko v. City of Sunnyvale*, 14 Cal.2d 213, 216, 93 P.2d 93; where "spot" zoning created an "island" in the middle of a larger area devoted to other uses, e. g. *Maxwell v. Incorporated Village of Rockville Centre*, Sup., 84 N.Y.S.2d 544, 545-546; *Reynolds v. Barrett*, 12 Cal.2d 244, 251, 83 P.2d 29; where the zoning restriction deprived the property owner of all beneficial or profitable use of the property, e. g. *Eaton v. Sweeney*, 257 N.Y. 176, 177 N.E. 412, 414.

[13, 14] Plaintiffs refer to McCarthy's above-mentioned letter to the city council in the summer of 1940 advising of the public destruction of the fence they were attempting to build on their property. They contend that the city was thereby put on notice that plaintiffs could not successfully maintain any fence around their beach property and charge a fee for its use for recreational activities because of the threat of "mob violence." But that alleged destruction occurred when plaintiffs' property was zoned for residential use and more than a year prior to the enactment of the 1941 ordinance. The city's liability for such damage is fixed by statute, Government Code, § 50140, subject to the one-year period of limitations for commencement of the action, *Ibid*, § 50141. But in any event such act of mob violence, so remote in point of time, is not germane to the issue of reasonable zoning of plaintiffs' property under the 1941 ordinance, and it must be presumed that the city could perform its duty

in affording police protection to safeguard plaintiffs' property. The physical facts and surrounding circumstances, not the possible action of unidentified third persons, provide the test for determining the validity of zoning regulations. *Lockard v. City of Los Angeles*, supra, 33 Cal.2d 453, 461, 202 P.2d 38; *Clemons v. City of Los Angeles*, supra, 36 Cal.2d 95, 100, 222 P.2d 439.

[15, 16] The trial court properly disregarded plaintiffs' contention that the 1941 zoning restriction of their property was not made in good faith but was a maladministration of the city's police power pursuant to a scheme or plan of action to depress the value of plaintiffs' beach property so that it could eventually be acquired by the public authorities at the lowest price possible, and meanwhile be used for public recreational purposes. The record simply shows that following the 1938 determination of the city's quiet title action in favor of plaintiffs' predecessors in interest in the beach property, *City of Manhattan Beach v. Cortelyou*, supra, 10 Cal.2d 653, 76 P.2d 483, plaintiffs and the city endeavored together—through extended informal negotiations evidenced by the city council's resolutions and the interchange of voluminous correspondence—to interest the public authorities in the purchase of plaintiffs' land for permanent beach recreational purposes; that in 1940 plaintiffs sought an amendment of the ordinance then zoning their property for residential purposes, so as to permit some business use thereon and said request, after public hearings, was denied; that in 1941 the zoning ordinance in question was passed, restricting plaintiffs' property to beach recreational purposes pursuant to an overall city-wide zoning plan, but permitting commercial use to be made of plaintiffs' property according to the zoning limitation; that thereafter, and for nine years, plaintiffs made no attempt to use their property so as to derive any income pursuant to the purposes authorized by the 1941 ordinance but the city and plaintiffs still continued to negotiate and work together in an effort to further public acquisition of plaintiffs' property; that in November, 1950, plaintiffs made their

first move in objection to the zoning restriction, when they sought its modification to permit residential construction thereon though they had previously been dissatisfied with such residential limitation and wanted the property available for business use; and then upon the denial of their request in early 1951, plaintiffs brought this declaratory relief action. While plaintiffs charge that the "scheme" was initiated shortly after the city lost its quiet title action and included the state's condemnation suit brought ten years later in 1948 (and still pending), plaintiffs did not call one city official to the witness stand to testify on the matter. See *Safeway Stores v. City Council, San Mateo*, supra, 86 Cal.App. 2d 277, 287, 194 P.2d 720. The only evidence, except physical facts, as to the purpose of the 1941 zoning restriction, was the above-mentioned testimony of the city's planning experts, attesting to the adoption of the city-wide zoning plan in the interest of the general welfare. The trial court, in its comments upon the evidence and plaintiffs' specific charges, determined that the city council had not been actuated by any improper motive or intent in the matter.

Plaintiffs' claims are entirely immaterial in view of the settled rule that "the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. * * * If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. * * *" *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87, 99, 33 P.2d 672, 677. The cases which plaintiffs cite as example of the maladministration of the police power involve factual dissimilarities, which render them inapplicable here: *Grand River Dam Authority v. Grand-Hydro*, 200 Okl. 157, 201 P.2d 225, at page 228, where the state passed an act removing the principal value of the property and then sought to "acquire the property by condemnation, basing the reimbursement to the owner on the reduced value", *State ex rel. Tingley v. Gurda*, su-

pra, 209 Wis. 63, 243 N.W. 317; Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N.W.2d 195; and Long v. City of Highland Park, supra, 329 Mich. 146, 45 N.W.2d 10, where the ordinance effected "spot" zoning and there was evidence showing significant relative value differentiations in use of the property; and Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, where a private citizen was led in good faith to make large expenditures on certain property pursuant to the terms of an ordinance and thereafter, without change in existing conditions within the city, a second ordinance was passed prohibiting the previously authorized use, thereby destroying a considerable property investment.

Plaintiffs also argue the error of several rulings of the trial court in the rejection of evidence. The first concerns certain testimony of Mr. McCarthy relative to conversations had with city officials and offered in support of plaintiffs' claim of improper motive on the part of the city council in its adoption of the 1941 zoning restriction on plaintiffs' property. Objection to this testimony was properly sustained. The assigned motive or purpose of various city officials in passing a zoning ordinance was irrelevant to any inquiry concerning its reasonableness in municipal over-all planning. Sunny Slope Water Co. v. City of Pasadena, supra, 1 Cal.2d 87, 99, 33 P.2d 672.

[17] Plaintiffs next assert that the trial court committed prejudicial error in rejecting certain expert testimony relative to the suitability of plaintiffs' property for subdivision for residential purposes. But such testimony had only cumulative value in that its admission would have added nothing to what was already before the court through Colonel Leeds' statements as to the feasibility of the residential development of the beach property and his proposed plan. There was no dispute that plaintiffs' property could be so subdivided and the court recognized that fact after viewing the premises. Under the circumstances plaintiffs suffered no prejudice from the ruling.

Plaintiffs finally argue the point of the trial court's disposition of McCarthy's above-mentioned letter of July, 1940, notifying the city of the public destruction of the fence which was being erected on the property. The record shows some confusion on this phase of the case. This letter, upon objection, was originally rejected by the trial court but marked for identification. Then later in the trial when McCarthy testified as to the particular acts of "mob violence" experienced more than a year before the 1941 zoning regulation was adopted, the trial court commented that his testimony was "related in the document that is in evidence (the letter)." As aforestated, possible damage to plaintiffs property through mob violence and the city's liability therefor are matters wholly covered by statute, Gov. Code, §§ 50140-50141, and not germane to the issue of reasonableness of the zoning process in city-wide planning. But regardless of this consideration, the trial court apparently treated the particular letter as in evidence, corroborating McCarthy's testimony, and plaintiffs now have no ground for complaint.

[18] As the record has been reviewed, the zoning restriction of the 1941 ordinance (§ 10) on the use of plaintiffs' property appears to be a fair, just and reasonable regulation for the general welfare of the city as a whole, and not so burdensome that it contravenes the constitutional guarantees in protection of property rights. See City of Miami Beach v. Hogan, Fla.1953, 63 So.2d 493, 494-495.

The judgment is affirmed.

EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance because I can see no escape from the proposition that the record in this case presents a factual situation as to the reasonableness of the ordinance here in question upon which reasonable minds might differ. Such being the case it cannot fairly or honestly be said as a matter of law that as applied to plaintiff's property the ordinance is so

unreasonable as to constitute an arbitrary and unconstitutional exercise of the police power by the defendant.

I have heretofore given expression to my views with respect to the validity of zoning ordinances enacted by city councils and boards of supervisors which arbitrarily and unreasonably limit and restrict the use of private property under the guise that such limitation and restriction constitute a reasonable exercise of the police power. See, *County of San Diego v. McClurken*, 37 Cal.2d 683, 692, 234 P.2d 972; *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 107, 222 P.2d 439; *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 43, 207 P.2d 1, 11 A.L.R.2d 503; *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 468, 202 P.2d 38, 7 A.L.R.2d 990; *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 345, 175 P.2d 542.

In the *McClurken*, *Lockard* and *Wilkins* cases, supra, the trial court had held the zoning ordinance in each of said cases unconstitutional as applied to the property there involved and this Court by a bare majority reversed the trial court notwithstanding the record contained overwhelming evidence that the ordinance in each of said cases was so arbitrary and unreasonable as to seriously impair the value of the property affected by the ordinance. In the *Wilkins* case the trial judge viewed the premises. This is likewise true in the case at bar. It has been repeatedly held that the observations of a trial judge in viewing the premises or scene of the controversy is evidence in the case upon which findings may be based. *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 122 P.2d 576; *Gates v. McKinnon*, 18 Cal.2d 179, 114 P.2d 576; *Ethel D. Co. v. Industrial Acc. Comm.*, 219 Cal. 699, 28 P.2d 919; *People v. Milner*, 122 Cal. 171, 54 P. 833; *Gastine v. Ewing*, 65 Cal.App. 2d 131, 150 P.2d 266; *MacPherson v. West Coast Transit Co.*, 94 Cal.App. 463, 271 P. 509; *Vaughan v. County of Tulare*, 56 Cal. App. 621, 205 P. 21.

Notwithstanding this circumstance a bare majority of this Court held that the findings that the enforcement of the ordinance would be oppressive, confiscatory and an

unreasonable restriction on plaintiff's property rights were not supported by the evidence.

At page 352 of 29 Cal.2d, at page 555 of 175 P.2d of my dissent in the *Wilkins* case, supra, I stated: "The effect of the majority opinion in this case is to commit to the legislative body the solution of all questions of both fact and law which arise when a zoning ordinance is attacked for unreasonableness in its application to certain property unjustly affected thereby. This is contrary to the rule which has been uniformly followed in the prior decisions of this court hereinabove cited and discussed. The decision of the trial court is in accord with these decisions and should therefore be affirmed." In the *Lockard* case, supra, the majority of this Court stated in 33 Cal.2d at page 462, 202 P.2d at page 43: "The findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject. The appellate courts look beyond such determinations and consider in some detail the basic physical facts appearing in the record, such as the character of the property of the objecting parties, the nature of the surrounding territory, the use to which each has been put, recent trends of development, etc., to ascertain whether the reasonableness of the ordinance is fairly debatable." In my dissent in that case I stated in 33 Cal.2d at page 473, 202 P.2d at page 49: "In essence, what the majority opinion holds is this: That the validity of such an ordinance depends upon whether four members of this Court think it is reasonable as applied to plaintiffs' property, they being the judges of both fact and law. Such being the case, the function of the trial court is that of a mere referee to hear the evidence and make his recommendation which has no binding effect as a factual determination. This is indeed a new and unique legal philosophy of law without constitutional or statutory postulate."

In every zoning case which has come before this Court since I have been a member of it, I have taken the position that the law should be that the determination of the reasonableness of zoning ordinances as applied to private property is a question of fact to be determined by the trial court and if its determination is supported by sufficient competent evidence, such determination is binding upon an appellate court the same as in other cases where factual situations are involved. It has been my position that under the Constitution and laws of this state, fact finding powers are reposed in juries and trial judges and that where factual determinations are made by juries and trial judges upon sufficient competent evidence and no error has been committed prejudicial to the party against whom such determination is made, the appellate courts of this state are bound by such determinations as such courts have no fact finding powers and their only function is to determine issues of law; that an issue of fact becomes an issue of law only where no fact is left in doubt, and no deduction or inference can be drawn in support of an issue that the court can say, as a matter of law, that the issue has not been established. And even where the facts are undisputed, if reasonable minds might draw different conclusions from the evidence the issue is one of fact to be determined by the trier of fact. This is the traditional rule which has been followed by this Court since its institution in 1850 with the exception of the past two or three years when this Court has assumed the role of a fact finding tribunal both in zoning ordinance cases and many other cases, see dissenting opinion in *Gray v. Brinkerhoff*, 41 Cal.2d 180, 258 P.2d 834.

As stated at the beginning of this opinion the record in this case presents a factual situation as to the reasonableness of the ordinance here involved, as applied to plaintiff's property, upon which reasonable minds might differ, the trial judge viewed the premises and made findings to the effect that the ordinance as applied to plaintiff's property was and is reasonable.

In view of this state of the record and the law as it has been declared by this Court, I can see no escape from the affirmance of the judgment.

SCHAUER, Justice (dissenting).

I dissent. In my view the opinion of the District Court of Appeal, authored by Justice Parker Wood and concurred in by Presiding Justice Shinn and Justice Vallee (reported in 257 P.2d 679-690), adequately discusses and correctly resolves all issues of law presented on this appeal.

From 1923 to June 26, 1941 (when ordinance No. 502 was passed), plaintiffs' property was zoned as residential property. Not until after the city failed in an attempt to quiet title to the property, and in efforts to purchase it, extending over several years, did the city, in 1941, pass ordinance 502, thereby zoning the property so as to limit it to beach recreation activities and cause it to remain available for public use without requiring the public or any public body to expend any money therefor, and to remain without income to plaintiffs but subject to some \$9,000 in annual taxes. At the time this action was commenced plaintiffs' was the only privately owned property falling within the beach recreation zone (B-1). Moreover, the city had failed to provide plaintiffs with police protection to avoid destruction of a fence designed to protect the property from the encroaching public. These circumstances appear to me to constitute a clear and deliberate taking of the property for public use without the payment of compensation therefor.

Such taking of private property without compensation, as effected in this case, appears to me to go beyond any reasonable application of the police power of a constitutional state which would maintain capitalism as the foundation of its institutions. Capitalism is not to be ashamed of or whittled away. It encompasses the economic system which has brought our country to world leadership. It denotes a way of living in society and of having dealings with others for reciprocal benefits and with mutual gain; it thrives on free

enterprise and competition; and it furnishes incentive to be diligent, efficient and thrifty. It means that a man is free, not a slave; that he alone or collectively with others may bargain for his labor and receive and possess the price thereof; that he alone or collectively with others may invest his earnings in real or other property; and that in either event he shall be protected in his right to work and in the ownership and enjoyment of his wealth.

The fact that a particular property is desirable for the public use does not make its private ownership unlawful or warrant using the power of government to destroy its value. Our Constitution envisages a taking for public use in all proper cases but it no more permits to the state a taking without paying fair compensation than it does to an individual. As between the state and an individual our first concern always should be to guard the rights of the individual, not to build up the power of the state. Under my view of constitutional American procedures the state, when it takes private property for the public use, must, if purchase for a fair price cannot be negotiated, proceed under the power of eminent domain, condemn the property desired, and pay the reasonable value as fixed by a jury. Taking the property as is here done does not appear to me to be encompassed within a reasonable exercise of police power by a constitutional state; it smacks more of calculated and arbitrary confiscation by a police state. Besides all that, I should like to think that the scheme here resorted to was beneath the honor of a self-respecting American municipality.

For the reasons more fully developed in the able opinion of Mr. Justice Wood, above referred to, I would reverse the judgment.

SHENK, Justice (dissenting).

I dissent. I agree with the District Court of Appeal of the Second Appellate District, Division 3, and would reverse the judgment for the reasons stated by that court in its opinion reported in 257 P.2d 679-690, inclusive.

Rehearing denied; **SHENK** and **SCHAUER, JJ.**, dissenting.

GRANT v. McAULIFFE.

MANCHESTER v. McAULIFFE.

JENSEN v. McAULIFFE.

Sac. 6416-6418.

Supreme Court of California.

In Bank.

Dec. 23, 1953.

Action for injuries sustained by plaintiffs as result of collision of automobile in which they were riding in Arizona with automobile of decedent, of whose estate defendant was administrator. The Superior Court, Plumas County, Wm. M. Macmillan, J., granted defendant's motions to abate, and plaintiffs appealed. The Supreme Court, Traynor, J., held that the matter of survival of a cause of action is a problem of procedural law, and is governed by the law of the forum, with result that survival was to be determined by the law of California, and rule of Arizona that if a tort action has not been commenced before death of the tortfeasor a plea in abatement must be sustained, would not be applied.

Orders reversed, and causes remanded.

Schauer, Spence and Edmonds, JJ., dissented.

Prior opinion, 255 P.2d 819.

1. Abatement and Revival ◊52

Under the law of Arizona, if a tort action has not been commenced before the death of the tortfeasor, a plea in abatement must be sustained. Civ.Code, § 956; Code Civ.Proc. § 385; Probate Code, §§ 573, 574; A.C.A.1939, §§ 21-530, 21-534.

2. Torts ◊2

In actions on torts occurring outside the boundaries of California, the courts of California will determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless that law is contrary to the public policy of the state, but the courts will not adopt as their own the procedural law of the place where the tortious acts occurred.

3. Death ◊10, 11, 31(3, 5, 6)

A cause of action for wrongful death is statutory in nature, and is a new cause of

action, arising on death of the injured person, and vested in the widow or next of kin, and it is not the survival of the separate and distinct cause of action which the injured person himself had before death, and which may be subject to enforcement by the personal representative of the deceased against the tortfeasor. Civ.Code, § 956; Code Civ.Proc. § 385; Probate Code, §§ 573, 574.

4. Abatement and Revival ⇐54

Survival statutes do not create a new cause of action, as do wrongful death statutes, but they merely prevent the abatement of a cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased. Civ.Code, § 956; Code Civ.Proc. § 385; Probate Code, §§ 573, 574.

5. Limitation of Actions ⇐2(2)

A cause of action arising in another state, by the laws of which an action cannot be maintained thereon because of lapse of time, can be enforced in California by a citizen of California, if he has held the cause of action from the time it accrued. Code Civ.Proc. § 361.

6. Abatement and Revival ⇐49

The terms "substance" and "procedure," with reference to characterization of survival of causes of action as substantive law of state where a tort occurred, and thus the law to be applied in the forum, or procedural law of state where tort occurred, and not to be applied by the forum, are not legal concepts of invariant content, but a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

7. Abatement and Revival ⇐49, 52

Generally, under revival statutes, if the cause of action dies with the tortfeasor, a pending proceeding must be abated, and a personal representative cannot be substituted in place of the deceased party, and ordinarily the domestic law of the forum will be applied to determine whether the cause of action survives, as well as to determine whether the personal representative can

be substituted as a party to the action, Code Civ.Proc. § 385.

8. Abatement and Revival ⇐49

Survival of causes of action is governed by the law of the forum in that survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages against the decedent's estate in administration. Code Civ.Proc. § 385.

9. Abatement and Revival ⇐49

Where action was brought in California for injuries sustained by plaintiffs in collision in Arizona with automobile driven by decedent, questions of whether the cause of action survived death of decedent and were maintainable against his estate, were to be determined by applying the law of California as the law of the forum, since a problem of procedure was involved.

10. Executors and Administrators ⇐429

Problem of responsibilities of defendant, as administrator of estate of decedent whose negligence in connection with automobile collision in Arizona allegedly caused injuries of plaintiffs, was governed by law of California when decedent's estate was located therein, and letters of administration were issued to defendant by courts of California. Probate Code, § 573; Civ. Code, § 956.

11. Automobiles ⇐229½

Where all parties plaintiff in cause of action for injuries arising out of automobile collision in Arizona were residents of California, and estate of deceased tortfeasor was being administered in California, plaintiffs' right to prosecute their causes of action was governed by the laws of California relating to the administration of estates. Probate Code, § 573; Civ. Code, § 956.

Goldstein, Barceloux & Goldstein, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, San Francisco, and Jordan N. Peckham, Chico, for appellants.

Honey & Mayall and John J. Hurley, Stockton, for respondent.

TRAYNOR, Justice.

On December 17, 1949, plaintiffs W. R. Grant and R. M. Manchester were riding west on U. S. Highway 66 in an automobile owned and driven by plaintiff D. O. Jensen. Defendant's decedent, W. W. Pullen, was driving his automobile east on the same highway. The two automobiles collided at a point approximately 15 miles east of Flagstaff, Arizona. Jensen's automobile was badly damaged, and Jensen, Grant, and Manchester suffered personal injuries. Nineteen days later, on January 5, 1950, Pullen died as a result of injuries received in the collision. Defendant McAuliffe was appointed administrator of his estate and letters testamentary were issued by the Superior Court of Plumas County. All three plaintiffs, as well as Pullen, were residents of California at the time of the collision. After the appointment of defendant, each plaintiff presented his claim for damages. He rejected all three claims, and on December 14, 1950, each plaintiff filed an action against the estate of Pullen to recover damages for the injuries caused by the alleged negligence of the decedent. Defendant filed a general demurrer and a motion to abate each of the complaints. The trial court entered an order granting the motion in each case. Each plaintiff has appealed. The appeals are based on the same ground and have therefore been consolidated.

[1] The basic question is whether plaintiffs' causes of action against Pullen survived his death and are maintainable against his estate. The statutes of this state provide that causes of action for negligent torts survive the death of the tortfeasor and can be maintained against the administrator or executor of his estate. C. C., § 956; C.C.P., § 385; Prob.C., §§ 573, 574. Defendant contends, however, that the survival of a cause of action is a matter of substantive law, and that the courts of this state must apply the law of Arizona governing survival of causes of action. There is no provision for survival of causes of action in the statutes of Arizona, although there is a provision that in the event of the death of a party to a pending proceeding his personal representative can be substituted as a party to the action, Arizona

Code, 1939, § 21-534, if the cause of action survives. Arizona Code, 1939, § 21-530. The Supreme Court of Arizona has held that if a tort action has not been commenced before the death of the tortfeasor a plea in abatement must be sustained. *McClure v. Johnson*, 50 Ariz. 76, 82, 69 P.2d 573. See also *McLellan v. Automobile Ins. Co. of Hartford, Conn.*, 9 Cir., 80 F.2d 344.

[2] Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. *Loranger v. Nadeau*, 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264. "[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." Learned Hand, J., in *Guinness v. Miller*, D.C., 291 F. 769, 770. But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. It must, therefore, be determined whether survival of causes of action is procedural or substantive for conflict of laws purposes.

[3-5] This question is one of first impression in this state. The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question. *Burg v. Knox*, 334 Mo. 329, 335-338, 67 S.W.2d 96; *Chubbuck v. Holloway*, 182 Minn. 225, 227-230, 234 N.W. 314, 868, followed in *Kerston v. Johnson*, 185 Minn. 591, 593, 242 N.W. 329, 85 A.L.R. 1; *Davis, Adm'r v. New York & N. E. R. Co.*, 143 Mass. 301, 305-306, 9 N.E. 815; *Hyde, Adm'r v. Wabash, St. L. & Pac. Ry. Co.*, 61 Iowa 441, 444, 16 N.W. 351 [but see

Gordon v. Chicago, R. I. & P. Ry. Co., 154 Iowa 449, 451, 134 N.W. 1057]; Mexican Cent. Ry. Co. v. Goodman, 20 Tex.Civ.App. 109, 110, 48 S.W. 778 [but see Texas & Pac. Ry. Co. v. Richards, 68 Tex. 375, 378, 4 S.W. 627]; Needham, Adm'x v. Grand Trunk Ry. Co., 38 Vt. 294, 307-311; Ormsby Ex'rs v. Chase, 290 U.S. 387, 388, 54 S.Ct. 211, 78 L.Ed. 378, followed in McIntosh v. General Chemical Defense Corp., D.C., 67 F.Supp. 63, 64; Woollen v. Lorenz, 68 App.D.C. 389, 98 F.2d 261, 262, Gray v. Blight, 10 Cir., 112 F.2d 696, 697-698, and Muir v. Kessinger, D.C., 35 F.Supp. 116, 117; Orr v. Ahern, Adm'r, 107 Conn. 174, 178-180, 139 A. 691; Potter v. First National Bank, 107 N.J.Eq. 72, 74-75, 151 A. 546, followed in Friedman v. Greenberg, 110 N.J.L. 462, 464-466, 166 A. 119, 87 A.L.R. 849, and Rathgeber v. Sommerhalder, 112 N.J.L. 546, 548-549, 171 A. 835; Sumner v. Brown, Ex'rx, 312 Pa. 124, 127, 167 A. 315. The Restatement of the Conflict of Laws, section 390, is in accord. It should be noted, however, that the majority of the foregoing cases were decided after drafts of the Restatement were first circulated in 1929. Before that time, it appears that the weight of authority was that survival of causes of action is procedural and governed by the domestic law of the forum. Austin's Adm'r v. Pittsburg, C., C., & St. L. Ry. Co., 122 Ky. 304, 309-310, 91 S.W. 742, 5 L.R.A., N.S., 756; Baltimore & Ohio R. Co. v. Joy, 173 U.S. 226, 231, 19 S.Ct. 387, 43 L.Ed. 677; Clough v. Gardiner, 111 Misc. 244, 248-249, 182 N.Y.S. 803; Herzog v. Stern, 264 N.Y. 379, 383-384, 191 N.E. 23, followed in Demuth v. Griffin, 253 App.Div. 399, 401, 2 N.Y.S.2d 2; Domres v. Storms, 242 App.Div. 807, 275 N.Y.S. 212; Silverman v. Rappaport, 165 Misc. 543, 545-546, 300 N.Y.S. 76; Taynton v. Vollmer, 242 App.Div. 854, 275 N.Y.S. 284; Gordon v. Chicago, R. I. & P. Ry. Co., 154 Iowa 449, 451, 134 N.W. 1057; In re Vilas' Estate, 166 Or. 115, 123-124, 110 P.2d 940; Martin v. Baltimore & Ohio R. Co., 151 U.S. 673, 692-693, 14 S.Ct. 533, 38 L.Ed. 311; Martin v. Wabash R. Co., 7 Cir., 142 F. 650, 651; Page v. United Fruit Co., 1 Cir., 3 F.2d 747, 754; Matter of Killough's Estate, 148 Misc. 73, 85-89, 265 N.Y.S. 301; Texas &

Pac. Ry. Co. v. Richards, 68 Tex. 375, 378, 4 S.W. 627. See also Barker v. Ladd, Fed. Cas.No.990, 3 Sawy. 44; Gaskins v. Bonifils, D.C., 4 F.Supp. 547, 551; Luster v. Martin, 7 Cir., 58 F.2d 537, 539-540; Portland Gold Mining Co. v. Stratton's Independence, Ltd., D.C., 196 F. 714, 716-717; Whitten v. Bennett, C.C., 77 F. 271, 273; Winslow v. Domestic Engineering Co., D. C., 20 F.Supp. 578, 579. Many of the cases, decided both before and after the Restatement, holding that survival is substantive and must be determined by the law of the place where the tortious acts occurred, confused the problems involved in survival of causes of action with those involved in causes of action for wrongful death. See, for example, the precedents on which the courts relied in Hyde, Adm'r v. Wabash, St. L. & Pac. Ry. Co., supra, 61 Iowa 441, 16 N.W. 351; Orr v. Ahern, supra, 107 Conn. 174, 139 A. 691; and Ormsby Ex'rs v. Chase, supra, 290 U.S. 387, 54 S.Ct. 211. The problems are not analogous. See Schumacher, "Rights of Action Under Death and Survival Statutes," 23 Mich.L. Rev. 114, 116-117, 124-125. A cause of action for wrongful death is statutory. It is a new cause of action vested in the widow or next of kin, and arises on the death of the injured person. Before his death, the injured person himself has a separate and distinct cause of action and, if it survives, the same cause of action can be enforced by the personal representative of the deceased against the tortfeasor. The survival statutes do not create a new cause of action, as do the wrongful death statutes. Needham, Adm'x v. Grand Trunk Ry. Co., supra, 38 Vt. 294, 303-306; Austin's Adm'r v. Pittsburg, C., C. & St. L. Ry. Co., supra, 122 Ky. 304, 308-310, 91 S.W. 742; Martin v. Baltimore & Ohio R. Co., supra, 151 U.S. 673, 696, 698, 701, 14 S.Ct. 533; Patton v. Brady, 184 U.S. 608, 612-615, 22 S.Ct. 493, 46 L.Ed. 713; Spring v. Webb, D.C., 227 F. 481, 484-485; 1 C.J.S., Abatement and Revival, § 160, page 211; Schumacher, supra, 23 Mich.L.Rev. 114, 124-125. The English courts have reached the same result in construing similar statutes. Davies v. Powell Dufferin Assoc. Collieries, Ltd., [1942] A.C. 601, 610-616; Rose v. Ford,

[1937] A.C. 826, 852, 855-856. See also *Bradshaw v. Lancashire and Yorkshire Ry. Co.*, [1875] 10 C.P. 189, 192-193. They merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased. They are analogous to statutes of limitation, which are procedural for conflict of laws purposes and are governed by the domestic law of the forum. *Biewend v. Biewend*, 17 Cal.2d 108, 114, 109 P.2d 701, 132 A.L.R. 1264. Thus, a cause of action arising in another state, by the laws of which an action cannot be maintained thereon because of lapse of time, can be enforced in California by a citizen of this state, if he has held the cause of action from the time it accrued. C.C.P., § 361; *Stewart v. Spaulding*, 72 Cal. 264, 266, 13 P. 661. See also *Biewend v. Biewend*, *supra*; and *Western Coal & Mining Co. v. Jones*, 27 Cal.2d 819, 828, 167 P.2d 719, 164 A.L.R. 685.

[6] Defendant contends, however, that the characterization of survival of causes of action as substantive or procedural is foreclosed by *Cort v. Steen*, 36 Cal.2d 437, 442, 224 P.2d 723, where it was held that the California survival statutes were substantive and therefore did not apply retroactively. The problem in the present proceeding, however, is not whether the survival statutes apply retroactively, but whether they are substantive or procedural for purposes of conflict of laws. "Substance" and "procedure," * * * are not legal concepts of invariant content." *Black Diamond Steamship Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 397, 69 S.Ct. 622, 628, 93 L.Ed. 754. See also *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079; *Sampson v. Channell*, 1 Cir., 110 F.2d 754, 756, 758, 128 A.L.R. 394; *In re Estate of Caravas*, 40 Cal.2d 33, 41-42, 250 P.2d 593; *W. W. Cook, The Logical*

and Legal Bases of the Conflict of Laws (1942), c. 6: "Substance and Procedure", and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

[7] Defendant also contends that a distinction must be drawn between survival of causes of action and revival of actions, and that the former are substantive but the latter procedural. On the basis of this distinction, defendant concludes that many of the cases cited above as holding that survival is procedural and is governed by the domestic law of the forum do not support this position, since they involved problems of "revival" rather than "survival." The distinction urged by defendant is not a valid one. Most of the statutes involved in the cases cited provided for the "revival" of a pending proceeding by or against the personal representative of a party thereto should he die while the action is still pending. But in most "revival" statutes, substitution of a personal representative in place of a deceased party is expressly conditioned on the survival of the cause of action itself.¹ If the cause of action dies with the tortfeasor, a pending proceeding must be abated. A personal representative cannot be substituted in the place of a deceased party unless the cause of action is still subsisting. In cases where this substitution has occurred, the courts have looked to the domestic law of the forum to determine whether the cause of action survives as well as to determine whether the personal representative can be substituted as a party to the action. *Gordon v. Chicago, R. I. & P. Ry. Co.*, *supra*, 154 Iowa 449, 451, 134 N.W. 1057; *Martin v. Baltimore & Ohio R. Co.*, *supra*, 151 U.S. 673, 692, 14 S.Ct. 533; *Martin v. Wabash R. Co.*, *supra*, 7 Cir., 142 F. 650, 651; *Baltimore & Ohio R. Co. v. Joy*, *supra*, 173 U.S. 226, 231, 19

1. For example, C.C.P., § 385: "An action or proceeding does not abate by the death, or any disability of a party * * * if the cause of action survive or continue." (Italics added.) See also 28 U.S.C.A., Fed.Rules Civ.Proc. Rule 25(a) (1), leg. hist., U.S.Rev.Stat. § 955 (1874); Judiciary Act of 1789, §

31: "If a party dies and the claim is not thereby extinguished, the court * * * may order substitution * * *" of the personal representative. (Italics added.) The exact language of Rule 25 (a) (1) is repeated in Arizona Code 1939, § 21-530.

S.Ct. 387. Defendant's contention would require the courts to look to their local statutes to determine "revival" and to the law of the place where the tort occurred to determine "survival," but we have found no case in which this procedure was followed.

[8-11] Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum. Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding. The problem here is whether the causes of action that these plaintiffs had against Pullen before his death survive as liabilities of his estate. Section 573 of the Probate Code provides that "all actions founded * * * upon any liability for physical injury, death or injury to property, may be maintained by and against executors and administrators in all cases in which the cause of action * * is one which may not abate upon the death of their respective testators or intestates * * *." Civil Code section 956 provides that "A thing in action arising out of a wrong which results in physical injury to the person * * * shall not abate by reason of the death of the wrongdoer * * *," and causes of action for damage to property are maintainable against executors and administrators under section 574 of the Probate Code. See *Hunt v. Authier*, 28 Cal.2d 288, 292-296, 169 P.2d 913, 171 A.L.R. 1379; *Cort v. Steen*, supra, 36 Cal.2d 437, 439-440, 224 P.2d 723. Decedent's estate is located in this state, and letters of administration were issued to defendant by the courts of this state. The responsibilities of defendant, as administrator of Pullen's estate, for injuries inflicted by Pullen before his death are governed by the laws of this state. This approach has been followed in a number of well-reasoned cases. *Matter of Killough's Estate*, supra, 148 Misc. 73, 85-89, 265 N.Y.S. 301; *Herzog v. Stern*, supra, 264 N.Y. 379, 191 N.E. 23; *In re Vilas' Estate*, supra, 166 Or. 115, 110 P.2d

940; *Martin v. Baltimore & Ohio R. Co.*, supra, 151 U.S. 673, 14 S.Ct. 533; *Whitten v. Bennett*, supra, C.C., 77 F. 271, 273. It retains control of the administration of estates by the local legislature, and avoids the problems involved in determining the administrator's amenability to suit under the laws of other states. The common law doctrine *actio personalis moritur cum persona* had its origin in a penal concept of tort liability. See Prosser, *Law of Torts* 950-951; Pollock, *The Law of Torts* (10th ed.) 64, 68. Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of the deceased tortfeasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.

The orders granting defendant's motions to abate are reversed, and the causes remanded for further proceedings.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

SCHAUER, Justice.

I dissent. In *Cort v. Steen* (1950), 36 Cal.2d 437, 442, 224 P.2d 723, this court held that under the doctrine of nonsurvivability the abatement of an action by the death of the injured person through the tortfeasor's act or otherwise, or by the death of the tortfeasor, abates the wrong as well; that the effect of a survival statute is to create a right or cause of action rather than to either continue an existing right or revive or extend a remedy theretofore accrued for the redress of an existing wrong; and that consequently a survival statute enacted after death of the tortfeasor did not apply to the tort or cause of action involved. And more recently, in *Re Estate of Arbulich* (1953), 41 Cal.2d 86, 257 P.2d 433, we recognized the rule that the burden of proof provisions of the Probate Code sections (259 et seq.) dealing with reciprocal inheritance rights are not merely procedural in nature, but, rather, are substantive statutes regulating succession,

and that consequently such rights are to be determined by the law as it existed on the date of decedent's death. (See also *In re Estate of Giordano* (1948), 85 Cal.App.2d 588, 592, 594, 193 P.2d 771.)

Irreconcilably inconsistent with the cases cited in the preceding paragraph, the majority now hold that "Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding." If the above stated holding is to prevail, then for the sake of the law's integrity and clarity, and in fairness to lower courts and to counsel, the cited cases should be expressly overruled. But even more regrettable than the failure to either follow or unequivocally overrule the cited cases is the character of the "rule" which is now promulgated: the majority assert that henceforth "a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made," thus suggesting that the court will no longer be bound to consistent enforcement or uniform application of "a statute or other rule of law" but will instead apply one "rule" or another as the untrammelled whim of the majority may from time to time dictate, "according to the nature of the problem" as they view it in a given case. This concept of the majority strikes deeply at what has been our proud boast that ours was a government of laws rather than of men.

Although any administration of an estate in the courts of this State is local in a procedural sense, the rights and claims both in favor of and against such an estate are substantive in nature, and vest irrevocably at the date of death. (*Matter of Estate of Patterson* (1909), 155 Cal. 626, 634, 102 P. 941, 26 L.R.A.,N.S., 654.) Since this court has clearly held that a right or cause of action created by a survival statute is likewise substantive, rather than procedural, we should hold, if we would follow the law, that the trial court properly granted defendant's motions to abate.

SPENCE, J., concurs.

EDMONDS, Justice (dissenting).

I concur in the conclusion that the order granting the defendant's motion to abate should be affirmed.



122 Cal.App.2d 452

CHAMBERS et al. v. DONALDSON.
Civ. 4744.

District Court of Appeal, Fourth District,
California.

Jan. 6, 1954.

Action for damages sustained in collision between automobiles in intersection. Defendant filed cross-complaint. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment for defendant on his cross-complaint, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that although ordinance classified avenue as "boulevard", required automobiles to stop before entering avenue, and required that signs be posted at intersections, motorist, who did not know of the ordinance, was not required to stop before entering avenue at intersection at which there was no stop sign.

Judgment affirmed.

1. Automobiles ⇐171(11)

Although ordinance classified avenue as "boulevard", required automobiles to stop before entering avenue, and required that stop signs be posted, motorist, who did not know of ordinance, was not required to stop before entering avenue at intersection at which there was no stop sign. Vehicle Code, § 82.5.

2. Automobiles ⇐246(9)

In action for damages sustained in collision between automobiles in intersection, instructions in language of statutes which govern right of way at intersections and which recite basic speed law were proper. Vehicle Code, §§ 510, 550(b).

3. Automobiles

Where ordinance required automobiles to stop before entering avenue, and although speed on avenue was established at 55 miles per hour, statute establishing speed limit at obstructed intersections as 15 miles per hour applied to motorist on avenue when approaching obstructed intersection which had no sign warning others to stop before entering avenue. Vehicle Code, § 511.

Henry F. Rager, Fontana, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiffs, husband and wife, brought this action against Robert Donaldson, et al, for their alleged negligence arising out of an intersection accident between two cars. Defendant Donaldson and his wife filed a cross-complaint alleging negligence of plaintiffs and prayed for damages. The controlling facts are undisputed.

The accident happened on a clear, dry day at the intersection of Alder Street and Merrill Avenue in the rural area near Fontana. Donaldson was driving his DeSoto automobile in a southerly direction on Alder Street accompanied by his wife. Chambers was driving his Ford in an easterly direction on Merrill Avenue, accompanied by his wife. Each street is 24 feet wide with smooth asphalt pavement. There is a six-foot dirt shoulder on each side of the pavement on each street. It is conceded by all parties that the intersection is quite obstructed. Trees and shrubbery on the northwest corner of the intersection made it practically impossible for a south-bound driver on Alder Street to see toward the west on Merrill Avenue until the driver's view cleared the shrubbery along the north edge of Merrill Avenue. The view of an east-bound driver on Merrill Avenue would be almost as badly obstructed. It is also conceded that a stop sign had at one time been lawfully installed at the northwest corner of the intersection facing south-bound traffic on Alder Street, that it had been previously removed by some unknown person, and that Donaldson made no

boulevard stop as he entered the intersection. This stop sign was originally erected pursuant to a San Bernardino County ordinance which designated Merrill Avenue as a boulevard and required that south-bound vehicles on Alder Street stop before crossing Merrill Avenue, and also required "such designated intersections to be clearly marked or signposted * * *." Chambers was familiar with the intersection and knew there was supposed to be a stop sign at the north entrance to the intersection. Donaldson was not familiar with it and did not know that there was supposed to be a stop sign facing him as he approached and entered Merrill Avenue, and did not know that south-bound traffic ordinarily was supposed to stop there.

Donaldson said he could see that the corner was a "blind" or an obstructed intersection so he slowed his speed to approximately ten miles an hour as he entered it. He also claims he did not remember anything after his front wheels entered the intersection at about ten miles an hour and after he had checked in each direction to make sure that no vehicle was within 75 feet of the intersection at that particular instant.

Mrs. Donaldson said she raised her eyes and noticed that she was about in the center of Merrill Avenue and saw the Ford automobile bearing down on her from the west at a distance of 40 or 45 feet, traveling at a speed of 45 or 50 miles an hour, and that the left front side of the Ford struck the right side of the Donaldson DeSoto, causing it to throw her from the car.

Chambers testified that he was driving at approximately 30 miles an hour; that the first time he saw the Donaldson vehicle he was approximately ten or twelve feet west of the intersection and at that time the Donaldson vehicle was approximately 20 to 25 feet north of the intersection traveling between 40 and 45 miles per hour; that the collision was a "head-on-broadside collision" in that the Ford automobile of plaintiffs was struck approximately in the center of its left-hand side by the front of the Donaldson vehicle. All of the parties suffered and sustained severe personal injuries as a result of the accident.

Upon the foregoing facts the jury returned a verdict in favor of the defendant on the complaint of Mr. and Mrs. Chambers, and in favor of the cross-defendants on the cross-complaint of Mr. and Mrs. Donaldson.

Counsel for appellants on this appeal states that there is but one main question involved, i. e., did the court err in giving certain instructions. The first one complained of reads:

"If the boulevard stop sign at the northwest corner was not standing erect and in place at the time Mr. Donaldson approached and entered the intersection, Merrill Avenue was not at that time a through highway at Alder Street.

"A through highway is a highway, or portion thereof, at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same and when stop signs are erected as provided in this Code." (Citing Vehicle Code Sec. 82.5.)

It is plaintiffs' argument that since the ordinance required that vehicles stop before crossing Merrill Avenue at other streets and since stop signs were actually erected therefor, the temporary removal of this particular stop sign did not affect the character of the highway, citing out-of-state cases such as *Titus v. Braidfoot*, 226 Ala. 21, 145 So. 423; *Connors v. Dobbs*, 77 Ohio App. 247, 66 N.E.2d 546; and *Jones v. McCullough*, 148 Kan. 561, 83 P.2d 669.

The ordinance classified Merrill Avenue as a "boulevard" and not a "through highway", and required vehicles to stop before entering or crossing it, and also required it "to be clearly marked or signposted to give notice of such fact * * *."

[1] Regardless of some decisions in other states indicating a contrary holding, the courts of this state have disposed of that question in *Casselman v. Hartford Accident and Indemnity Company*, 36 Cal. App.2d 700, 98 P.2d 539, 544 [hearing denied by Supreme Court] where it was said:

"It is urged by appellant that, though no stop sign was erected at the inter-

section, the duty of stopping was imposed upon respondent as a matter of law, very much the same as the 'stop, look and listen' rule is applied to one driving a vehicle across a railroad track. This is a novel contention, and apparently has some support from other jurisdictions. The rule has never been applied in California in respect to a highway intersection. The premise of the appellant is based upon the assumption that the highway on which Maguire was traveling, and on which the accident occurred, was a 'through highway'. As we have pointed out, this was not the fact. 'Through highways' are not designated by law in this state as continuous in character. They are only such when running past an intersection at which stop signs have been erected. Where there is no sign, there is no such highway."

Complaint is then made about an instruction in the language of section 550(b) of the Vehicle Code in reference to the right of way of vehicles approaching or entering intersections, and stating that if the jury found that either driver failed to yield the right of way to the other in violation of that section, such violation was negligence in and of itself. This was followed by another instruction in the language of sec. 510 of the Vehicle Code in reference to the basic speed law.

The court gave the following instruction at plaintiffs' request:

"When a driver does not have a clear and unobstructed view of an intersection and all traffic upon all of the highways entering such intersection for a distance of 100 feet along all such highways during the last 100 feet of his approach to such intersection, then the statutory speed across such intersection is fifteen miles per hour [Vehicle Code, § 511]."

The only instruction on this subject requested by the defendant reads as follows:

"The evidence establishes that this intersection was an obstructed intersection within the meaning of the Vehicle Code. At obstructed intersections of this type where boulevard

stop signs are not in place the *prima facie* or permissible speed limit for vehicles traveling east on Merrill and entering and crossing the intersection of the two streets is 15 miles per hour.

"While a violation of the foregoing speed limit does *not* constitute negligence as a matter of law, the above speed limit should be considered by you in your deliberations on the issue of whether Mr. Chambers drove his vehicle at an unlawful or negligent speed at the time and place in question."

These instructions were followed by a general instruction in reference to proximate cause.

As we view plaintiffs' objections to the instructions, it is his claim that the speed law applicable to Chambers at that time was not 15 miles per hour but due to the fact that he knew he was traveling on a through highway and was authorized to travel thereon at 55 miles per hour under those conditions, he was not bound by the 15-mile speed limit provision. In support thereof he cites *Shivers v. Van Loben Sels*, 109 Cal.App.2d 286, 240 P.2d 635; and *Howard v. Alta Chevrolet Company*, 111 Cal.App.2d 38, 243 P.2d 804.

In the *Shivers* case the stop sign was standing at the intersection. Apparently it has no factual application to the instant case. In the *Howard* case the stop sign was down but the question remained as to whether or not the passenger in the car had knowledge of this fact because he traveled across this same intersection the day before and may have gained knowledge of its absence at that time.

In *Casselman v. Hartford Accident and Indemnity Company*, supra, 36 Cal.App.2d at page 708, 98 P.2d at page 544, the court said:

"Where there is no sign, there is no such highway. In any event, it is the rule in California that one approaching an intersection of this character is governed by the provisions of the Vehicle Code, or, in the absence of any specific provision covering the situation, by the ordinary law of negligence. This case, as we have pointed out, is

governed by a specific provision of such code. This appellant, in common with many users of the highway, seems to have the impression that every motorist who attempts to enter a main highway from a side road, does so at his peril. This misconception of the law is a prolific source of accidents. As we have shown, such motorist has very definite rights granted to him by the provisions of the Vehicle Code, and those users of the main highway who ignore such rights must be prepared to pay the penalty."

[2, 3] It is apparent, under this holding and the admitted facts here presented, that the instructions given were proper.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



122 Cal.App.2d 436

PEOPLE v. LIZARRAGA.

Cr. 2452.

District Court of Appeal, Third District,
California.

Jan. 5, 1954.

Defendant was convicted of grand theft. The Superior Court, Sacramento County, Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Paulsen, J., pro tem., held that evidence, which revealed that furrier of 25 years' experience and another experienced furrier estimated fair market value of piece at from \$235 to \$250 plus tax and estimated wholesale price at from \$120 to \$165, was sufficient to sustained implied finding that value of property exceeded \$200.

Judgment affirmed.

I. Larceny $\Leftrightarrow$ 46

Value to be placed upon stolen articles for purpose of establishing a felony charge is fair market value of the articles and not

value thereof to any particular person. Pen.Code, § 487, subd. 1.

2. Criminal Law Ⓒ494

It is sufficient, for determination of issue whether a defendant is guilty of grand or petty theft, if fair market value is established by expert testimony. Pen. Code, § 487, subd. 1.

3. Larceny Ⓒ68(1)

Where there is a conflict in evidence upon value of article stolen, question whether defendant is guilty of grand or petty theft is for jury. Pen.Code, § 487, subd. 1.

4. Larceny Ⓒ59

In prosecution for grand theft of a fur piece taken by defendant from store, evidence, which revealed that furrier of 25 years' experience and another experienced furrier estimated fair market value of piece at from \$235 to \$250 plus tax and estimated wholesale price at from \$120 to \$165, was sufficient to sustained implied finding that value of property exceeded \$200. Pen.Code, § 487, subd. 1.

Peter M. Koutchis, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PAULSEN, Justice pro tem.

Defendant was charged with grand theft. After trial by jury he was found guilty as charged and sentenced to prison for the term prescribed by law. He appeals from the judgment.

Defendant does not deny the commission of the crime. In fact, he admitted the theft from the witness stand. His sole point on this appeal is that he should have been convicted of petty theft for the reason that the evidence did not support the implied finding that the value of the property stolen exceeded \$200. Penal Code, § 487, subd. 1.

On December 23, 1952, defendant and two others entered the store of Marcroft and Sons. While one of his confederates diverted the attention of the person in charge of the store, defendant walked out

with a fur piece that had been on display in the front of the store. He was almost immediately apprehended.

The price marked on the tag attached to the stolen fur piece was \$250 plus tax, or a total of \$307. Allen Marcroft, a furrier of 25 years' experience, testified that this was a fair market price; that their prices were generally lower than those of other local fur stores. He estimated the wholesale price at \$165. Mr. Beckman, another experienced furrier, estimated the fair market value of the piece at from \$235 to \$240, plus tax. He estimated the wholesale price at between \$120 and \$150.

Defendant contends that there was not a proper evaluation of the fur piece because the reasonable value was not definitely established; that the markup on furs is excessively high and that "the fair market value is not as high as the retail price or as low as the wholesale price, but substantially in between." There is also a suggestion that the jury was permitted to take the taxes into consideration but the record shows that this was not the case.

Defendant relies on *People v. Simpson*, 26 Cal.App.2d 223, 79 P.2d 119, in which the offense was reduced to petty theft because the only evidence of value was produced by a witness who had no knowledge of the property involved or of property of that kind generally. In the instant case the witnesses were admittedly competent.

[1-4] "The value to be placed upon stolen articles for the purpose of establishing a felony charge is the fair market value of the property and not the value of the property to any particular individual." *People v. Latham*, 43 Cal.App.2d 35, 110 P.2d 101, 103. It is sufficient if the fair market value is established by expert testimony. *People v. Mitchell*, 80 Cal.App. 252, 251 P. 682. When there is a conflict in the evidence, the question is one for the jury. *People v. Rice*, 29 Cal.App. 2d 614, 85 P.2d 215; *People v. Haney*, 126 Cal.App. 473, 14 P.2d 854. The appeal is without merit.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

RUSTAD
v.
CITY OF LONG BEACH et al.
Civ. 19715.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1953.

Rehearing Denied Jan. 8, 1954.

Hearing Denied Feb. 10, 1954.

Mandamus proceeding to compel city council to grant petitioner a fireman's disability pension under the city charter. From a judgment of the Superior Court, Los Angeles County, Paul Nourse, J., granting a peremptory writ of mandate directing the council to grant petitioner a pension payable in monthly installments of 50 percent of his average monthly salary during the five years immediately before the date of determination of his disability, in so far as the judgment decreed that petitioner was not entitled to a monthly pension of 50 percent of his salary at the time of his retirement, petitioner appealed. The District Court of Appeal, Moore, P. J., held that petitioner's right to a disability pension did not vest on the happening of the accident resulting in his disability before repeal of the charter provision for payment of the monthly disability pension denied by the judgment and adoption of the provision for the pension granted, but that his right to retirement and immediate commencement of pension payments accrued only on establishment of his disability after such repeal and adoption of the new provision.

Judgment affirmed.

1. Municipal Corporations ⇐209(5, 7)

A Long Beach city fireman's right to reasonable disability pension does not vest on happening of accident resulting in his disability, but his right to retirement and immediate commencement of pension payments accrues only on establishment of his disability, so that fireman disabled by disease contracted before repeal of city charter provision for payment of yearly pension of half of his salary at date of his retirement and adoption of provision for payment of half of his average monthly salary during five years before his retire-

ment, was not entitled to pension, based on original provision, for disability established after such repeal and adoption of new provision. St.1925, p. 1335, § 187(3); St.1945, p. 2950, § 187.1; St.1951, p. 4635, § 187.2 (b); U.S.C.A.Const. art. 1, § 10; Amend. 14, § 1.

2. Municipal Corporations ⇐200(7)

The provision of Long Beach City Charter that amount of pension payable to city fireman granted pension after effective date of such provision, pursuant to rights vested under charter provision prior to repeal thereof and adoption of new provision, shall be based on applicable percentage of his average monthly salary during five years immediately before his retirement, should not be construed as reading "pursuant to the rights vested prior to the repeal" of such previous provision, as phrase, "prior to the repeal thereof," refers to previous provisions, not to vesting of rights. St.1925, p. 1335, § 187(3); St.1945, p. 2950, § 187.1; St.1951, p. 4635, §§ 187.2, 187.2(b).

3. Constitutional Law ⇐102(2)

Municipal Corporations ⇐215

A city employee has vested right only to a substantial and reasonable disability pension provided for by city charter, but such right is not impaired by legislation merely withdrawing any right or option to earn a bonus by continuing in employment after becoming eligible for retirement.

4. Municipal Corporations ⇐200(7)

A Long Beach city fireman, granted disability pension after effective date of charter provision that amount paid as pension to person granted pension after effective date of such provision, pursuant to rights vested under previous charter provision before repeal thereof, shall be based on applicable percentage of his average monthly salary during five years before his retirement, was entitled to pension based on formula prescribed in new provision, though it did not fix amount of pensions of employees retired because of previous injuries. St.1925, p. 1335, § 187(3); St.1945, p. 2950, § 187.1; St.1951, p. 4635, §§ 187.2, 187.2(b).

Kenneth Sperry, Long Beach, for appellant.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

MOORE, Presiding Justice.

Appellant was employed by respondent city as a member of its Fire Department July 16, 1941. While discharging his duties as fireman on September 3, 1950, he was so affected by poisonous fumes that he became ill and contracted "chronic severe bronchitis." His condition deteriorated until December 3, 1951, when it was determined to be dangerous for him to continue as a fireman. Despite appellant's application and his proofs of disability filed in January 1952, the City Council on May 6, 1952, denied his application for a disability pension as provided by section 187, subdivision 3, of the City Charter. Basing his claim upon such section, appellant by judgment entered December 17, 1952, obtained a peremptory writ of mandate directing the City Council to make an order granting appellant a disability pension from December 3, 1951, payable in equal monthly installments, in an amount equal to *fifty per cent of the average monthly salary earned by appellant* "during the five years immediately preceding December 3rd, 1951, which said average monthly salary is to be determined by dividing the total salary earned by Petitioner during said five year period by the actual number of months during which he earned said salary, and further directing Respondents, and each of them, to take such steps as may be necessary to pay or cause to be paid to Petitioner forthwith the disability pension payments which have heretofore accrued to date and likewise such payments as may hereafter accrue in the future in accordance with the provisions of Section 187, Subdivision (3) as limited by the provisions of Section 187.2 of the City Charter * * *."

Appellant is not dissatisfied with the judgment in its entirety but appeals from that portion which decrees "that petitioner is not entitled to receive the disability pension provided for by Section 187, Subdivision (3) of the City Charter * *

i. e. a monthly pension equal to fifty per cent of the salary attached to the rank held by Petitioner at time of retirement, and which varies according to the salary currently attached to said rank." That appellant misconceives his rights under the charter will presently appear.

At the times of appellant's employment and accident, section 187, subdivision 3, of the Charter provided as follows:

"Whenever any member of the Police or Fire Department shall become physically disabled or by reason of bodily injuries received in, or by reason of sickness caused by the discharge of the duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service in such department; and thereafter such person so retired shall, during his lifetime, be paid from said pension fund a yearly pension equal to one-half ($\frac{1}{2}$) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order." Stats.1925, p. 1335. Because the trial court did not follow the quoted section in fixing appellant's pension, he insists that he has been denied his rights under such section. After appellant's injury, but before he became disabled and entitled to be paid his pension, section 187 had been repealed and section 187.2 had been adopted, June 5, 1951, St.1951, p. 4635, providing as follows:

"(b) The amount to be paid as a pension to each person who shall be granted a pension subsequent to the effective date of this amendment pursuant to the rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, shall be based in each instance upon the applicable percentage of the average monthly salary earned during the five (5) years immediately preceding the retirement or death of the person whose service formed the basis for such right to a pension. Such average monthly salary shall be determined by dividing the total salary earned by such person during said five-year

period by the number of months during which such person earned such salary."

Appellant contends that the section 187.2 (b) does not apply to him for the reason that he was injured prior to its adoption and that, therefore, its application to him is unconstitutional. He quotes the stray sentence in *Holt v. Board of Police and Fire Pension Com'rs*, 86 Cal.App.2d 714, 717, 196 P.2d 94,¹ and maintains that (1) section 187.2 was not intended to apply to pension benefits payable by reason of injuries previously sustained by existing members of the police and fire departments of Long Beach, and (2) that section 187.2 violates the provisions of due process of both state and federal constitutions.

Section 187.2 Is Applicable.

[1] Appellant contends that it is impossible to determine that the new section was intended to apply to "pensions granted subsequent to the effective date of the amendment by reason of a service-connected injury which had been previously sustained by an employee." He says that appellant's right stems from an injury received by him prior to the adoption of section 187.2. He hitches his wagon to our decision in *Holt v. Board of Police and Fire Pension Com'rs* and on the strength of it argues that appellant's right to receive a disability pension became vested upon the happening of the accident. Such is not the law. The right to receive a reasonable disability pension accrues immediately upon a fireman's employment by the City of Long Beach. His right to retirement and immediate commencement of payment of his pension accrues only upon his disability's becoming established. Such is the right guaranteed by the federal constitution. Art. I, sec. 10; Amend. 14, sec. 1; *Adams v. City of Long Beach*, 101 Cal.App.2d 15, 224 P.2d 792.

The interpretation of subdivision (3) of section 187 was clearly set forth in *Tyra v. Board of Police and Fire Pension Com'rs*, 32 Cal.2d 666, 197 P.2d 710. Tyra received injuries in the course of duty in February,

1937. After having been granted workmen's compensation in March 1942 he applied to the defendants for a pension, which was denied. He then sued to enforce his claim for a pension. Despite difficulties arising from Tyra's action to recover under workmen's compensation laws, it was proved that his disability was permanent and that he was entitled to the pension. "The duty of the defendants to grant the pension may not always attach automatically upon the happening of an accident as where the right to a widow's pension accrues upon the death of the employee. * * * Here something more than the happening of the injury was intended by a provision requiring the commission to order payment of pension whenever a member of the department should become so physically or mentally disabled as a result of the injury as to render necessary his retirement from active service." *Id.*, 32 Cal.2d at page 671, 197 P.2d at page 712. That decision came two months² after the pronouncement in *Holt v. Board of Police and Fire Com'rs*, *supra*, and should have cured the erroneous statement in the opinion of the latter action. The point as to whether his accident or his disability was the "vital contingency" which sparked his right to collect a pension was not in issue. When the case was on appeal, the city was contesting Holt's right to a pension on two grounds, namely, (1) that he forfeited his right to a pension by virtue of his resignation previous to his application and (2) his having obtained judgment under the Workmen's Compensation Act for his injuries. The opinion emphasized the law with citations, 86 Cal.App.2d at page 717, 196 P.2d at page 96, "that such pension rights become 'vested as to each employee at least on the happening of the contingency upon which the pension becomes payable.'" That such contingency is an applicant's disability had already been established. Three years earlier the Tyra case was reversed by reason of the trial court's failure to find "when plaintiff's condition became 'such as

1. "The contingency in the instant case was the accident which disabled Officer Holt."

2. The *Holt* decision was filed July 13, 1948. The decision in *Tyra v. Board of*

Police & Fire Com'rs was filed by the Supreme Court September 28, 1948, but it had been argued June 16, 1948.

to render necessary his retirement from active service.'" *Tyra v. Board of Police & Fire Com'rs*, 71 Cal.App.2d 50, 53, 54, 162 P.2d 35, 37.

Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956, is especially pertinent to the point under consideration. Brooks was injured in April 1932 but remained on active duty until the following October when he filed his application for a disability pension. At that time the charter authorized a pension of two-thirds of his salary. His application was denied, but two years after the charter had been so changed in March 1933 as to provide for a pension equal to fifty per cent of his salary, he renewed his application. A pension based on two-thirds of his salary was granted. Thereafter the pension board determined it had made an erroneous order and reduced the pension to fifty per cent of his salary at the time of his retirement and debited his account in the sum he had been overpaid. In his action to compel payment in accordance with the original offer, the court, in approving the acts of the board, held that only "upon the occurrence of the contingencies prescribed in a pension statute does the right to a pension become vested. * * * it is not the illness or injury, but the result therefrom, namely, the inability to perform the work, that is the controlling factor in forcing the government to recognize the express or implied contract with its employee." *Id.*, 30 Cal.App.2d at page 121, 123, 85 P.2d at page 957. It follows, therefore, that long before the Holt case was heard of, the courts of this state had announced their adherence to a rational interpretation of the statute which authorizes the payment of a disability pension after the employee has become disabled so as to render necessary his retirement. It had never been held that a fireman or policeman of Long Beach might collect a pension because he had merely been involved in an accident. There appears to be no sound excuse for relying upon the erroneous dictum in the Holt decision.

[2] In his reply brief appellant presents a new construction of section 187.2, namely, it should be read "* * * pursuant to the rights * * * vested * * * prior to the repeal [of section 187]. * * *

This view would have the section applicable only to rights vested prior to 1945, the date of the repeal of section 187 by the adoption of section 187.1. But a reading of the complete text, "* * * pursuant to the rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof * * *" leads to a more reasonable and a grammatically correct construction, to wit, the phrase, "prior to the repeal thereof," refers to the provisions of section 187, not to the vesting. If appellant's view were to be followed, the City of Long Beach would be adopting a Charter section in 1951 which would apply *only* to the unusual situation wherein the employee's right to the pension *vests* prior to 1945 but is not *applied for* until 1951.

Section 187.2 Is Not Violative Of Contract And Due Process Clauses.

[3] The fact that his pension granted December 3, 1951, was subsequent to the effective date of section 187.2 of the charter does not constitute a material factor. His disability was not established until that date and he was not entitled to a pension prior thereto. After section 187.1 had been added to the Charter, Stats.1945, p. 2950, it was held that "the statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered." *Kern v. City of Long Beach*, 29 Cal.2d 848, 855, 179 P.2d 799, 803. More than two years elapsed after the last-cited decision when one Palaske undertook to collect from Long Beach a pension equal to two-thirds of the annual salary attached to the rank held by him one year prior to the date of retirement as provided by section 187, subdivision 2, of the Charter. Many issues were adjudicated but on appeal it was held "that it was within the power of the city to modify its pension plan to provide that on and after the effective date of the amendment an employee who was entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an em-

ployee he could not thereby earn any additional pension above that to which he was entitled on the effective date of the amendment." An employee has a vested right only to a substantial and reasonable pension, but such right is not impaired by legislation which merely withdraws any right or option to earn a bonus by continuing in employment after he has become eligible for retirement. *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 132, 208 P.2d 764, 771. That opinion was followed by the same court in *Allen v. City of Long Beach*, 101 Cal.App.2d 15, 20, 224 P.2d 792. In *Packer v. Board of Retirement*, 35 Cal.2d 212, 217 P.2d 660, the court in April 1950 in reaffirming its decision in *Kern v. City of Long Beach*, supra, held that (1) a public employee as a part of his compensation acquired with his employment a vested right to a pension; (2) the right, once acquired, could not be wholly destroyed by repeal of the pension law prior to his retirement; (3) the employee is not entitled to any fixed benefit, but only to a substantial pension; and (4) the statute is subject to the implied qualification that reasonable changes in the system may be made.

These authorities are explained and distinguished in *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833, wherein the court stated, "The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency." In that case, the City of Berkeley's attempt to reduce the amount of a pension four years after the pensioner's retirement was held to be in violation of contractual rights acquired on his retirement, the time when the last condition precedent to the obligation of the city was fulfilled.

In support of appellant Rustad's contention that he is entitled to a pension provided for by the City Charter in force at the time of his injury, he cites *Chaney v. Los Angeles County Peace Officers Retirement Board*, 59 Cal.App.2d 413, 138 P.2d 735. It is not pertinent. This court there in 59 Cal.App.2d at page 415, 138 P.2d at page 737, attempted to show that the effect

of the section was merely to afford members retired prior to the 1941 amendment the privilege of accepting benefits of the amendment or of retaining their rights under the act as it read at the time of retirement. It was held that the language of the section does not indicate that the legislative intent was to provide a different formula for an injured employee not yet eligible for retirement on the effective date of the section from that which was intended for an employee who might become eligible for a pension upon the occurrence of other contingencies.

[4] Also, he argues that the statute does not fix the amount for employees retired from active service on account of previous injuries. While the Charter did not enumerate the various types of condition required to exist to make the statute operative, yet because appellant was granted a pension subsequent to the effective date of section 187.2, he is such a person. By reason of the broad language used in the section, appellant was entitled to a pension based upon the formula prescribed in section 187.2.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



122 Cal.App.2d 229

STOKES et al.

v.

COUNTY CLERK OF LOS ANGELES
COUNTY et al.

Civ. 19744.

District Court of Appeal, Second District,
Division 1, California.

Dec. 22, 1953.

Rehearing Denied Jan. 11, 1954.

Hearing Denied Feb. 17, 1954.

Mandamus proceeding by which petitioners sought to compel issuance to them of a license to marry and a certificate of registry of marriage. The Superior Court, Los Angeles County, Frank G. Swain, J., denied the relief sought, and the petition-

ers appealed. The District Court of Appeal, Drapeau, J., held that it is reasonably necessary for public welfare to accumulate information as to race and color for legitimate identification and statistical purposes, and that marriage license applicants can properly be required to state their color and race.

Affirmed.

1. Marriage ⇨2

It is within legislative power to regulate and require a certain procedure and form in celebration of marriages, and registration of marriages constitutes a proper exercise of police power; the matter being not one of local concern only, but of general public importance. Health and Safety Code, §§ 10526-10536; Civ.Code, §§ 69, 69a.

2. Constitutional Law ⇨48

All presumptions and intendments are in favor of constitutionality of statute, and all doubts should be resolved in favor of its validity.

3. Constitutional Law ⇨70(3)

Whether legislation is wise or unwise, as a matter of policy, is question with which courts are not concerned.

4. Marriage ⇨2

It is reasonably necessary for public welfare to accumulate information as to race and color for legitimate identification and statistical purposes, and marriage license applicants can properly be required to state their color and race. Civ.Code, §§ 69, 69a; Health and Safety Code, § 10526.

5. Statutes ⇨47

It takes a very vague statute to invoke void for vagueness rule. U.S.C.A.Const. Amend. 14.

6. Statutes ⇨47

Health and Safety Code section requiring that marriage applicants state their race or color "as near as can be ascertained" is not unconstitutionally vague. Health and Safety Code, § 10526(b).

7. Marriage ⇨25

Government Code section prohibiting inclusion of questions relative to applicant's race or religion in any application blank or form required to be filled in and submitted by applicant to any department,

board, commission, officer, agent or employee of state was designed to prevent discrimination against applicants for employment with state, and would have no application to marriage license application blanks. Government Code, § 8400; Health and Safety Code, § 10526(b).

Richard W. Petherbridge and Daniel G. Marshall, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Earl O. Lippold and John B. Anson, Deputy County Counsel, Los Angeles, for respondent County Clerk.

Edmund G. Brown, Atty. Gen., Henry A. Dietz, Asst. Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondents Registrar and Department of Public Health.

DRAPEAU, Justice.

By the instant proceeding in mandamus, petitioners sought from the Superior Court an order compelling the County Clerk of Los Angeles County to issue to them a license to marry and a certificate of registry of marriage, pursuant to sections 69 and 69a of the Civil Code, respectively.

When petitioners applied for the license to marry, they declined to state their color or race in the spaces provided therefor on the application, or to make any declaration with respect thereto. As a result, respondent clerk refused to issue the license and the accompanying certificate of registry.

The petition for an alternative writ of mandate was denied in the Superior Court. This appeal is from the minute order which followed.

Section 69, Civil Code, provides: "All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show:

"1. The identity of the parties.

"2. Their real and full names, and places of residence.

"3. Their ages; and

"4. Whether white, Mongolian, Negro, Malayan or mulatto. * * *

Section 69a, Civil Code, provides: "All persons about to be joined in marriage must

obtain from the county clerk of the county in which the license is issued, in addition to the license therefor provided for in Section 69 of the Civil Code, a certificate of registry of marriage as provided in Section 10526 of the Health and Safety Code containing the items therein listed * * *."

Section 10526, Health and Safety Code, requires that the form of the certificate of registry of marriage "shall be prescribed by the State Registrar and shall contain among other matters as near as can be ascertained: * * *

"(b) The race, color, age, name, and surname, birthplace and residence of the parties married. * * *"

The certificate of registry accompanies the application for a marriage license. Apparently, for the purposes of convenience and efficiency, the County of Los Angeles has combined the two documents into one form.

Appellants first urge that disclosure of their race or color on a license to marry and on a certificate of registry would restrict or inhibit their freedom of religion and liberty of conscience. Also, that such disclosure would deprive them of their liberty to marry in violation of the due process and equal protection of the law clauses of the fourteenth amendment to the Federal Constitution.

In support of these claims, appellants rely upon *Perez v. Sharp*, 32 Cal.2d 711, 715, 717, 198 P.2d 17, 18. In that case, the Supreme Court held unconstitutional the California miscegenation statute, Section 60, Civil Code, which prohibited marriage between white persons and Negroes, Mongolians, members of the Malay race or mulattoes.

It was there declared: "Marriage is * * * a fundamental right of free men. * * * Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry."

Nonetheless, the court recognized the propriety of regulating conduct for the protection of society where such regulation was not discriminatory even though it

might indirectly affect religious activity, when it stated at page 713 of 32 Cal.2d, at page 18 of 198 P.2d:

"The provision of the First Amendment to the Constitution of the United States that Congress shall make no law 'respecting an establishment of religion, or prohibiting the free exercise thereof' is encompassed in the concept of liberty in the Fourteenth Amendment. State legislatures are therefore no more competent than Congress to enact such a law. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352. *They may, however, regulate conduct for the protection of society, and insofar as their regulations are directed towards a proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee. Although freedom of conscience and the freedom to believe are absolute, the freedom to act is not.* *Cantwell v. Connecticut*, supra, 310 U.S. at pages 303-304, 60 S.Ct. at page 903.

"The regulation of marriage is considered a proper function of the state." (Emphasis added.)

In *Butterworth v. Boyd*, 12 Cal.2d 140, 152, 82 P.2d 434, 440, 126 A.L.R. 838, an attack was made on a charter provision establishing a health service system for city employees. The suggestion was made "that the plan interferes with the freedom of religion, on the ground that it provides an exemption for employees believing in healing by prayer, and requires the employee to disclose his religion by filing of the affidavit making the exemption claim."

It was there held: "It seems unnecessary to point out that there is no interference with the practice of religion in the mere disclosure of a particular faith to a board which has nothing to do with its practice. In no way does the charter permit the slightest interference with the practice or belief in any religious faith. See *Hamilton v. Regents of University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343."

The statute under consideration places no limitation on the right to marry. It merely requires persons applying for a marriage license to disclose certain in-

formation for statistical and identification purposes. The requirement applies equally to all persons of every race or color and makes no attempt to discriminate between races.

And, as pointed out by respondent county clerk, the certificate of registry is part of the state-wide programme of Vital Statistics under the supervision of the State Department of Public Health which is charged with the uniform and thorough enforcement of Division 9 of the Health and Safety Code, which covers Birth, Sections 10150-10330, Death, Sections 10350-10501, and Marriage Registration, Sections 10526-10536.

[1] "It is within the legislative power to regulate and require a certain procedure and form in the celebration of marriages. * * * The fact that a requirement for the registration of marriages constitutes a proper exercise of the police power is conceded. The matter is not one of local concern only, but it is of general public importance." 35 Am.Jur. pp. 188, 198, secs. 15, 27 (Marriage).

Along this same line, it was said in *Perez v. Sharp*, supra, 32 Cal.2d 711, 736, 198 P.2d 17, 32: "It is, of course, conceded that the state in the exercise of the police power may legislate for the protection of the health and welfare of the people and in so doing may infringe to *some* extent on the rights of individuals." (Emphasis included.)

[2] As stated in *People v. Western Fruit Growers*, 22 Cal.2d 494, 499, 140 P.2d 13, 16, "The principle is universally recognized that all presumptions and intendments are in favor of the constitutionality of a statute and all doubts should be resolved in favor of its validity. *Ray v. Parker*, 15 Cal.2d 275, 280, 101 P.2d 665; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 636, 91 P.2d 577."

And in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 55 S.Ct. 187, 192, 79 L.Ed. 281, 288, a suit for injunction against enforcement of a statute on the ground of its unconstitutionality the Supreme Court of the United States said:

"When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. * * * The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court."

[3] Moreover, "Whether the legislation is wise or unwise as a matter of policy is a question with which [the courts] are not concerned." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-448, 54 S.Ct. 231, 243, 78 L.Ed. 413, 434, 88 A.L.R. 1481.

Pursuant to the various sections of the Health and Safety Code, the legislature of this State has set up a comprehensive system by which to identify its inhabitants and to accumulate statistical information concerning them. Information as to color or race is required to be shown not only in marriage certificates but also in birth and death certificates.

[4] And, as urged by respondents Registrar and State Department of Health, "information as to the items of color or race are both valuable and necessary for the State to amass information as to population, birth and death rates and trends, and the relationship of color or race to factors of mortality, morbidity, fecundity, public health and matters or problems of social interest. For example, it has been contended that certain races are more susceptible to certain diseases which in turn requires special health precautions. Certainly, it is a legitimate function of State government to amass statistics designed to verify or disprove a relationship between an individual's race or color and such individual's susceptibility to disease."

In the light of the foregoing, the conclusion is irresistible, that the information required by section 10526(b), Health and Safety Code, is a valid exercise of police

power and does not constitute an invasion of constitutional rights.

Appellants urge that the demanded information is without reasonable relation to any purpose within the competency of the State.

This point is without merit. This court has reached the conclusion that the disputed provisions of the statute constitute a valid exercise of the police power and that it is reasonably necessary for the public welfare to accumulate information as to race and color for legitimate identification and statistical purposes.

[5,6] It is also urged that the demanded information, if supplied, would be meaningless, vague and uncertain.

As stated in 41 Cal.Law Rev. 523, at 534: "It would seem that the void for vagueness rule has taken only its initial step in California. There are no hard and fast rules which can be relied on in the close cases. The decisions would seem to be a result of measuring the many factors and considerations pointed out above. About the only safe generalization is that it takes a very vague statute to invoke the rule."

As hereinbefore mentioned, section 10526(b), Health and Safety Code, requires that the parties state their race or color "as near as can be ascertained". No penalty is exacted for being wrong or not 100% accurate. The vast majority of people know their race. Those few who are uncertain may state it as near as they can ascertain it. That there may be varied evaluations of race or color among individuals only serves to illustrate the freedom of choice permitted in making such an evaluation. A lack of uniformity goes only to the weight of the statistical information obtained but does not invalidate the right of the State to acquire the information.

[7] Appellants finally submit that the disputed requirement as to race and color violates Act 7971a, Stats.1949, ch. 1578, as set out in 3 Deering's General Laws (1949 Pocket Supp. p. 110):

"§ 1. * * * The inclusion of any question relative to an applicant's race or religion in any application blank or form required to be filled in and submitted by an applicant to any department, board, commission, officer, agent or employee of this State, is hereby prohibited.

"Any person who violates this section is guilty of a misdemeanor.

"§ 2. * * * Any provision of law which is inconsistent with this act is hereby repealed."

This act was placed in General Laws under the subdivision "State Employees" immediately succeeding Act 7971, the "Salary Increase Act." However, said Act 7971a, Stats.1949, ch. 1578, was repealed and codified into the Government Code as section 8400 by Statutes 1953, Chapter 170, page 1091. The new section omits the provision of Act 7971a which repealed any law inconsistent therewith.

The obvious purpose of these two statutory enactments was to prevent discrimination against applicants for employment with the State. However, since no discrimination is involved in requiring a disclosure of race or color from all persons applying for a marriage license, this court is of the opinion that neither Act 7971a nor section 8400 was intended to apply to the situation covered by section 10526(b), Health and Safety Code.

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.
Hearing denied; CARTER, J., dissenting.

122 Cal.App.2d 196

ROSELEAF CORP. v. RADIS et al.

Civ. 19477.

District Court of Appeal, Second District,
Division 3, California.

Dec. 21, 1953.

Action by present realty owner against mesne owners for costs of refinancing trust deeds against realty and for allegedly false and fraudulent representations of original vendor that mesne owners would pay entire expense of securing loan for refinancing. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment favorable to plaintiff, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, *inter alia*, that where mesne realty owners agreed in trust deed provision relative to refinancing of trust deeds against realty and in subsequent refinancing agreement with their grantees to pay costs in connection with obtaining of new loan, not to exceed \$75,000, but mesne owners accepted performance consisting of obtaining of larger loan and such performance was of value to mesne owners equal to that of loan previously agreed upon, mesne owners would be liable to present owners only for costs of obtaining loan in amount of loan provided for by agreements.

Judgment modified and as modified affirmed.

1. Appeal and Error ⇨931(4)

In action by present realty owner against mesne owners for costs of refinancing trust deeds against realty on ground that mesne owners had agreed to pay such costs in their trust deed and by subsequent agreement with owner's predecessors, rule that if evidence is not brought out it will be presumed that it was sufficient to support findings, was not applicable to conclusions of court relative to refinancing agreements, in view of fact that such conclusions were not misplaced findings, but only court's interpretation of agreements.

2. Appeal and Error ⇨926(1)

Where extrinsic evidence would be incompetent to add to or vary terms of a written agreement because such agreement is clear and complete as to subjects to

which it relates, it may not be presumed that such inadmissible evidence was received.

3. Appeal and Error ⇨901

Error will not be presumed.

4. Contracts ⇨221(2)

Under agreement for refinancing trust deeds against realty and providing that certain trustors would accept loan not exceeding \$75,000 at rate of interest not exceeding 5% per annum and that trustors agreed to pay expenses incurred in connection with the obtaining of such new loan, such provisions were not merely covenants but conditions precedent to obligation of trustors to perform.

5. Contracts ⇨354

In action by present realty owner against mesne owners for cost of refinancing trust deeds against realty on ground that mesne owners had agreed to pay such costs in their trust deed and by subsequent agreement with owner's predecessor, where there were findings that mesne owners did not object to terms of refinancing and did not complain that present owners and another were not meeting terms of agreements, in absence of evidence it would be deemed a fact that parties did not altogether abandon original agreements or substitute a new one.

6. Contracts ⇨320

There is no hard and fast rule in cases of imperfect performance by which liability of the promisee to render compensation and the amount of an allowable recovery can be judged.

7. Contracts ⇨346(2)

Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent.

8. Work and Labor ⇨12

Where imperfect performance has been rendered in good faith, and has been accepted so as to give the defendant the benefit of it, a recovery may be had in quantum meruit and there is a liability in quasi

contract for reasonable value of benefit conferred.

9. Contracts ⚡320

Where there is imperfect performance, rendered in good faith and accepted voluntarily, the court may adopt as a proper measure of liability the contract price less damages, or the value to the defendant of the imperfect performance that has been rendered.

10. Contracts ⚡320

Where mesne realty owner agreed in trust deed provision relative to refinancing of trust deeds against realty and in subsequent refinancing agreement with their grantees to pay costs in connection with obtaining of new loan not to exceed \$75,000 but mesne owners accepted performance consisting of obtaining of larger loan and such performance was of value to mesne owners equal to that of loan previously agreed upon, mesne owners would be liable to present owners only for cost of obtaining loan in amount of loan provided for by agreements.

11. Appeal and Error ⚡854(2)

If judgment is a proper one upon facts, it may not be reversed merely because trial court applied a theory which is believed on appeal to have been in error.

12. Fraud ⚡66

In action against original vendor of realty for allegedly false and fraudulent representations that mesne owners would pay entire expense of securing loan of \$125,000 for refinancing trust deeds against realty, finding that present owner was damaged in sum of \$5,844 was supported by finding as to original owner's fraud, present owner's reliance thereon, and the incurring of indebtedness that present owner would not otherwise have incurred.

13. Appeal and Error ⚡1151(2)

Fraud ⚡59(1)

In action by present realty owner against mesne owners who had allegedly agreed to pay costs of refinancing trust deeds for cost of refinancing and against original vendor for alleged false and fraudulent representations that mesne owners would pay entire expense of securing loan

in amount of \$125,000, where mesne owners were found liable to extent of \$3,824, the cost of securing \$75,000 loan, the amount of loan provided for in agreements, judgment against original vendor in amount of \$5,844, the cost of securing entire loan, would be modified and original vendor would be held liable for difference between cost of securing \$75,000 loan and \$125,000 loan.

Alvin P. Jackson, Hollywood, and Martin Goldman, Los Angeles, for appellants Max Radis, Jean Radis, Martin Goldman and Sylvia Goldman.

Benjamin J. Goodman, Los Angeles, Victor J. Obegi and Jess F. High, Van Nuys, for appellant Victor Malley.

Pacht, Tannenbaum & Ross, Clore Warne and Leo Altshuler, Los Angeles, for respondent.

SHINN, Presiding Justice.

By the judgment in this action it was declared that defendants Max Radis, Jean Radis, Martin Goldman and Sylvia Goldman, should credit \$3,824 and interest upon the principal of a trust deed note of \$65,500, executed by plaintiff's predecessors, Isadore Rosenblot and Dora Rosenblot, in favor of said defendants. The credit was to be made by defendants within ten days, or in case of default, by a commissioner, and if the credit should not be made plaintiff was to have execution for the amount of the judgment. Plaintiff also recovered judgment against defendant Victor Malley in the sum of \$5,844, plus interest, but it was provided that if the credit on the note was entered, or if plaintiff recovered \$3,824 from the four defendants above named, the amount of the credit or the amount collected from said defendants should be credited on the judgment against Malley; otherwise, plaintiff should have execution against Malley for the total amount of the judgment. Defendants Radis and Goldman appeal, and Malley appeals separately. The record on appeal consists of a clerk's transcript and certain exhibits. We will hereafter refer to defendants Radis and Goldman as appellants.

As to appellants, liability was imposed by reason of an agreement contained in a trust deed executed by them in favor of Malley by which they promised to pay the cost of refinancing encumbrances upon a property known as the Hollywood-Melrose Hotel and a second agreement in which they made the same promise to plaintiff's predecessor, Rosenblot. The basis of the judgment against Malley was false and fraudulent representations made to plaintiff by reason of which it refinanced the encumbrances on the hotel at a cost of \$5,844.

On or about November 26, 1946, appellants acquired title to the Hollywood-Melrose Hotel property by purchase from defendant Malley, and as a part of the purchase price they executed their note dated August 13, 1946, in favor of Malley, for \$146,500, secured by a trust deed on the hotel property. At that time there were prior encumbrances consisting of trust deeds, the beneficiaries and original amounts being Ohio National Life Insurance Co. \$60,000, Laura J. Hinkle \$12,675, and Herbert A. McCallister \$6,500, or a total of \$79,175. Appellants' trust deed to Malley contained a provision for refinancing the encumbrances.¹ The clear meaning is that both trustor and beneficiary would

accept a new loan on the specified terms and conditions.

On July 23, 1948, appellants sold the property to Isadore Rosenblot and his wife Dora, subject to the four trust deeds, and in this transaction the Rosenblots gave their promissory note to the sellers in the amount of \$65,500, secured by a fifth trust deed on the property. This trust deed provided: "Trustor is to receive a credit on the note secured hereby for any refinancing expenses, costs, bonuses or premiums incurred by trustor under the provisions of said One Hundred Forty-Six Thousand, Five Hundred Dollar (\$146,500) trust deed of record, such credit to apply on the current installments of principal and interest on the note secured hereby." On July 30, 1948, the Rosenblots conveyed the property to plaintiff, Roseleaf Corporation, subject to the five trust deeds.

On November 8, 1948, Malley negotiated and plaintiff accepted a new loan with the firm of Salk, Ward & Salk as lender, for \$125,000, secured by a first deed of trust on the hotel property and a \$25,000 third trust deed on property known as the Barker Hotel, which also was owned by plaintiff. From the proceeds of the \$125,000 loan the Ohio National and Hinkle trust deeds were

1. "The parties hereto, in consideration of the mutual benefits accruing to them, agree that in the event the Beneficiary can arrange for a loan for Trustor not exceeding \$75,000 at a rate of interest not exceeding 5% per annum, to be evidenced by a note signed by the Trustor and the Beneficiary as co-makers thereof, the Beneficiary will accept such loan, and the Beneficiary will execute and deliver to the lenders of such loan such note and trust deed, and any and all other instruments and documents required by such lender, including also a chattel mortgage on the goods and chattels now used in the hotel on the above mentioned real property and upon such goods and chattels as may be brought into said hotel in replacement and in substitution of the foregoing goods and chattels and in addition thereto, such new trust deed to replace the aforementioned encumbrances hereinabove enumerated and to become and remain a lien, prior and superior to the within trust deed; that any such new trust deed shall contain a recital that it is given in compliance with this agree-

ment and shall be duly recorded in the office of the Recorder of Los Angeles County; provided, however, that the monthly payments on account of principal and interest on such new note and trust deed shall not exceed the total monthly payments of principal and interest now payable on the aforementioned existing encumbrances; and, provided further that the Trustor shall pay any and all costs and expenses incurred in connection with such new loan, including also any bonuses and/or premiums, if any, required to be paid to the holders of the aforementioned encumbrances in order to have the aforementioned encumbrances paid and discharged; and, provided further that any amount of such new loan in excess of the total amount required for the payment of the balance of principal and interest on the aforementioned encumbrances shall be paid to the Beneficiary on account of principal of the note secured by the within trust deed, and the Trustor shall be credited with such payment on account thereof."

paid off, the McCallister trust deed having already been paid; Malley received in cash \$64,723.48 and a new trust deed for \$20,000, being the balance unpaid of the \$146,500 trust deed. Appellants subordinated their \$65,500 trust deed to the \$125,000 trust deed, and Malley subordinated his new trust deed to the one held by appellants. The encumbrances then were: A first of \$125,000; a second of the balance unpaid on the \$65,500 trust deed; and a third of \$20,000 in favor of Malley. In this refinancing the expenses paid by plaintiff amounted to \$5,844. These consisted of a commission for obtaining the loan, fee for policy of title insurance, escrow fee and miscellaneous expenses.

By its findings and conclusions the trial court determined that plaintiff had demanded and been refused a credit on the note held by appellants and that appellants were obligated to plaintiff in the amount of expenses that would have been incurred had the refinancing been for the sum of \$75,000. This amount was found to be \$3,824, which was the amount of the judgment against appellants.

The record on appeal consists of the clerk's transcript.

The complaint set out the agreement of appellants with Malley, the later agreement with Rosenblot and the furnishing of the refinancing, but did not allege exact performance by plaintiff. Upon the contrary, it listed seven particulars, including an increase in the amount from \$75,000 to \$125,000 in which the terms of the new loan differed from those specified in the agreement. It alleged that the loan was arranged pursuant to the refinancing agreement, that appellants accepted it, orally waived compliance with the terms specified for a new loan in all particulars in which there was nonconformance, and in writing subordinated their trust deed to the new trust deed. It pleaded that appellants were estopped to deny liability. The answer of appellants admitted they had accepted the new loan and subordinated their trust deed thereto, but denied that it was provided or accepted pursuant to the agreements for refinancing, and denied they had waived any

of the conditions of their agreement with Malley.

The findings to be presently considered on the appeal of Radis and Goldman are: (XV) "On or about December 20, 1948, and as a part of said refinancing transaction, the defendants Radis and Goldman did agree in writing in a document entitled 'Subordination Agreement,' that the deed of trust in their favor against said property should be inferior and subordinate to said new loan of \$125,000.00, and did in said written agreement approve of the execution of said new loan in the amount of \$125,000.00 as a first lien against said property. Said new loan was consummated and the costs and expenses in connection therewith were incurred by plaintiff"; (XVI) "The defendants Radis and Goldman did not waive any of the conditions of the \$146,500.00 trust deed, orally or in writing"; (XVIII) "Defendants Radis and Goldman have not been estopped by any act or conduct of said defendants." It was also found that Radis and Goldman suffered no "monetary nor any damage" by reason of the fact that the new loan did not conform to the terms and provisions specified in the Malley trust deed.

Since voluntary acceptance of the new loan, as found by the court, was indisputably a waiver of appellants' right to refuse a new loan in an amount exceeding \$75,000, the finding that they did not waive any of the conditions of the trust deed could mean only that they did not accept the new loan as full performance by plaintiff and Malley, but as imperfect performance, with a reservation of the right to claim damages for failure of plaintiff to render full performance. This interpretation is consistent with the fact that the question of appellants' damage was tried and determined as a matter in issue. The significance of these admitted facts and findings will be discussed later.

From the facts found the court drew the following conclusions: I. "The terms and provisions found in the \$146,500.00 trust deed, providing for refinancing, were not conditions precedent to the obligation of defendants Radis and Goldman, but

were promises, the breach of any of said promises not excusing said defendants from performance, but allowing said defendants a credit to the extent they were able to show monetary damage by reason of said breach"; II. "In the refinancing agreement made in the said \$146,500.00 trust deed, the defendants Radis and Goldman agreed to pay for all of the refinancing costs and expenses in connection with refinancing the hotel property up to the sum of \$75,000.00, and that the refinancing costs in that respect amounted to \$3,824.00"; VII. "Construing the terms of the \$146,500.00 deed of trust and the \$65,500.00 deed of trust together, defendants Radis and Goldman agreed to credit to plaintiff on their note for \$65,500.00 the refinancing costs in connection with refinancing up to \$75,000.00."

Plaintiff says these three statements of conclusions were findings of fact and that it must be presumed there was evidence to support them under the rule that where the evidence is not brought up it will be presumed that it was sufficient to support the findings. *Transportation Guarantee Co. v. Jellins*, 29 Cal.2d 242, 174 P.2d 625; *Freeman v. Gray-Cowan, Inc.*, 219 Cal. 85, 25 P.2d 415. The rule has no application.

[1-3] The conclusions were not misplaced findings, but only the court's interpretation of the agreements. Conclusions II and VII are merely incomplete recitals of the terms of the agreements and do not purport to be findings of any facts that were not admitted or otherwise found. There was an express finding that the expense of financing to the amount of \$75,000 was \$3,824. Conclusion I was only an interpretation of the terms and provisions of the agreement with Malley drawn from the writings themselves without resort to extrinsic evidence. For an additional reason the presumption is inapplicable. Plaintiff pleaded the agreements in *haec verba*. There was no claim of mistake or other ground for the receipt of evidence that the understanding of the parties was different from that expressed in the writing. Extrinsic evidence would not have been admissible to prove that the parties under-

stood from the writing that appellants would be obliged to accept a loan in an amount exceeding \$75,000, or at interest above five per cent per annum, or one on which the payments would exceed the limitation specified in the agreement. Where extrinsic evidence would be incompetent to add to or vary the terms of a written agreement because it is clear and complete as to the subjects to which it relates, it may not be presumed that such inadmissible evidence was received. To presume that the court received evidence tending to prove that the parties had an understanding different from the one they stated clearly in the agreement would be to presume that the court committed serious error. Error will not be presumed. 4 Cal.Jur.2d, § 559, p. 426.

[4] We think conclusion I was in error. There is nothing whatever ambiguous in the provision that appellants would accept a loan "not exceeding \$75,000 at a rate of interest not exceeding 5 per cent per annum" and the further provision that the monthly payments should not exceed those of the existing encumbrances. Appellants agreed to pay only the expenses incurred "in connection with such new loan." They had an absolute right to refuse a new loan which differed substantially from the terms specified in the Malley agreement. If these terms and provisions were merely covenants, appellants would have been obliged to accept and pay for a new loan unlimited as to amount, rate of interest and monthly payments. They made no such agreement. It may be mentioned again that the complaint alleged there were certain conditions to be met which appellants waived. And in finding against the allegation of waiver the court found that appellants did not waive any of the "conditions" of the agreement. Clearly the terms of the proposed new loan were specified as conditions upon which appellants' acceptance depended.

Plaintiff contends the judgment is a proper one under the conclusion (erroneously called a finding) that the terms and provisions of the writing were covenants and not conditions. If the conclusion had been a correct one it would have justified

a recovery by plaintiff, but the judgment is erroneous if it is not otherwise supported.

[5] A question of major importance was whether the refinancing was arranged by Malley and plaintiff, and accepted by appellants, by way of performance under the original agreement, or was an entirely unrelated and independent arrangement which was of no benefit to appellants and under which they assumed no liability. As noted above, the complaint alleged and the answer denied that the refinancing was pursuant to the agreement with Malley. The answer did not allege the agreements had been abandoned, or a new agreement made. It alleged only nonperformance. The court found appellants' denial that the refinancing was pursuant to the agreements to be untrue. This finding must be construed as a finding that notwithstanding the deviations from the original plan, and the changed conditions, the parties understood they were acting under the original agreement. The purposes of that agreement were to replace the three trust deeds with a single first trust deed, and to apply on the \$146,500 trust deed any surplus that might remain. These purposes were accomplished by the refinancing. In the absence of the evidence it must be deemed to be a fact that the parties did not altogether abandon the original agreements or substitute a new one. It is a necessary conclusion from the findings that appellants did not object to the terms of the refinancing, did not complain that plaintiff and Malley were not meeting the terms of the agreement and did not notify the latter that they, appellants, would not consider themselves bound thereby. The findings establish that the agreement remained in effect throughout the refinancing arrangements. The case, then, is one of imperfect performance, accepted without waiver of a claim for damages, where the principal purposes of the agreement had been accomplished and nothing remained to be done by plaintiff by way of performance.

[6] There is no hard and fast rule in cases of imperfect performance by which liability of the promisee to render compensation, and the amount of an allowable re-

covery can be judged. The unique facts of the present case call for the application of general principles. Some of these are stated in American Jurisprudence as follows: "Where a party has in good faith fulfilled the contract, but not in the manner or within the time agreed, and the other party has sanctioned or accepted the performance, the former may recover upon an implied contract. If such performance is accepted and used by the other party, he is answerable to the amount whereby he is benefited on an implied promise to pay for the value he has received." 12 Am.Jur. p. 917.

"The performance of conditions or of promises is dispensed with when the performance thereof is waived by acceptance of performance differing from the performance required by the contract. * * * Although conditions precedent must be performed and a partial performance is not sufficient, yet, where a contract has been performed in a substantial part and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received and may be compelled to rely upon his claim for damages in respect of the defective performance. The foundation of this rule undoubtedly is that it would be unfair that a party should receive and keep a part of what he has bargained for and pay nothing for it, because he has not received the whole. The technical reason given is that a covenantor or promisee must be held to have dispensed with the performance of a condition precedent, as such, if, with knowledge that the condition was not being fully performed, he treats the contract as continuing and takes the benefit of a part performance. It seems that the performance must be of a substantial part of the contract and that the acceptance must be under such circumstances as to show that the party accepting knew or ought to have known that the contract was not being fully performed. But the difficulty of determining the measure of

damages for failure fully to comply with the terms of a particular contract will not prevent the acceptance of a substantial part performance from changing a warranty which constitutes a condition precedent into a covenant which is not a condition." 12 Am.Jur. p. 921.

Mr. Williston says (Rev. Ed., Williston on Contracts, § 805) that in many jurisdictions a plaintiff who has not complied with an express condition but has rendered substantial performance may recover the contract price, less whatever damages the defendant may have sustained by reason of nonperformance, although in other states plaintiff's only redress is on quantum meruit. In § 1473 he says: "Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without legal excuse to recover for such benefit as he may have conferred on the other party by part performance of an indivisible contract or by the performance of an indivisible fraction of a divisible portion of a contract. A satisfactory solution is not easy, for two fundamental legal policies seem here to come in conflict. On the one hand, it seems a violation of the terms of a contract to allow a plaintiff in default to recover—to allow a party to stop when he pleases and sell his part performance at a value fixed by the jury to the defendant who has agreed only to pay for full performance. On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff. The mores of the time and place will often determine which policy will be followed. But the second of these opposing policies has steadily increased in favor in recent years. Except where the obliquity of the defective performance is of a sort that indicates moral obliquity, and where, therefore, the courts feel that the one who is in default may properly be penalized, the tendency is to grant him restitution if a substantial net benefit has accrued to the defendant by partial performance."

The subject is treated in the Restatement as follows: "(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment, except as stated in Subsection (2), for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if (a) the plaintiff's breach or non-performance is not wilful and deliberate; or (b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.

"(2) The plaintiff has no right to compensation for his part performance if it is merely a payment of earnest money, or if the contract provides that it may be retained and it is not so greatly in excess of the defendant's harm that the provision is rejected as imposing a penalty.

"(3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in Subsection (1 b), in which case it is the price fixed by the contract for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price." Rest., Contracts, Ch. 12, § 357, pp. 623-624.

"d. Even if the plaintiff's non-performance is a breach of his contractual duty for which the defendant has a right to damages, there are many cases in which it is not just to permit the defendant to retain the whole benefit of the plaintiff's part performance without paying anything in return. If the benefit received by the defendant is no more than his harm, he owes nothing to the plaintiff. But if the benefit

received is more than the amount of his harm, to let him retain the excess would not only be giving him something for nothing, it would also be making the plaintiff suffer a penalty for his wrong in excess of the compensatory damages that are held to be a fully adequate remedy in actions for wrongful breach. * * * f. Even though the plaintiff's breach is wilful and without semblance of excuse, the defendant must restore the excess of benefit over harm if, with knowledge that the breach has occurred or is impending, he assents to the part performance, or retains it or accepts the benefit of it unreasonably." Rest., Contracts, § 257, p. 626.

In line with the above there are certain well established principles to be considered.

[7] Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent. Civ.Code, § 1439; 6 Cal.Jur., § 239, p. 399.

[8] Where imperfect performance has been rendered in good faith, and has been accepted so as to give the defendant the benefit of it, a recovery may be had in quantum meruit. There is a liability in quasi contract for the reasonable value of the benefit conferred. *Leoni v. Delany*, 83 Cal.App.2d 303, 307, 188 P.2d 765, 189 P.2d 517; *Castagnino v. Balletta*, 82 Cal. 250, 258, 23 P. 127; *De Boom v. Priestly*, 1 Cal. 206; 5 Cal.Jur.2d (Assumpsit), § 11, p. 540. Although the complaint pleaded waiver of full performance, it also pleaded all the facts and was sufficient to support a recovery on the contract, if the waiver was proved, or in quantum meruit, if it was not proved.

[9] Where there is imperfect performance, rendered in good faith and accepted voluntarily, the court may adopt as a proper measure of liability the contract price less damages, or the value to the defendant of the imperfect performance that has been rendered. Adoption of the contract price, less damages, in case of performance falling short of substantially full perform-

ance, is not necessarily enforcement of the contract. It may be only the best available method of arriving at a fair and just result.

We shall see that upon the established facts the proper measure of liability was the one the court used, namely, the contract price, less damages, if any, of appellants. The court expressly omitted any finding as to the value of the refinancing to appellants, stating as the reason that they were liable for the agreed price. Whatever may have been the reasoning of the court a correct conclusion was reached.

[10] It is a necessary conclusion from the facts found that there was no difference in amount between the contract price, less damages, and the value of the financing to appellants. Appellants had fixed the value of the refinancing in their agreement with Malley and they reaffirmed it in their agreement with Rosenblot. In each case their obligation to pay a certain amount was an inseparable part of the consideration they agreed to render. It was an inducement to Malley to sell to them, and an inducement to Rosenblot to buy the property. In each case they had received full value for their promise to pay for a new loan of not over \$75,000. Had such a loan been offered them they could not have refused to pay the expense of it upon a claim that it would be worth less to them than they had agreed to pay. They would have been bound by their contract. It is true they had not agreed to pay for financing in an amount exceeding \$75,000, but they accepted the larger loan as a substitute for the smaller one when they could have rejected it altogether. Having accepted it, pursuant to their agreement, it was acceptance of imperfect performance on the part of plaintiff. Appellants became obligated to pay what it was worth to them. The finding that they suffered no damage was, in effect, a finding that the \$125,000 loan was worth to them what a \$75,000 loan would have been worth. Since the value of the benefit they would have derived from the smaller loan had been irrevocably agreed upon, it would necessarily follow from the finding of no damage that the larger loan was worth to them what they

had agreed to pay. The admitted facts lend support to that conclusion. Appellants voluntarily accepted the loan; the transaction was completed; nothing remained to be done by plaintiff in the way of performance except to make application of the money as agreed. The three trust deeds were paid off and the balance applied on appellants' trust deed note to Malley, less a small amount, nonapplication of which was found to have caused appellants no damage. In view of the findings, and in the absence of the evidence, it must be presumed that appellants sought to prove that the larger loan was worth less to them than they had agreed to pay for a smaller one and that they had suffered some detriment. Had they succeeded in establishing that claim plaintiff would have had to suffer a diminution of its recovery, perhaps to the extent of the entire expense, as a consequence of its imperfect performance. But when financing was procured which was of value to appellants equal to that of the loan they had previously agreed upon, there could be no difference in the amount of their liability between the agreed price, where there was no damage to them, and the value to them of the imperfect performance. Had the court made a finding as to the value of the benefit received by appellants it would necessarily have been in the amount of the judgment against them.

The recovery was properly limited to the amount appellants had agreed to pay. In the absence of a new agreement, imposing a greater liability than the one appellants had assumed, the additional expense of the larger financing would justly fall upon plaintiff.

The second cause of action of the complaint sought damages from defendant Malley. The court found that Malley, in order to induce plaintiff to accept the refinancing, represented to Rosenblot, president of plaintiff, that he had conferred with Radis and Goldman respecting the refinancing, and that they would pay the entire expense of securing a first loan of \$125,000; that plaintiff relied upon said representation and would not otherwise have incurred the expense of refinancing; that the representa-

tions were false, known by Malley to be false, and were fraudulently made; and that the total cost of financing and the damage to plaintiff was \$5,844.

It is contended by appellants that there is an irreconcilable conflict in the findings. There was a finding to the effect that plaintiff incurred the refinancing expense in reliance upon the representations of Malley. It is argued that if plaintiff relied upon those representations it did not rely upon appellants' agreements with Malley and Rosenblot. The point appears to be that if Malley was liable for the total expense, appellants could not be liable for any part of it, although they had agreed to pay it. We discover no conflict or inconsistency in the findings. If Malley is liable for part or all the expense and appellants for only a part of it, neither one should escape liability. We have heretofore set out the terms of the conditional judgment. It provides that if plaintiff collects by credit or otherwise the amount due from appellants, that amount is to be credited upon the judgment against Malley; otherwise, Malley will receive no credit. Appellants say: "The alternative judgment, as the trial court has rendered it, is in itself proof that the court could not make up its mind." This is an unwarranted and pointless criticism. It is of no concern to appellants that Malley's liability will be reduced by the amount of the judgment against them.

We have mentioned that the court found that appellants were not estopped. We do not see that this finding has any bearing on the merits of the action. The estoppel pleaded by plaintiff was related to the allegation that appellants had waived full performance by plaintiff, had agreed to the new loan, benefited by it, subordinated their own lien, and that plaintiff relied upon all these facts in taking the new loan. It was found that full performance had not been waived. All the other allegations as to estoppel were found to be true, but the conclusion that appellants were not estopped to claim failure to render full performance is not inconsistent with the judgment. The findings and the conclusion were to the effect that appellants had not waived the only

right which remained, namely, the right to assert a claim of damages. They were accorded that right.

[11] The fact that the trial court may have decided the case on the theory that the conditions of the agreement for refinancing were merely covenants furnishes no reason for disturbing the judgment as to Radis and Goldman. These appellants were not entitled to a judgment in their favor upon the facts found. If the judgment is a proper one upon those facts it may not be reversed merely because the trial court applied a theory which is believed on appeal to have been in error. 4 Cal.Jur.2d 391, § 536.

[12] On the appeal of Malley the first claim made is that the conditional judgment is "inconsistent, uncertain, incomplete, contradictory and inequitable." We have previously expressed general approval of the form of the judgment. It is also asserted that the finding that plaintiff was damaged in the sum of \$5,844 has no support in the other facts found. It has support in the findings as to Malley's fraud, plaintiff's reliance thereon, and the incurring of indebtedness that plaintiff would not otherwise have incurred. In the absence of the evidence the finding of damage is conclusive.

[13] Malley's further criticism of the judgment has merit. He is held liable in the amount of \$5,844, subject to a conditional credit, because he falsely represented that Radis and Goldman would pay all the expense of the refinancing. A judgment against him for the entire amount would have been proper if there had been no obligations on the part of Radis and Goldman and no judgment against them. But since they have been held liable to the extent of \$3,824, the only detriment suffered by plaintiff by reason of Malley's fraud is the amount of the difference between \$3,824 and \$5,844, or \$2,060. Malley did not guarantee payment of what was owed by Radis and Goldman. He only represented they had promised to pay more than their agreements bound them to pay.

The judgment is modified to award plaintiff \$2,060 and interest against Victor Malley, and in other respects, and as modified,

is affirmed; respondent to recover costs as against Radis and Goldman, and Malley to recover his costs on appeal from respondent.

PARKER WOOD and VALLÉE, JJ.,
concur.



122 Cal.App.2d 22

HENSLEY-JOHNSON MOTORS

v.

CITIZENS NAT. BANK OF BELLFLOWER.

Civ. 19697.

District Court of Appeal, Second District,
Division 3, California.

Dec. 14, 1953.

Hearing Denied Feb. 10, 1954.

Action by corporation against bank to recover sums deposited with bank and paid out on endorsements forged by an employee of the corporation. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vallée, J., held that plaintiff was entitled to recover the amount paid out on one forged endorsement, not having been previously reimbursed therefor, but that, with respect to certain other forged endorsements, plaintiff, by accepting part payment from surety which had bonded the employee, as well as an agreement by surety to reimburse plaintiff for balance of losses, should plaintiff not recover such balance in action against defendant, which payment and agreement in effect constituted reimbursement in full by surety, thereby waived its claim against defendant, and treated money paid out on forged endorsements as belonging to plaintiff, and, having done so, plaintiff could not reverse its position and claim that the money was still in hands of defendant.

Judgment modified and affirmed.

1. Corporations ⇨432(12)

In action by corporation against bank to recover sums deposited with bank and paid out on endorsements forged by an employee of the corporation, evidence sustained finding that the employee was without authority to endorse the checks other than for deposit.

2. Banks and Banking ⇨154(6)

In action by corporation against bank to recover sums deposited with bank and paid out on endorsements forged by an employee of the corporation, the bank, which charged that the corporation was negligent in not discovering the defalcations sooner, had burden of establishing such negligence.

3. Banks and Banking ⇨148(3)

To constitute a defense to action by customer of bank against bank to recover amount paid out on forged endorsement, negligence of customer must contribute to or induce the acceptance by the bank of the forged instrument.

4. Banks and Banking ⇨148(2)

Obligation of seeing whether there is a forged endorsement rests primarily on bank.

5. Banks and Banking ⇨148(3)

In action by corporation against bank to recover sums deposited with bank and paid out on endorsements forged by an employee of the corporation, bank's charge that corporation was negligent in not discovering the defalcations sooner did not constitute a defense, in absence of any evidence that failure of corporation to discover the defalcations sooner contributed to or induced the acceptance of the checks by the bank.

6. Banks and Banking ⇨148(2)

Generally, a bank which has paid out money on a forged endorsement is liable to the payee of the check for the amount which he should have received thereon.

7. Release ⇨37

Where employee's thefts from his corporate employer totalled \$7,316.22 during period while such employee was covered by a \$2,500 fidelity bond, which sum included \$766.23 obtained by employee from bank on

a forged endorsement, and corporation was paid on account of such defalcations \$2,500 from the bonding company and \$2,000 from the employee's estate in consideration of a covenant not to sue, the corporation, not having been fully reimbursed for its losses during such period, was entitled to recover from the bank the amount paid out on the forged endorsement.

8. Banks and Banking ⇨148(3)

Where corporation received from surety a portion of losses sustained through defalcations of corporation's employee, as well as an agreement by the surety to reimburse corporation for balance of losses, should the corporation not recover such balance in an action against bank which had paid the employee certain sums upon forged endorsements, the corporation, by accepting payment from surety and the agreement to reimburse in full, which in effect constituted reimbursement in full by the surety, thereby waived its claim against bank, and treated money paid out on forged endorsements as belonging to the corporation, and, having done so, corporation could not reverse its position and claim that the money was still in the bank.

Everett H. Smith, Los Angeles, for appellant.

Getz, Aikens & Manning and DeWitt Morgan Manning, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action to recover sums deposited with defendant bank and paid out in the cashing of checks on forged endorsements.

Plaintiff, an automobile dealer, maintained two accounts with defendant bank and one with a Bellflower bank. In the ordinary course of business, checks received were endorsed with a stamp bearing plaintiff's name for deposit only. No signature was required for deposit. The signature cards which plaintiff furnished defendant, pursuant to resolution of its board of directors, authorized two signatures only—Ben F. Hensley and Leland C. Johnson.

In 1947, plaintiff employed one Marchand as a bookkeeper. On June 6, 1950, Marchand presented to defendant a check for \$766.23, payable to plaintiff. It was endorsed with a stamp of plaintiff's name and thereunder the following: "By A. H. Marchand, Bus. Mgr." On August 7, 1950, Marchand presented to defendant a check for \$968.53, payable to plaintiff. It bore the stamp endorsement and thereunder, "A. H. Marchand." On October 3, 1950, Marchand presented to defendant a check for \$1,302.29, payable to plaintiff. It was endorsed in longhand with plaintiff's name, by "A. H. Marchand." Defendant paid Marchand the amounts of the checks and charged plaintiff's account therefor. In due course, the checks cleared and defendant received the full amount of them. Of the \$1,302.29 which he received on the third check, Marchand deposited \$985.58 in plaintiff's account in the Bellflower bank and retained \$316.71. The total amount retained by Marchand from the three checks was \$2,051.47.

Marchand's thefts from plaintiff totaled \$9,980.10 and he was indebted to plaintiff on an open book account in the sum \$517.28. Of the total thefts, \$7,316.22 was taken prior to August 2, 1950, and \$2,663.88 after August 2. Plaintiff had a fidelity bond issued by Fireman's Fund Indemnity Company in the amount of \$2,500 until August 2, 1950, which covered its employees, including Marchand. On that date, the bond was increased to \$10,000. Fireman's Fund paid plaintiff \$2,500 on account of Marchand's defalcations which occurred prior to August 2, 1950. At the time of this payment, it was agreed between plaintiff and Fireman's Fund that the \$2,500 should be, and it was, applied on defalcations which occurred prior to August 2 other than the \$766.23 check cashed on June 6. Fireman's Fund paid plaintiff \$1,378.64 on account of losses occurring after August 2. It did not pay plaintiff \$1,285.24—the combined net amount of the losses suffered after August 2 on the two checks endorsed by Marchand (\$968.53 plus \$316.71 equals \$1,285.24)—with the understanding that that sum would be paid by it to plaintiff in the event the latter failed to recover it in an action against defendant.

Marchand died prior to the trial of this action. Plaintiff filed a claim against his estate for \$12,901.68. The claim was rejected. Plaintiff then brought an action on the claim against the administrator of Marchand's estate. The action was settled by the administrator's paying \$2,000 in consideration of a covenant not to sue.

Plaintiff demanded payment of defendant of the amounts of the checks of June 6, August 7, and October 3. Payment was refused. Plaintiff then brought this action for the total of the three checks, \$3,037.05.

The court found: 1. Marchand was without authority from plaintiff to endorse the checks other than for deposit. 2. Plaintiff has not been paid on account of the checks except the \$985.58 deposited by Marchand in the Bellflower bank. Judgment was for plaintiff for \$2,051.47 (check of June 6, \$766.23, plus check of August 7, \$968.53, plus \$316.71 of October 3 check). Defendant appeals.

Defendant's specifications of error are: 1. The agency of Marchand was established by the acts of the parties; by reason of such agency defendant cannot be held liable for their conversion. 2. Plaintiff's loss was covered by the fidelity bond; and since payment was made by the surety, plaintiff has no right of recovery against defendant.

[1] The first assignment of error is in reality a claim that the finding that Marchand was without authority to endorse the checks other than for deposit is not supported by the evidence. The claim cannot be sustained. The evidence was in conflict on the question of Marchand's authority. Mr. Hensley, president of plaintiff, testified that neither defendant nor any of its officers had ever been advised orally or in writing that Marchand might endorse checks payable to plaintiff and cash them, and that he did not have such authority. The signature cards did not authorize Marchand to do so. Defendant did not have any other written authority from plaintiff respecting the cashing of checks. This evidence is sufficient to support the finding. We may not review the question which was purely factual.

[2-5] Defendant argues that plaintiff was negligent in not discovering the defalcations sooner. The only evidence as to the date of discovery was that it was in the fall of 1950. The burden was on defendant to establish that plaintiff was negligent. Negligence of the customer of a bank must contribute to or induce the acceptance by the bank of a forged endorsement. Mere negligence in the conduct of the customer's business is not a sufficient defense where it does not contribute to the payment of the check, since the obligation of seeing whether there is a forged endorsement rests primarily on the bank. 8 Cal.Jur.2d 65, § 99. There was no evidence that the failure of plaintiff to discover the defalcations sooner contributed to or induced the acceptance of the checks by defendant.

[6] The general rule is that a bank which has paid out money on a forged endorsement is liable to the payee of the check for the amount which he should have received thereon. *Union Tool Co. v. Farmers, etc., Nat. Bank*, 192 Cal. 40, 46, 218 P. 424, 28 A.L.R. 1417; *Los Angeles Inv. Co. v. Homes Sav. Bank*, 180 Cal. 601, 604, 182 P. 293, 5 A.L.R. 1193; *Frankini v. Bank of America*, 31 Cal.App.2d 666, 672, 88 P.2d 790.

We consider first plaintiff's right to recover the amount of the check of June 6 for \$766.23. Defendant argues that plaintiff was paid by the receipt of \$2,500 from Fireman's Fund and the receipt of \$2,000 from the administrator of Marchand's estate. Plaintiff says that since its losses prior to August 2 were \$7,316.22, its receipt of \$2,500 from Fireman's Fund and \$2,000 from Marchand's estate did not fully reimburse it for its losses and it has a legal right to recover from defendant on its liability.

Plaintiff's right to recover the amount of the June 6th check is settled by *Sommer v. Bank of Italy, etc., Ass'n*, 109 Cal.App. 370, 293 P. 98. *Sommer v. Bank of Italy* was an action to recover sums deposited with the defendant bank and paid out on checks forged by an employee of the plaintiffs. The forged checks totaled \$1,550. The bank reimbursed the plaintiffs in the sum of \$365, but refused further reimbursement.

The employee was arrested, placed on probation, re-employed by the plaintiff, and made partial restitution to the extent of \$443.50. The action was against the defendant bank for the unpaid balance. The court said, 109 Cal.App. at page 376; 293 P. at page 101: "From the defenses set forth in the pleadings and the grounds stated upon the motion for nonsuit in the trial court, it appeared that defendant placed reliance upon an alleged ratification of the forgeries by plaintiffs. This ratification is claimed upon the evidence which showed that plaintiffs had re-employed the employee after he was placed on probation and had accepted partial restitution from him through the probation office. Our attention has not been directed to any authority to sustain the proposition that such re-employment and acceptance of partial restitution would constitute a ratification precluding a claim by the depositor against the bank for the unpaid balance, and we find no reason for so holding."

[7] Since plaintiff has not been fully reimbursed for the losses which occurred prior to August 2, defendant is not relieved of its liability to reimburse plaintiff for the check of June 6. See *Houseman-Spitzley Corporation v. American State Bank*, 205 Mich. 268, 171 N.W. 543; *City of New York v. Bronx County Trust Co.*, 261 N.Y. 64, 184 N.E. 495; *International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 79 N.E.2d 249; *August v. Fourth Nat. Bank*, 48 Hun 620, 1 N.Y.S. 139, 143; *Central Nat. Bank of Richmond v. First & Merchants Nat. Bank*, 171 Va. 289, 298, 198 S.E. 883.

As to the losses after August 2, when the amount of the bond was \$10,000, defendant argues that since plaintiff received \$1,378.64 from Fireman's Fund on account of such losses and an agreement by the latter to reimburse it for the balance of the loss after that date should plaintiff not recover such balance in an action against defendant, it was reimbursed in full and plaintiff may not recover the loss after August 2 from it. Plaintiff argues it has a legal right to collect the balance of the loss after August 2, irrespective of its agreement with Fireman's Fund.

Plaintiff's right to recover the amount of the checks cashed after August 2, 1950, depends on the legal effect of its acceptance of \$1,378.64 from Fireman's Fund to apply on losses which occurred after that date and the agreement of the latter to pay plaintiff \$1,285.24, the total of the two checks cashed after August 2 less the amount deposited by Marchand in the Bellflower bank, in the event plaintiff failed to recover that sum in an action against defendant.

There are two independent contracts involved: one, between plaintiff and defendant by which the latter agreed it would not pay the checks of plaintiff on forged endorsements; the other, between plaintiff and Fireman's Fund by which the latter agreed to reimburse plaintiff for its losses. Both remedies were open to plaintiff with the limitation that there could be but one satisfaction.

Meyers v. Bank of America, etc., Ass'n, 11 Cal.2d 92, 77 P.2d 1084, holds that where an employer has sustained loss as a result of his employee's forging endorsements on checks, and the employer's surety has reimbursed him in full for the loss, the surety cannot recover from the bank since the surety has no equities superior to those of the bank. See 27 Cal.L.Rev. 88.

The facts in *American Alliance Ins. Co. v. Capital Nat. Bank*, 75 Cal.App.2d 787, 171 P.2d 449, were similar to those in the case at bar. The surety had reimbursed the employer in full for its loss. The court stated, 75 Cal.App.2d at page 794, 171 P.2d at page 453: "The principal wrongdoer in this case was the forger, Ernest C. Dietz. He was the agent and employee of plaintiff, who, by implication at least, vouched for his honesty to the bank. Dietz is not a party to this suit. The liability of the surety company, which paid plaintiff the losses sustained, was contractual and absolute independently of the separate liability of the wrongdoer Dietz for his forgeries and misappropriations. * * *

The bank was not a party to the fraudulent transactions of Dietz, but it was an innocent third party who paid the drafts in reliance upon the certificate of plaintiff's agent that the signatures of the payees

were genuine. The bank paid the drafts to Dietz in the regular course of banking business without knowledge of the forgeries. The equities of the transactions are all favorable to the bank. Neither the surety company nor the bank was a party to the forgeries. But the bank was misled by the certificate of the genuineness of the payees' signatures by plaintiff's agent and employee." It was held that since the employer had been reimbursed in full by the surety it could not recover from the bank.

A number of cases hold that a bank depositor who claims that a bank has paid out his money to a person not entitled to receive it has an election to sue either the bank or the person who received the money but that, if he chooses to sue the latter, he thereby precludes himself from suing the bank. See annotation 144 A.L.R. 1440. *No Dust O Co. v. Home Trust Co., Mo.* App., 46 S.W.2d 203, 207, was an action by a depositor against a bank for the aggregate of checks wrongfully cashed by its employee. The depositor-employer accepted a note and mortgage from a relative of the employee in full payment of his shortages. The court held that by accepting the note and mortgage the employer ratified the employee's "act in cashing the checks in question at the defendant bank", citing *Cushman v. Loker*, 2 Mass. 106; *Lafitte, Dufilho & Co. v. Godchaux*, 35 La. Ann. 1161; *Ogden v. Marchand*, 29 La. Ann. 61; *Glor v. Kelly*, 49 App.Div. 617, 63 N.Y.S. 339; *McCoy v. Simon*, 64 Wash. 574, 117 P. 400; *Crute v. Burch*, 154 Mo. App. 480, 482, 135 S.W. 1004; *Lokey v. Rudy-Patrick Seed Co., Mo.* App., 285 S.W. 1028.

In *Liberty Mut. Ins. Co. v. First Nat. Bank in Dallas, Tex.* Civ.App., 239 S.W.2d 738, an employee obtained payment of checks from the drawee bank on forged endorsements. The employer recovered the defalcations from the surety on the employee's fidelity bond. The employer and the surety executed a written instrument which declared that the payment for the defalcations was an advance and that the employer would prosecute a claim against the bank and pay over such money as it

recovered to the surety. The court held, 239 S.W.2d at page 740: "To our way of thinking, the more reasonable thing to say under the facts of the present case is that appellant, the employer, after treating the money paid out on the checks as belonging to appellant, in order to get at the surety company, and after collecting from the surety company on the ground that it was the employer's money, and not that of the bank, which had been embezzled by the employee, may not now be allowed to reverse its position and claim that its money is still in the bank. It is inconsistent for appellant to take the position as between it and the fidelity surety that the money was obtained from the bank and embezzled by the employee, and to claim as between it and the bank that the money is still in appellant's account in the bank.

"Possibly in an effort to avoid the effect of an election of remedies, appellant and the fidelity insurer executed an instrument in writing, at the time the claim on the bond was paid, which declared that the sum involved was being advanced to appellant, and that appellant would prosecute a claim against the bank at the cost and expense of the fidelity insurer, and would pay over to the latter such money as it might recover from the bank.

"We are not able to see that the language of this writing changed either the form or the substance of what was done by way of making claim on the fidelity bond. It is undisputed that claim was made on the bond, and that the full amount of the defalcations was paid to appellant. Appellant elected as to the remedy it would pursue, and prosecuted the claim on the fidelity bond to a successful conclusion. To call this transaction a loan would be to ignore the realities of the situation. If, as we have held, the doctrine of election of remedies is applicable to the case, the result is that appellant waived its claim against the bank, and had no claim against the bank which it could thereafter prosecute on behalf of the fidelity insurer, or assign to it."

[8] There is no difference in principle between the Liberty Mutual case and the case at bar insofar as the losses after Au-

gust 2 are concerned. The effect of the agreement between plaintiff and Fireman's Fund is that plaintiff has been reimbursed in full by the surety for the losses sustained after August 2. Plaintiff, by accepting payment of \$1,378.64 from Fireman's Fund, together with its agreement to reimburse it in full, treated the money paid out after August 2 as belonging to it (plaintiff). Having treated the money as its own and having secured the agreement from the surety, it will not now be allowed to reverse its position and say the money is still in the bank. When plaintiff accepted the agreement from the surety, it waived its claim against defendant.

We conclude that plaintiff is entitled to recover from defendant \$766.23, the amount of the check of June 6, 1950, and that it is not entitled to recover the amounts of the checks of August 7 and October 3, 1950.

The judgment is modified by reducing the amount thereof from \$2,051.47 to \$766.23. As thus modified, it is affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



122 Cal.App.2d 264

BARKETT et al. v. BRUCATO.

Civ. 15517.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1953.

Action by former tenants against former landlord and contractors for damages for constructive eviction in violation of implied covenant of quiet enjoyment, for negligence, for conspiracy to willfully and maliciously harass plaintiffs and for punitive damages. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment upon verdict against landlord for \$5,000, and landlord appealed from the judgment and from

order denying her motion for judgment notwithstanding the verdict. The District Court of Appeal, Peters, P. J., held, *inter alia*, that general waiver clause of lease whereby tenants agreed that landlord should not be liable for damage or injury to any person, personal property or effects from any clause whatever did not relieve landlord from liability for negligence, if any, in removing roof of demised premises during rainy season while constructing additional structure on top of demised premises.

Affirmed.

1. Appeal and Error ⇨109

Order denying motion for judgment notwithstanding verdict was appealable. Code Civ.Proc. § 963, subd. 2.

2. Conspiracy ⇨21

Landlord and Tenant

⇨130(3), 134(5), 169(11)

In action by former tenants against landlord and contractors for breach of covenant of quiet enjoyment, negligence, conspiracy to annoy and harass tenants by blocking garage driveway, causing flooding of demised premises by removing roof during rainy season, refusing to clear clogged drain and to make designated repairs, and annoying tenants on telephone and threatening injury to them if they did not move, evidence presented question for jury as to whether landlord's actions had been maliciously motivated.

3. Principal and Agent ⇨159(1)

Where alleged negligent act of agent was not directed or ratified by principal, and sole basis of claimed responsibility of principal is doctrine of respondeat superior, exoneration of agent exonerates principal.

4. Landlord and Tenant ⇨169(11)

In negligence action by former tenants against former landlord and contractors for removing roof of demised premises during rainy season, evidence presented question for jury as to whether removal of roof, in absence of emergency, constituted negligence on part of landlord regardless of whether contractors were negligent.

5. Landlord and Tenant ⇨166(7)

Where landlord caused roof of demised premises to be removed during rainy season by contractor, landlord could be held liable in tenants' negligence action for having such work done, and, therefore, landlord's liability did not have to be predicated upon theory of respondeat superior.

6. Conspiracy ⇨6

In a civil conspiracy, it is the wrong done and the damage suffered, pursuant to conspiracy, rather than the conspiracy itself, which is the cause of action.

7. Pleading ⇨35

In civil conspiracy action, allegations of conspiracy are mere surplusage where conspiracy itself is unproved but there is evidence of actionable conduct on part of one defendant.

8. Conspiracy ⇨1

Fact that alleged co-conspirators had been exonerated from liability in civil conspiracy action did not exonerate remaining conspirator since the gist of the action was the damage to plaintiffs, pursuant to the conspiracy, not the conspiracy itself.

9. Torts ⇨11

The actor is liable in tort for damages for nontrespassory invasion of another's interest in private use and enjoyment of land where the other has property rights and privileges in respect to use or enjoyment interfered with, the invasion is substantial, the actor's conduct is legal cause of invasion, and the invasion is either intentional and unreasonable or unintentional and otherwise actionable under rules governing liability for negligent, reckless or ultrahazardous conduct.

10. Landlord and Tenant

⇨134(5), 166(3, 4), 172(2)

Landlord's removal of roof of demised premises during rainy season, blocking of garageway, refusal to make repairs, and otherwise annoying tenants so as to compel them to vacate premises constituted a nontrespassory invasion of tenants' interest in the private use and enjoyment of the

premises, and rendered landlord liable for damages in tort.

11. Landlord and Tenant ⇨134(5), 166(3, 4)

Negligence, if any, of landlord in removing roof of demised premises during rainy season, in blocking garageway, and in failing to make repairs was active, not passive.

12. Landlord and Tenant ⇨166(6)

Provision of lease whereby tenants agreed that landlord should not be liable for damage or injury to any person, personal property or effects from any cause whatever did not exonerate landlord for injuries willfully caused or resulting from active negligence.

13. Appeal and Error ⇨1033(5)

Landlord and Tenant ⇨130(3), 169(10)

In action by former tenants against former landlord for breach of covenant of quiet enjoyment and for negligence in removing roof of demised premises during rainy season thus exposing tenants to elements, which exposure resulted in personal injury and damage to personalty, wherein landlord relied upon waiver clause of lease whereby tenants agreed that landlord should not be liable for damage or injury to any person, personal property or effects from any cause whatever, instructions to effect that waiver clause did not apply to impairment of health and that because of the waiver clause, tenants could not under count for breach of covenant recover for damage to their personalty were erroneous, but, being favorable to landlord, were not subject to attack by landlord on appeal.

14. Landlord and Tenant ⇨200(11/2)

War and National Defense ⇨201

During emergency covered by Federal Emergency Price Control Act and Housing Regulations, the renting of property ceased to be a private matter and became impressed with a public use. Civ.Code, § 1668; Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

15. Landlord and Tenant ⇨200(11/2)

War and National Defense ⇨211

Tenants, who sought to invalidate waiver clauses of lease, whereby they

agreed that landlord should not be liable for damage or injuries to any person, personal property or effects from any cause whatever and whereby they agreed to accept temporary inconveniences until construction of pent house on top of demised premises was completed, on ground that such clauses were violative of statute providing that contracts which purport to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, are against the policy of the law, because such clauses would permit landlord to decrease services in violation of Federal Emergency Price Control Act, had burden of proof on such issue: Civ. Code, § 1668; Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

16. Landlord and Tenant ⇨130(3), 169(10)

In action by former tenants against former landlord for breach of covenant of quiet enjoyment and for negligence in removing roof of demised premises during rainy season while building additional structure on top of demised premises, wherein landlord relied upon special waiver clause of lease whereby tenants agreed to accept temporary inconveniences if "pent house" were constructed on top of demised premises, instruction to effect that such clause exonerated landlord only if structure were found to be a pent house was correct.

17. Landlord and Tenant ⇨130(3), 169(11)

In action by former tenants against former landlord for breach of covenant of quiet enjoyment and for negligence in removing roof of demised premises during rainy season while building additional structure on top on demised premises, wherein landlord relied upon special waiver clause of lease whereby tenants agreed to accept temporary inconveniences if "pent house" were constructed on top of demised premises, evidence presented question for jury as to whether the structure was of a type covered by the waiver clause.

18. Landlord and Tenant

⚖130(3), 134(5), 169(11)

In action by former tenants against former landlord for breach of covenant of quiet enjoyment and for negligence in removing roof of demised premises during rainy season while constructing additional structure on top of demised premises, in blocking garageway with materials, in erecting scaffolding so as to shut out light, in failing to make repairs, and in making much noise during construction, wherein landlord relied upon special waiver clause of lease whereby tenants agreed to accept "temporary inconveniences" if pent house were constructed on top of demised premises, evidence presented question for jury as to whether episodes sued upon were, because of their nature, repetition and duration, more than mere "temporary inconveniences".

19. Conspiracy ⚖20

Landlord and Tenant

⚖130(4), 134(5), 169(9), 180(5)

In action by former tenants against landlord and contractors for breach of covenant of quiet enjoyment, negligence, conspiracy to annoy and harass tenants by blocking garage, causing flooding of demised premises by removing roof during rainy season, refusing to clear clogged drain and to make designated repairs, and annoying tenants on telephone and threatening injury to them if they did not move, and for punitive damages, award of \$5,000 for nervous upset condition and cold, wrongful eviction, blocking access to garage and demised premises, for failing to make repairs, for damages caused by having to re-rent other premises at higher rate, and costs of moving, and for willfully causing damage to personalty when rain came through ceiling, was not excessive.

PETERS, Presiding Justice.

[1] Plaintiffs, Walter and Adelaide Barkett, former tenants of Raffaella Brucato, brought this action against the landlord and others for damages for a constructive eviction in violation of the implied covenant of quiet enjoyment, for negligence, for a conspiracy to willfully and maliciously harass the plaintiffs, and for punitive damages. The jury exonerated all defendants with the exception of defendant Brucato, refused to award any punitive damages, but returned against Brucato a general verdict of \$5,000. Defendant Brucato appeals from the judgment entered on the verdict, and from the order denying her motion for a judgment notwithstanding the verdict. The order is appealable. § 963, subd. 2, Code Civ.Proc.

The landlord, Raffaella Brucato, a contractor, William A. Alaimo, doing business as the Alaimo Co., and the contractor's manager, Roy E. Brousseau, are named as defendants in all four counts set forth in the complaint. The first count is for breach of the covenant of quiet enjoyment, alleging as the breach that defendant committed a series of described acts, including the construction of a third story over the second story flat rented by plaintiffs so as to expose their premises to the elements, and that, as a result, the premises were flooded during a rainstorm making the premises uninhabitable, and access to the leased premises was interfered with by that and other acts. Damages of \$2,605.82 to furnishings, and injury to Mrs. Barkett's health in the amount of \$15,000 are alleged, as well as \$5,000 damages for the blocking up of plaintiffs' garage. The same damages are prayed for, and the same acts alleged in the second cause of action, which is based on negligence. The third cause of action alleges that after the plaintiffs discovered that defendant Brucato was charging an overceiling rental, defendants engaged in a conspiracy to annoy and harass the plaintiffs, by blocking the garageway, causing the flooding, refusing to clear a clogged drain, refusal to make other designated repairs, annoying plaintiffs on the telephone,

J. Bruce Fratis, Joseph L. Alioto and Walter F. Calcagno, San Francisco, for appellants.

Alvin Gerlack and Irving Schoenfeld, San Francisco, for respondents.

and by threatening injury to plaintiffs if they did not move. \$25,000 general damages for humiliation and embarrassment are prayed for, as well as \$750 for loss in being compelled to move to premises with a higher rent, and \$32.95 actual moving costs. The fourth cause of action asks for \$10,000 punitive damages based upon the facts alleged in the conspiracy count.

Attached to the complaint is a copy of the lease between Mrs. Brucato and Mr. Barkett. It is for an upper flat of a building in San Francisco and covers the period September 1, 1949, to August 31, 1950, with an option in the tenant to renew for two years, and provides for \$175 per month rental. The lease contains the usual covenants to protect the landlord, and some special provisions. Paragraph 12 provides: "Lessor contemplates erecting a Pent House on the premises. In the event that all plans go through, Lessee herewith agrees to accept temporary inconveniences until the work is completed." Paragraph 2 contains the usual covenant that the premises are in good condition; that the tenant shall not alter or repair without consent; that the landlord is not required to repair except "such as may be caused by the elements or structural defects"; that the tenant will return the premises in good condition; and then provides: "That the lessee agrees * * * that the lessor shall not be liable for damage or injury to any person, personal property, or effects in said premises from any cause whatever."

The answer of defendant Brucato alleged that the lease as pleaded did not include a provision that the premises were leased furnished, alleged that such was the fact, denied the material allegations of the complaint, and set forth a cross-complaint, which was later dismissed. The defendant contractors denied the material allegations of the complaint, specially pleaded the waiver clauses, quoted above, and also raised the defense of contributory negligence. The jury brought in a verdict in favor of the defendant contractors so that on this appeal we are concerned only with defendant Brucato as appellant, and the plaintiffs as respondents.

The evidence in many respects is highly conflicting. On this appeal we are compelled to accept all the evidence and the reasonable inferences therefrom most favorable to respondents, and, at least where it is conflicting, to reject the evidence produced by appellant. So construed, the record shows the following: Respondents moved into the premises a week before the landlord submitted a final lease. Respondents testified that they leased the premises unfurnished. Before they moved in, appellant told them that she was contemplating building a pent house on the roof of the premises; that she did not know when it would be built; that she was not sure it would be built during the year of the lease, or ever; and that she had applied for a building permit. She neglected to tell respondents that her application for such a permit had already been once rejected. Respondents offered to assist in getting the permit. There is a grave conflict over whether appellant told respondents of the extent of the inconveniences that would be caused by such construction. Respondents also denied that they knew that appellant did not want to lease the premises or that they had induced her to do so against her will, or that the contractor had advised that the premises should be vacated during construction. Respondents admitted that they had agreed to accept inconveniences during construction, but testified that appellant stated that she would give them "lots of notice so you can move out." There is substantial evidence that appellant herself was contemplating moving into the upper flat before she leased it to respondents. There was also a conflict as to whether it had been orally agreed that a certain closet, part of the leased premises, would be surrendered by respondents if the construction work was done.

As part of the building in which the leased flat was located there was a double garage, one space for each flat. Respondents testified that it was agreed that a designated half of this garage was allocated to them, the appellant testifying that garage space was not assigned between

respondents and the tenant in the lower flat.

The parties were quite friendly when the lease was executed, but shortly thereafter their relations began to steadily and rapidly deteriorate. One of the causes of friction was the continued presence of some of appellant's furniture, including a massive dining room set, which appellant in spite of her prior promise to do so, refused to remove. Friction also developed over the closet, before mentioned. But the major cause of friction arose when respondents discovered that the ceiling rental on the premises was \$110, while the lease called for \$175 per month, and made complaint to the O.P.A. and to appellant. The latter became very angry, stated that she would make respondents sorry they ever lived there, and threatened that she would evict them. For the first few months of the lease the respondents paid the rent with a \$110 check, and the balance in cash. Even after discovering the overcharge, and reporting it to the O.P.A., respondents told appellant they would continue to pay the \$175 a month if appellant would make needed repairs to the entrance light and doorbell. In reference to this overcharge it should be mentioned that on May 2, 1950, after respondents had vacated the premises, the O.P.A. retroactively, and as of December 13, 1949, increased the ceiling rental to \$145 per month. Of course, even then, the rent provided in the lease was excessive.

Shortly after respondents moved in, the doorbell to the upper flat failed to work, requiring that Mrs. Barkett go downstairs to admit callers. The two entrance lights were also out of order so that the entrance way was dark and unpleasant. In spite of repeated requests on the part of respondents, these repairs were not made, except that an unskilled workman was sent to the apartment by appellant but he was unable to do the required work. The respondents also testified that a drain on the premises was stopped up with dead rats, mice and garbage, resulting in a nauseating odor in the flat that caused an adverse effect on the health of Mrs. Barkett, and that appellant, in spite of six separate complaints, refused to remedy the situation.

Construction of the structure over respondents' flat started about February 15, 1950. The preceding day appellant, on the advice of her contractor Alaimo that the tenants should be out before the new construction was undertaken, personally filed a petition with the O.P.A. to evict respondents because of "major improvements," thus representing that such improvements could not be carried out without major injury to respondents. Permission to evict was granted on March 7, 1950, several weeks after construction had started, but granted subject to the condition that: "Action to remove or evict the tenant shall not be commenced sooner than three months from February 14, 1950, date petition was filed." Thus, eviction could not lawfully have been accomplished until May 14, 1950. All of the acts here involved were performed long before that date.

The construction work was undertaken by the company by defendant Alaimo, under a cost plus contract containing a maximum ceiling of \$14,200. Brousseau, superintendent for Alaimo, had charge of the job, and he consulted frequently with appellant. Construction started with the building of a full scaffolding, and then the roof of the building was torn off, thus exposing the ceiling of the upper flat of respondents, and then floor joists and a subfloor were constructed for the addition on the third floor. There was a period of about a month and a half between the removing of the roof and the storm of March 23, 1950, that caused the major damage complained of by respondents.

The differences between the parties became aggravated with the start of construction. The scaffolding was so erected that it blocked the windows of respondents' flat. It also, on fifteen separate occasions, blocked the front door of the apartment. In addition, an upright, an integral part of the scaffolding, partially blocked the garage, making entrance and exit therefrom very difficult. This condition was corrected for the other tenant in the building on instructions from appellant, but not for respondents. Respondents also testified that lumber four or more feet high was periodically piled in front of the garage over a period

of six weeks, on which occasions use of the garage was prevented. On one occasion Mr. Barkett asked the contractors to move the lumber, and, upon their refusal to do so, Barkett, with the aid of several friends, moved the lumber onto the lawn. Appellant thereupon requested and secured from the district attorney a citation against Barkett for malicious mischief. The charges were dismissed at the hearing before the district attorney.

All during this period arguments between the parties occurred during which appellant made threats in addition to those already mentioned. After the scaffolding was erected appellant told respondents to move, and stated that if they did not she would "force" them to do so. When Mr. Barkett complained of the terrific pounding incidental to the removal of the roof, appellant told him to move if he did not like it, and that the pounding "is going to be worse than that. Why don't you move? We are going to make it just as tough for you as possible." Mrs. Barkett heard appellant tell Brousseau "I don't give a God damn what those bums want up there. I don't care if they move. Let them go. I want them out of there." Appellant told the contractors that the respondents were going to move; that she was going to evict them if they did not move, and she may have said she would harass them until they did move. She directed the workmen to disregard respondents' objections or requests, and to leave the scaffolding and lumber in front of the garage. Mrs. Barkett testified that from the middle of February, 1950, until they moved, her telephone would ring early in the morning four or five times a week; that no one responded, but there was merely a tapping on the line; that this made her exceedingly nervous and upset, causing her to leave the receiver off the hook and to complain to the telephone company. Mrs. Barkett believed that it was appellant who made these calls to annoy her.

One of the issues in the case was whether the construction involved was of a "pent house" or of a "third story," and whether the inconveniences were "temporary inconveniences" as set forth in the waiver clause of the lease. Mr. Barkett testified that the

structure was more than a mere pent house, and was in fact a full additional flat, and that the construction was far more extensive than had been agreed upon. The inconveniences involved have already been partially described. Defendant Brousseau testified at the trial that in the construction business anything constructed on the top of a building smaller than the existing structure was a pent house; that the structure involved was necessarily a pent house because it had an open patio, was designed differently from, and was somewhat smaller than respondents' flat. But this testimony was seriously impeached by the use of Brousseau's deposition, in which he had testified that he had constructed "another floor," that it "was another story" and not a pent house, because it looked like a third story in the building permits and its area was very close to that of the apartment underneath. He tried to explain these inconsistencies at the time of trial by stating that he had changed his mind after the deposition was taken.

Of considerable significance on this issue is the application for a building permit filed with the city. The Bureau of Inspection of the Department of Public Works denied the permit on the ground that the construction would permit four full floors of occupancy (there was a large rumpus room on the ground floor), but upon appeal to the Board of Permit Appeals the permit was granted. The application states that contemplated construction would create "an additional floor of occupancy" and would add "an additional story to the building." The work to be done is described in the application in detail and it concludes with the statement that the proposed construction aims to "change stair, construct new floor."

The most serious trouble between the parties occurred after the removal of the roof, thus exposing the ceiling plaster of respondents' flat to the elements during the rainy season. The contractor testified that he used the standard and accepted method to protect the property by covering the exposed area with three large tarpaulins, cleated together, and nailed down each night. But this method was not waterproof. Starting about the middle of March,

1950, it started to rain intermittently and water inevitably dripped into respondents' flat through the plaster, causing the ceilings to buckle and the walls to become very wet. But these difficulties were minor compared to what happened on the night of March 23, 1950. The tarpaulins were nailed down that night when the workmen left. It then started to rain very hard indeed, .74 of an inch falling in a short time. This rain was accompanied by a strong wind that tore the tarpaulins and ripped them loose in several places. Water poured through the subfloor of the new addition into respondents' flat. Water dripped through every ceiling and formed pools on the floor, causing them to warp. The canvas on the canvas walls began to come off, and all the clothing, linens, rugs and furniture in the apartment became wet. The waterlogged living room ceiling finally collapsed and streams of water ran into the various rooms. The respondents had to take refuge with neighbors because their bed was soaked with water.

There was a great deal of testimony as to the damage caused by the deluge to the personal property of respondents. The evidence shows that respondents' clothes, rugs and lampshades were soaked, clocks rusted, and the finish on furniture spoiled. An urn worth \$500 was broken. Mrs. Barkett prepared a list, which is not complete, in which she estimated that it would cost \$1,352.90 to make some of the necessary repairs. There is other evidence that the total damage to the personal property exceeded \$2,500.

There was substantial evidence that, as a result of the noise, drain odors and other irritations, Mrs. Barkett became nervous and emotionally upset, and that, as a result of the wetting during the storm, she contracted a bad cold which stayed with her for three months and which required medication and medical care. The cold also caused a recurrence of a menopause condition that previously had been cured.

On either March 31st or April 1, 1950, respondents vacated the flat and leased other premises at \$150 per month, thus establishing an additional item of damage of at least \$5 a month for the balance of the

lease period plus the two years of the option. It will be remembered that the O.P.A. had retroactively raised the \$110 ceiling to \$145 a month as of December, 1949.

[2] On the issue of the motive of appellant in trying to evict respondents, it was shown that after the respondents had vacated, appellant advertised the flat at \$180 a month and actually rented it for \$170. Appellant testified that, although she applied for permission to evict, she knew she had no legal right to evict but thought she was within her legal rights because respondents refused to cooperate. She admitted that she caused construction to start long before the O.P.A. permit became effective. Under all the evidence the jury would have been justified in finding that appellant's actions were maliciously motivated.

On the appeal it is basically the contention of appellant that she cannot be held liable at all on the second cause of action for negligence, or the third cause of action for conspiracy, because the only negligence that was shown was that of the contractors, and they were exonerated of all negligence, and were also exonerated on the conspiracy count. Therefore, says appellant, she must have been held liable solely on the first count charging a breach of the covenant of quiet enjoyment. Having established these premises to her satisfaction, appellant then argues that the waiver clauses, as a matter of law, exonerated her of all liability on the first cause of action, as well as on the second based on negligence.

These basic premises are all wrong.

[3-5] As to the second cause of action based on negligence, it is appellant's theory that if the waiver clauses are not applicable so as to exonerate her, she cannot be held liable for that negligence because it was the negligence of the contractors, and she can be held liable, if at all, only on the theory of *respondeat superior*. It is contended that a verdict exonerating the agent necessarily exonerates the principal. It is undoubtedly the law that where the alleged negligent act of the agent was not directed or ratified by the principal and where the

sole basis of the claimed responsibility of the principal is the doctrine of *respondere superior*, the exoneration of the agent exonerates the principal. *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875; *Johnston v. City of San Fernando*, 35 Cal.App.2d 244, 95 P.2d 147. The rule of these cases is not here applicable. In the instant case the jury could very well have found that in the absence of an emergency the removing of the roof of an occupied dwelling during the rainy season of the year constituted negligence whether or not the contractors were negligent. Over this aspect of the work appellant acted independently, and it was she and she alone who decided that the work should be done. Therefore, unless the waiver clauses are applicable, the verdict can be sustained on the second cause of action charging appellant with negligence.

[6-8] Equally fallacious is the contention that because the jury exonerated all defendants except appellant on the conspiracy count, and failed to award any punitive damages at all, appellant cannot be held on the conspiracy count. The argument is predicated on the fallacious premise that a finding of civil conspiracy cannot be upheld against but one person, that is, that a person cannot conspire with himself. Some general language to the effect appears in some of the cases, see *Rapaport v. Forer*, 20 Cal.App.2d 271, at page 278, 66 P.2d 1242, at page 1245, but as that case held, it is equally well settled that in a civil conspiracy it "is the wrong done and the damage suffered, pursuant to a conspiracy rather than the conspiracy itself, which is the cause of action." It is the general rule throughout the United States that in civil cases it is the damage to plaintiff that is the gist of the action, and that the charge of conspiracy is merely a mechanism affecting the rules of evidence or the liability of those who conspire but who do not act. Therefore, the allegations of conspiracy are mere surplusage in a case where the conspiracy itself is unproved but there is evidence of actionable conduct on the part of one defendant. Such conduct is actionable, regardless of the conspiracy, except in those cases, of which the

instant case is not one, where an essential element of the tort is group action. See annotation collecting many cases, 152 A.L.R. 1147. This has been the rule in California for many years. *Burckhardt v. Woods*, 124 Cal.App. 345, 12 P.2d 482; *More v. Finger*, 128 Cal. 313, 60 P. 933; *Revert v. Hesse*, 184 Cal. 295, 193 P. 943; *Blair v. Guarantee Title Co., Inc.*, 103 Cal. App. 260, 284 P. 719; *Mox, Inc. v. Woods*, 202 Cal. 675, 262 P. 302.

Here the basic tort alleged in the third cause of action was the willful wrongful eviction, that is, the breach of the covenant of quiet enjoyment, accomplished by a series of intentionally annoying acts designed to compel the tenant to vacate. Such a tort (as distinguished from an action for breach of the covenant of quiet enjoyment) is recognized in the law. Section 822 of the Restatement of Torts defines this tort as follows:

"The actor is liable in an action for damages for a nontrespassory invasion of another's interest in the private use and enjoyment of land if,

"(a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and

"(b) the invasion is substantial; and

"(c) the actor's conduct is a legal cause of the invasion; and

"(d) the invasion is either

"(i) intentional and unreasonable; or

"(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."

[9,10] California recognizes the existence of such a tort. *Tooke v. Allen*, 85 Cal.App.2d 230, 192 P.2d 804; *Sanders v. Allen*, 83 Cal.App.2d 362, 188 P.2d 760; *Butler v. Allen*, 73 Cal.App.2d 866, 167 P.2d 488. Removing the roof of an occupied dwelling during the rainy season in the manner here done, and the other acts already described, clearly fall within the above definition. The jury could have held appellant for an independent tort upon the third cause of action by reason of her intentional and even malicious conduct al-

ready described. When this conduct is considered, together with the attempt to secure permission to evict respondents, it is a reasonable inference that the construction was undertaken for the purpose of eviction so that appellant could once more obtain the illegal profits of rent overcharging.

This brings us to the next basic contention of appellant, and that is, that respondents, in the lease, validly waived damages for any damage to person or property caused by appellant. This contention applies to the causes of action alleged on the first and second counts of the complaint. It does not apply to the intentional acts complained of in the third count of the complaint. There are two clauses of the lease relied upon. Both have been quoted in full, *supra*. One is a special waiver clause that provides that in the event a "pent house" is constructed during the lease period the respondents agree "to accept temporary inconveniences until the work is completed." The other is a general waiver clause and is to the effect that respondents agree that appellant "shall not be liable for damage or injury to any person, personal property or effects * * * from any cause whatever." The trial court ruled that this last quoted clause operated to free appellant from liability for damage to the personal property under the first count, but did not extend to other elements of damage alleged. The jury was also instructed specifically that the waiver clause did not apply to impairment of health, but only to injuries, and that Mrs. Barkett could recover for impairment of health if caused by appellant's negligence. Appellant contends that the general waiver clause last quoted, as a matter of law, operated to release her from all claims of damage to person as well as property, and that the trial court committed error in limiting the application of the clause to damage to the property, and then only as to the first count.

There are cases holding that a provision such as is here involved does operate to exculpate a person from the consequences of his own negligent conduct. See, par-

ticularly, *Werner v. Knoll*, 89 Cal.App.2d 474, 201 P.2d 45; and *Inglis v. Garland*, 19 Cal.App.2d Supp. 767, 64 P.2d 501. See, also, *Kushner v. Home Service Co.*, 91 Cal.App. 692, 267 P. 555; *Nichols v. Hitchcock Motor Co.*, 22 Cal.App.2d 151, 70 P.2d 654; *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 41 P. 783; *Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co.*, 187 Cal. 38, 200 P. 934; but, see, *Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664; *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 P. 259. These cases hold that the matter is simply one of interpreting a contract; that both parties are free to contract; that the relationship of landlord and tenant does not affect the public interest; that such a provision affects only the private affairs of the parties. They hold that such a clause will exempt the landlord from liability for injuries to the tenant caused by the negligence of the landlord and prevents the landlord from being held for a breach of the covenant of quiet enjoyment based on such negligent acts. These California cases exempting the landlord from liability all deal with what might be called passive negligence. They usually involve injuries caused by some piece of equipment or machinery inherently defective leased or loaned to the tenant by the landlord, or injuries caused by the elements not aggravated by the landlord, or injuries caused by the negligence of other tenants or individuals for whose acts the landlord might otherwise be liable. The case of *Werner v. Knoll*, *supra*, is typical, and perhaps the strongest case in California upholding such clauses so as to exonerate the landlord for injuries caused by his negligence. That was an action for the wrongful death of the son of the tenant alleged to have been caused by a latent defect in a tractor owned by the landlord and used by the tenant on the leased premises. The lease exempted the landlord "for any damage arising from personal injuries sustained by any person or persons, in, on or about said premises, from any cause whatsoever". 89 Cal.App.2d at page 475, 201 P.2d at page 46. The appellate court held that such clause exonerated the landlord from the claimed liability. The court held that section 1668 of the Civil

Code only declared unlawful contracts exempting one "from responsibility for his own fraud, or willful injury * * * or violation of law, whether willful or negligent," and that the word "negligent" in the section modified "violation of law." The court also held that, although the waiver clause was all inclusive so as to purport to even include injuries caused by fraud and willful acts, and therefore to that extent was void, such void portion was severable.

The problem has two basic aspects. First, the waiver clause must be interpreted—was it intended by the parties to include the liability in question? There was no doubt that this was so in the Werner case, and the court devoted no space to a discussion of that problem. Second, what is the proper interpretation and application of section 1668 of the Civil Code? That section provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

The Werner case interpreted that section as invalidating contracts that purported to exempt one for the consequences of his fraud, or willful acts, or acts in violation of law whether willful or negligent, and then held that the word "negligent" modified only "violation of law." Were the question one of first impression, this interpretation might be questioned. The section provides that any contract purporting to exempt one from responsibility for "his own fraud," "willful injury to the person or property of another," and "violation of law" are "against the policy of the law." The phrase "whether willful or negligent" is found after this enumeration, and is set off from the threefold enumeration by commas. It is a possible interpretation to hold that the "willful or negligent" clause modifies all three of the prior clauses, and is not limited to a "violation of law." Specifically, the section could mean that it is illegal to attempt to contract away any liability for acts caused by "willful injury to the person or property of another

* * * whether willful or negligent". This would be one way of expressing, somewhat awkwardly, the distinction between "willful," that is, active, positive or affirmative negligence, and passive negligence.

However, the Werner case and perhaps other cases have interpreted the section differently, and we are not inclined to question that interpretation at the present time. The importance of the possibility of such an interpretation is that it serves to highlight the fact that many state courts, including those of California, have reached precisely that result not by interpreting statutes similar to section 1668, but by interpreting all-inclusive waiver clauses as not intended to include acts that amount to active, affirmative negligence. There is a marked tendency in the more recent cases involving the landlord and tenant relationship to hold that by such clauses the parties could not have intended to provide that the landlord should not be liable for acts amounting to active and affirmative negligence, and to limit such clauses to injuries caused by defects resulting from wear or tear, inherent defects, the elements, and not actively aggravated by the landlord, or to injuries caused by other tenants. In other words, these cases hold, based on the presumed intent of the parties, that such general clauses were never intended to immunize the landlord from responsibility for his acts of affirmative negligence. See annotation in 175 A.L.R. 8, particularly pp. 89 to 92, where cases from many states are collected and discussed; see, also, annotation in 26 A.L.R.2d 1044, pp. 1055 to 1056, where cases from California, New York, Washington and New Jersey are discussed.

California has definitely aligned itself with this school of thought. The leading case is *Butt v. Bertola*, 110 Cal.App.2d 128, 242 P.2d 32. In that case it was specifically held that the rule of the *Werner v. Knoll* and *Inglis v. Garland* cases, *supra*, did not apply to acts amounting to affirmative negligence. The rationale of the opinion is that a general waiver clause, independently of section 1668, will not be interpreted, in the absence of clear, positive

and specific language, to include acts amounting to affirmative negligence. The court, after discussing at some length the Werner and Inglis cases, concluded, 110 Cal.App.2d at page 140, 242 P.2d at page 40: "Such decisions are not persuasive of a different view than that which we have expressed. We observe, also, that the trend of decisions is to exclude from such general clauses the exemption of a landlord from the consequences of his own affirmative negligence; i. e., a species of exemption not intended by the parties unless clearly and in more specific terms expressed", citing with approval the annotation in 175 A.L.R. 8. The negligence in the Butt case was in fact nonaction, that is, the failure to repair after requests to do so. This was held to be, 110 Cal.App.2d at page 138, 242 P.2d at page 39, "at the very least, active or affirmative negligence, not mere ordinary negligence."

[11] It is quite apparent that the negligence here involved, and the acts offered in support of counts one and three of the complaint, all constituted at least active negligence if they were not, in fact, willful. So far as the failure to repair the drain, doorbell, lights, etc., after requests to do so is concerned, they are precisely of the same nature as the acts involved in the Butt case. It is equally clear that appellant knew or should have known that the removal of the roof during the rainy season would injure the exposed flat. If such act constituted negligence it was active and not passive negligence.

[12,13] It is true that the trial court's instructions on this subject were not all correct. But since, as a matter of law, the negligence, if any, was active and not passive, the instructions even though erroneous, were more favorable to appellant than the law permits. This is particularly true of the instruction to the effect that the waiver clause did not apply to impairment of health because impairment was not an injury within the waiver clause, and that because of the waiver clause the respondents could not, under the first count, recover for injury or damage to their personal property. Those instructions were wrong in that the waiver clauses, as here

construed, had no effect at all on the question of the liability here involved. But the errors were in favor of appellant. Respondents have not appealed. Appellant cannot complain of errors in her favor.

[14,15] There is another argument about these waiver clauses discussed by the parties. Respondents contend that even if the waiver clauses were intended to exonerate appellant from responsibility for the very acts here involved, such clauses would be void because in violation of the Emergency Price Control Act, 50 U.S.C.A. Appendix, § 901 et seq., and Housing Regulations. There can be no doubt that during the emergency covered by the federal act the renting of property ceased to be a private matter and became impressed with a public use. Under the regulations issued by the federal government the landlord was required to furnish the same space, services and equipment as were furnished on the date rent ceilings became effective, and before services could be decreased a petition had to be filed by the landlord and permission secured from the O.P.A. It is argued that a waiver clause that would permit the landlord, without liability, to render the premises untenable, and therefore necessarily decrease the services, necessarily violates these regulations and therefore would be void, not only being in violation of public policy, but also of section 1668 of the Civil Code in that it would be "in violation of law." This argument may be sound. In support of it is cited the four-to-three decision of the Supreme Court in Lovett v. Bell, 30 Cal. 2d 8, 180 P.2d 335. The reasoning of the majority in that case would seem to support respondents' argument. The difficulty of applying that argument to the instant case is that the terms and conditions of prior registration of these premises with the O.P.A. is not in evidence. In spite of some confusion in the authorities as to who has the burden of proof in such a case, see Wheeler v. Bainbridge, 84 Cal.App.2d Supp. 849, 191 P.2d 134; Lester v. Beer, 74 Cal.App.2d Supp. 984, 168 P.2d 998; but, see, Levitt v. Glen L. Clark & Co., 91 Cal.App.2d 662, 205 P.2d 747, we think the burden should rest upon the party seeking

relief, in this case, the respondents. It should also be mentioned that this theory was never brought to the attention of the trial court. For these reasons this argument is not considered controlling on this appeal.

[16, 17] The special waiver clause by which the tenant agreed "to accept temporary inconveniences" if a "pent house" was constructed, is not here applicable. The trial court left it to the jury to decide whether the construction ordered by appellant was of a pent house or was of a type not contemplated by the above clause. It instructed that the pent house clause exonerated the appellant only if the structure was found to be a pent house. This was a correct instruction. The facts have already been set forth on this issue. Certainly it was a fact question as to whether the structure was of a type covered by the lease, and certainly, as already pointed out, there was a direct, material and substantial conflict on this issue. Appellant argues, nevertheless, that the structure was a pent house as a matter of law. She defines a pent house as a "small building on the roof of a larger edifice," and then tries to prove that this structure was just that. In doing so, she picks out some isolated statements made by respondent Barkett in relation to another subject matter, ignores Barkett's testimony in chief, ignores the fact that Brousseau's statements at the trial were impeached, and ignores the voluntary description made by her in the application for the building permit. Thus it is obvious that whether the structure was or was not included within the waiver clause was a question of fact, and the trial court correctly so instructed.

[18] Moreover, it should be pointed out that even if the structure were a pent house, the jury could have found that the episodes here sued upon by reason of their nature, repetition and duration were more than mere "temporary inconveniences."

[19] The last contention of appellant is that the \$5,000 award is excessive. In this argument appellant assumes that the award is predicated solely upon injury to health. Based on this premise, it is urged that the only injury to health shown was a nervous

upset condition and a cold. This argument ignores other items of damage such as damages for wrongful eviction, for blocking access, damages for failing to make repairs, the damages caused by having to re-rent at a higher rate, and costs of moving, and damages under the third cause of action, regardless of negligence, for willfully causing damage to the personalty. This last item alone totalled at least \$1,200, and there is evidence that it amounted to over \$2,500. The judgment is not excessive.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



122 Cal.App.2d 262

BENTLEY

v.

**SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY.**

Civ. 20072.

District Court of Appeal, Second District,
Division 1, California.

Dec. 24, 1953.

Proceeding by petitioner charged with manslaughter for writ of prohibition to restrain Superior Court from proceeding with trial of such charge, on ground that petitioner was committed without reasonable and probable cause to believe that he committed manslaughter. The District Court of Appeal, Doran, J., held that the evidence was sufficient as a matter of law to justify petitioner's commitment.

Application denied.

I. Criminal Law ⇐238

Evidence was sufficient as a matter of law to justify commitment of accused on charge of manslaughter. Pen.Code, § 995.

2. Criminal Law ⇨238

Reasonable or probable cause required to uphold commitment of an accused exists if there is sufficient proof to make it reasonable to believe that the accused is guilty of the offense charged. Pen.Code, § 995.

Howser, Coughlin & Schmitt; James J. Coughlin, Arcadia, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Robert Wheeler, Deputy Dist. Attys., Los Angeles, for respondent.

DORAN, Justice.

Petitioner was charged with manslaughter and the crime of violating Section 480 of the Vehicle Code. The complaint duly charged that defendant, "while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, and while in the commission of a lawful act which might produce death, in an unlawful manner, with gross negligence, kill Robert J. Holt, a human being; the death of said decedent being the proximate result of the driving of said vehicle by the said defendant at the time, place and in the manner as aforesaid." Following a preliminary hearing defendant was held to answer. In the Superior Court petitioner moved to "set aside the charge of manslaughter on the grounds that petitioner was committed without reasonable and probable cause to believe that petitioner committed said crime of manslaughter." The motion was denied and defendant pleaded not guilty. The cause is set for trial. The petition herein seeks to prevent "further proceedings on said charge of manslaughter."

The alleged offense was committed on private property. The laws relating to the operation of motor vehicles on public highways therefore do not apply. Petitioner is alleged to have struck and killed the deceased at night. There is evidence that the headlights were very dim and inadequate. Also that defendant fled from the scene following the accident.

[1,2] Without further details it is sufficient to note that the evidence was suffi-

cient as a matter of law. It is well settled that reasonable or probable cause required to uphold the commitment of an accused under Section 995, Penal Code, exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged.

The application for a peremptory writ of prohibition is denied.

WHITE, P. J., concurs.



122 Cal.App.2d 409

PEOPLE v. McBRIDE.

Cr. 2437.

District Court of Appeal, Third District,
California.

Dec. 31, 1953.

Rehearing Denied Jan. 15, 1954.

Proceedings were brought against defendant by the People of the State of California. The Superior Court of Humboldt County, Christensen, J., entered judgment adverse to defendant, and defendant appealed. The District Court of Appeal, Peek, J., held that defendant's appeal, which was not filed within ten days after rendition of judgment as required by rule governing criminal appeals, would be dismissed, though defendant had been acting as his own counsel within the ten day period.

Motion to dismiss appeal granted.

1. Criminal Law ⇨1069(1)

Generally, time for filing notice of appeal is jurisdictional and cannot be extended by action of parties or by order of court. Rules on Appeal, rule 31.

2. Criminal Law ⇨1069(6)

Defendant's appeal, which was not filed within ten days after rendition of judgment as required by rule governing criminal appeals, would be dismissed, though defendant had been acting as his own counsel

within the ten day period. Rules on Appeal, rule 31.

Hugh F. Melvin, Jr., Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is a motion by the State to dismiss defendant's appeal upon the sole ground that it was not filed "within ten days after the rendition of the judgment" as provided in Rule 31 of Rules on Appeal.

[1] At the outset defendant is confronted with the general rule that the time for filing notice of appeal is jurisdictional and cannot be extended by action of the parties or by order of the court. *People v. Behrmann*, 34 Cal.2d 459, 211 P.2d 575. Defendant concedes that on its face the written notice was filed too late, but he contends that the rule above enunciated is not without exception nor is it mandatory. This is true, he says, because of the use of the word "may" that is "an appeal may be taken" by filing a written notice as therein provided. From this he concludes that by use of the particular wording discretion is thereby given a court to grant or deny a motion to dismiss as the facts of the case may warrant. In support of this contention reliance is placed upon *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868; *People v. Are-*

sen, 91 Cal.App.2d 26, 204 P.2d 389, 957, and *People v. Stinchcomb*, 92 Cal.App.2d 741, 208 P.2d 396.

In the *Slobodion* case the defendant, who at the time was incarcerated, did everything he could to perfect his appeal, but the prison authorities "carelessly and negligently" [30 Cal.2d 362, 181 P.2d 870] failed to forward his notice of appeal. In the *Stinchcomb* case comparable facts were shown and hence it came within the exception. No such question was presented in the *Aresen* case. There the question presented related to the sufficiency of the notice to constitute an appeal from the judgment.

[2] Here the only mitigating fact is that until subsequent to the filing of the notice of appeal defendant was acting as his own counsel. While this court may feel as does counsel for defendant that the rule is harsh (see *People v. Dawson*, 98 Cal.App. 2d 517, 220 P.2d 587) nevertheless in light of the conclusiveness of the rule it cannot be said that acting as one's own counsel is such a circumstance as would bring the case within the exception enunciated in *People v. Slobodion*, and hence we are compelled to conclude that the appeal must be dismissed.

The motion is granted.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



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